



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: GATEMBU, MURGOR & SICHALE, JJA]

CIVIL APPLICATION NO. 2 OF 2020

BETWEEN

SILVANUS OSORO ONYIEGO.....APPLICANT/APPELLANT

AND

ALICE NYOMENDA OERI

T/A A.N. OERI & CO. ADVOCATES..... RESPONDENT

(Application under Rule 5 (2) (b) and Rule 47 of the Court of Appeal Rules)

RULING OF THE COURT

The applicant, **Silvanus Osoro Onyiego** has moved the Court vide a Notice of Motion application dated **9th January, 2020**. He seeks *inter alia*, orders that this Court stays execution of the judgment of **Cherere, J** delivered on **19th December, 2019** pending the determination of an intended appeal as well as stay of execution of the Certificate of Taxation issued in Kisumu High Court Misc. application No. 55 of 2019. The motion was supported by an affidavit of the applicant sworn on the same date (**9th January, 2020**). In his deposition, the applicant deponed that he filed a Notice of Motion dated **26th November, 2019** seeking orders to vary, set aside or quash the Certificate of Taxation in Kisumu High Court Misc. Application No. 55 of 2019. The said Notice of Motion was dismissed on **19th December, 2019**; that unless this Court grants an order of stay, his property is likely to be attached thus rendering his intended appeal nugatory.

The motion was opposed by the respondent, **Alice Nyomenda Oeri t/a A.N. Oeri & Company Advocates** vide an affidavit dated **5th June, 2020**. In her affidavit, she deponed that there was no order issued by the High Court capable of being stayed and that in the event that the intended appeal succeeds, she is able to refund any sums of money paid to her.

Suffice to state that the applicant's motion dated **26th November, 2019** was dismissed on **19th December, 2019**. The effect of the dismissal is that there is no order capable of being stayed. There is no positive and enforceable order to be stayed. See **Western College of Arts and Applied Sciences vs. E.P. Oranga & 3 others [1976] eKLR**. Further, it was not demonstrated to us that the respondent, is a woman of straw and not capable of refunding any sums of money paid to her.

She has deponed that she is able to do so in the event that the intended appeal is successful.

In our view, the twin principle as set out by this Court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR** have not been satisfied.

The upshot of the above is that we decline to grant a stay of execution pending the hearing and determination of the intended appeal. The application is accordingly dismissed with costs.

Dated and Delivered in Nairobi this 7th Day of August, 2020.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR