



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. 13 OF 2014(UR NO.7/2014)

BETWEEN

SAMUEL OGODO WAGA APPLICANT

AND

FISH PROCESSORS (2000) LTD RESPONDENT

*(An application for stay of execution from the Ruling and orders of the High Court of Kenya at Kisumu
(Hon. Justice A. O. Muchelule, J) dated 13th March, 2014*

in

H.C.C.A. NO. 184 OF 2011)

RULING OF THE COURT

In a Judgment delivered on 26th July 2012 by the High Court at Kisumu (H. K. Chemitei, J) in High Court Civil Appeal No. 184 of 2011, the applicant's appeal, against a decision of the Magistrate's Court denying him leave to amend his statement of defence was dismissed. Costs of that appeal were awarded to the respondent and were taxed on 16th April 2013 against the applicant in the sum of Kshs. 52,532.60.

Unhappy, the applicant applied to the High Court through his application dated 3rd September 2012 to review, vary or set aside the Judgment delivered on 26th July 2012. That application was heard and dismissed by the High Court (H. K. Chemitei, J) on 31st October 2012. The applicant appealed to this Court against the order dismissing his application for review in Kisumu Civil Appeal No. 358 of 2012.

By an application by Notice of Motion dated 25th April 2013 the applicant moved the High Court for an order that "*the Bill of Costs as taxed be set aside*" and for an "*order for stay of execution*" pending appeal. That application was dismissed by the High Court (A. O. Muchelule, J) on 13th March 2014.

The applicant then filed the present application dated 26th March 2014, seeking an order of "*stay of execution on any subsequent proceedings until this appeal is heard and determined.*"

During the pendency of that application, the applicant's appeal in Kisumu Civil Appeal No. 358 of 2012

to which we have already referred was heard and determined by this Court in a Judgment delivered on 19th September 2014.

Against that background, Mr. Odeng learned counsel for respondent urged us to dismiss the present application as it is overtaken by the disposal of the appeal. On his part, the applicant who appeared in person maintained that the application remains relevant and that we should grant the orders sought ‘to remain in place forever’.

The powers of this Court under rule 5(2)(b) of the rules of the Court under which the applicant moved the court are aimed at maintaining a state of affairs where an applicant makes out an arguable appeal and demonstrates that the intended appeal will be rendered nugatory unless the temporary orders sought are granted. Where, as here the appeal has been heard and determined, there is no basis for us to exercise jurisdiction under rule 5(2)(b) of the rules of the Court, as the substratum of the application no longer exists.

For those reasons, the application dated 26th March 2014 is for dismissal the same having been overtaken by the delivery of the Judgment of this Court in Civil Appeal No. 358 of 2012. The respondent shall have the costs of the application.

Dated at Kisumu this 22nd day of May, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR