



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: KIAGE, GATEMBU & KANTAL, J.J.A)**

**CIVIL APPLICATION NO. 44 OF 2020**

**BETWEEN**

**DAVID OSCAR OWAKO.....APPLICANT**

**AND**

**CHEMELIL SUGAR CO. LTD.....1<sup>ST</sup> RESPONDENT**

**KIBOS SUGAR CO. LTD.....2<sup>ND</sup> RESPONDENT**

**MUHORONI SUGAR CO. LTD (in receivership).....3<sup>RD</sup> RESPONDENT**

**JOSEPH KENY, DANIEL LELEI, SIMION SERONEY**

**(Sued in the capacity as elected officials of**

**KAMALAMBEI SOCIETY).....4<sup>TH</sup> RESPONDENT**

**JOEPH CHEPSIROR, DAVID KIMELI, STEVEN YEGO**

**(Sued in their capacity as elected officials of**

**TUWAPSUL SOCIETY).....5<sup>TH</sup> RESPONDENT**

**WILLIAM LANG'AT, DAVID BOEN MUSA**

**(Sued in their capacity as elected officials of**

**BARMARENG SOCIETY).....6<sup>TH</sup> RESPONDENT**

**KAMALAMBU FARMERS COMPANY.....7<sup>TH</sup> RESPONDENT**

**KARATILI FARMERS CO. LTD.....8<sup>TH</sup> REDPONDENT**

***(Being an application for stay of Ruling of the High Court of Kenya at Kakamega***

***(Njagi, J.) dated 12<sup>th</sup> March 2020 in HCC Suit No. 6 of 2019)***

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**RULING OF THE COURT**

1. The applicant, David Oscar Owako, in his application before us dated 23<sup>rd</sup> March 2020 and titled “an application for stay of ruling at Kakamega made by Hon. J. N. Njagi dated 12<sup>th</sup> March 2020 civil suit 6 of 2019” and made under Section 1A and 1B of the Civil Procedure

Act and Articles 148 and 159 of the Constitution of Kenya, seeks numerous orders which are not entirely clear, and which we reproduce with minor paraphrase below as follows:

- a. That the Orders emanating from a ruling made by Hon. J. N. Njagi given on 12<sup>th</sup> March 2020 to expunge from the records a Request for Judgment made on 23<sup>rd</sup> January 2020 and refusal to recuse himself on application dated 13<sup>th</sup> February, 2020 be stayed/set aside by the Court of Appeal in the course of natural law and social justice.
- b. That the application dated 10<sup>th</sup> February 2020 for Request for Judgment for liquidated amount of Kshs.112,121,000.00 from civil suit No. 6 of 2019 be expedited by the Court of Appeal.
- c. That in the event the Respondents seek to set aside the request for judgment an escrow account be created by the Court of Appeal to deposit Kshs.112,121,000.00 as a guarantee for failure to follow under Order 11 Cap 21 of the Civil Procedure Rules (sic).
- d. That the application dated 26<sup>th</sup> June 2019 to vacate orders made by A.K. Kaniaru, J. on 5<sup>th</sup> March 2014 to be expedited by the Court of Appeal.
- e. That the 4<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> Defendants be reinstated in the suit after striking themselves out of these proceedings by Hon. A.K. Kaniaru J., acrimonious order issued on 5<sup>th</sup> March, 2014 by virtue of a hearing of application dated 26<sup>th</sup> June, 2019 that proceeded unchallenged, non-attendance by the Respondent/Respondent on 5<sup>th</sup> March, 2020.

2. From what we are able to gather from the record of the application generally, the applicant's grievance appears to be with a ruling delivered by the High Court at Kakamega (J. Njagi, J) on 12<sup>th</sup> March 2020. In that ruling the learned Judge dismissed the applicant's application dated 13<sup>th</sup> February 2020 in which he (the applicant) had applied for the Honourable Judge to recuse himself from hearing the suit on account of having made orders for the applicant's documents filed without leave of the court to be expunged from the record.

3. In declining the applicant's invitation to recuse himself, the learned Judge of the High Court expressed:

***“This court made categorical orders that the applicant should not file any application without leave of the court. The applicant admits that he did not seek leave of the court before filing the application dated 10/2/2020. He is now questioning the propriety of the orders of this court made on 11/12/2019. This is not the right court to determine the appropriateness of the said orders. If the applicant was aggrieved by the said orders he should have pursued an appeal against the orders. If not then he should comply with the orders. It is my considered view that I have powers to expunge from the record any document filed in defiance of the orders of the court. In so acting I do not think that that can be construed as an expression of bias or prejudice.*”**

***The upshot is that there is no basis for this court to recuse itself from the matter.”***

4. There is clearly nothing capable of being stayed arising from that ruling. We speculate that perhaps what the applicant intended to seek from this Court is an order to stay proceedings of the lower court pending the hearing and determination of the intended appeal from that ruling. In any event, the applicant would have to demonstrate that the intended appeal is arguable and that if the prayer for stay is declined, the intended appeal, if successful, would be rendered nugatory.

5. In our view, the applicant's application does not meet that threshold. It cannot be that bias is to be presumed or imputed merely because a court has made an order that is not favourable to party. In our view, the intended appeal is not arguable.

6. Consequently, the application for stay of execution is without merit. The other prayers in the applicant's application as reproduced above are matters the applicant should perhaps take up with the High Court.

7. In the result, the application dated 23<sup>rd</sup> March 2020 is hereby dismissed with costs to the respondents.

Orders accordingly.

***Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.***

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**