



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL APPEAL NO. 54 OF 2013

ALI BAKARI MOHAMED.....APPELLANT/APPLICANT

=VERSUS=

DAVID M. MUIRURI.....RESPONDENT

RULING

Introduction:

1. What is before me is the Appellant's Application dated 20th December 2013 seeking for the following orders;

- a. **That upon inter partes hearing, there be stay of execution of the decree in Malindi CMCC No. 19 of 2013 pending the hearing and determination of this appeal.**
- b. **That the costs of this Application be provided for.**

2. The Application is premised on the grounds that unless there is a stay of execution of the decree in Malindi CMCC No. 19 of 2013, the appeal shall be rendered nugatory.

3. The Applicant has deponed in his affidavit that CMCC No. 19 of 2013 was never heard on merit; that the appeal has overwhelming chances of success and that unless the orders of stay are granted, the appeal will be rendered nugatory.

The Respondent's case

4. The Respondent filed Grounds of Opposition and a Replying Affidavit. According to the Respondent, the Appeal has no chances of success and that the entire suit is bad in law and *res judicata*.

Submissions

5. The Applicant's advocate submitted that the jurisdiction of this court has been properly invoked under Order 42 Rule 6 of the Civil Procedure Rules.

6. According to the Applicant's counsel, the orders sought do not prejudice the Respondent and that if execution is permitted to proceed, the same may prejudice the Appellant.

7. On the other hand, the Respondent's advocate submitted that the Application is grounded on an appeal

that is clearly incompetent and that execution process has been on course for long time and the present application and appeal are merely intended to delay the said process.

Analysis and findings

8. Order 42 Rule 6 of the Civil Procedure Rules provides that the Appellate court may grant a stay of execution pending appeal if the Applicant satisfies the court that he is likely to suffer substantial loss if execution is to proceed. The Application must also be filed within reasonable time. The Applicant is also required to give security for the due performance of the decree.

9. According to the Memorandum of Appeal, the Appellant has deponed that the learned trial magistrate erred in law and fact by holding that Malindi CMCC No. 19 of 2013 is res judicata Malindi CMCCC No. 223 of 2012.

10. The appeal is therefore in respect of an order of the trial court dismissing CMCC No. 19 of 2013 for being res judicata.

11. It is not in the province of this court at this stage to determine whether the Appeal has chances of success or not.

12. All the Applicant is required to do is to meet the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for a stay of execution to be granted. The Applicant has not shown the substantial loss that he shall suffer in the event the execution process in respect of costs proceeds. Indeed, the order that the Appellant is appealing against is the dismissal of his suit. Consequently, there is no order to stay, other than the issue of costs which the Respondent is entitled to.

13. Although the Appellant filed the Application within reasonable time, that is, within four days from the date of the Ruling, the Applicant has not offered security for the due performance of the decree.

14. In the circumstances, I dismiss the Application dated 20th December 2013 with costs.

Dated and delivered in Malindi this 5th day of **September**, 2014.

O. A. Angote

Judge