



REPUBLIC OF KENYA



**Kilonzo v Mbsa (Civil Appeal E257 of 2024)
[2024] KEHC 16038 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E257 OF 2024
MW MUIGAI, J
DECEMBER 18, 2024**

BETWEEN

CHARLES SILA KILONZO APPLICANT

AND

MUTISYA MBASA RESPONDENT

RULING

Notice of Flower

1. Vide an application dated September 26, 2024 under Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, B and 3A of the *Civil Procedure Act* seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That an order of stay for execution of decree issued by the trial court at Kithimani PMCC No 304 of 2017 pending the hearing and determination of the appeal herein.
 - d. That this court be pleased to issue an order setting aside the decree, interlocutory judgment and all consequential proceedings therein and the defendant/ applicant be granted leave to file his defence and defend the suit.
 - e. That the Honourable court do issue any other order that it may deem fit and just to grant
 - f. Costs be provided for
2. The application has been premised on the grounds that the Applicant was never served with the plant, summons to enter appearance or any other document whatsoever. That the post office the Respondent averred that he used to serve the Applicant does not belong to him. That he was never served with notice of entry of judgment or a draft decree and was only served with a notice to show cause that



he be remanded. That at the trial court he filed for stay of execution but the same was dismissed on technicalities as he is a layman. It was a ground that his defence raised triable issues and he would suffer irreparably if the orders sought are not granted.

3. The application was not supported by any affidavit .
4. The application is not opposed and was canvassed by way of written submissions.

submissions

5. The Applicant filed submissions dated 27.11.2024 and stated that the conditions set under order 42 rule 6 had been met. While relying in the case of Dennis Odhiambo vs Elius Njoka & Another [2021] e KLR, it was submitted that the Applicant ought not be condemned unheard due to an omission that arose because of lack of representation. While reiterating the contents of the Notice of Motion application, it was submitted that the registered posy 37/90119 Matuu belongs to Judas Ndawa Mbili, not the Applicant. That the allegations that Judas Ndawa Mbili was not a part of the case and the allegations that he was the Applicant's uncle were not substantiated.

submissionsDetermination

6. I have considered the Application and the submissions thereto and find the issue for determination is whether the Applicant is entitled to orders of stay pending Appeal.
7. First and foremost, we need to establish whether what we seek to stay is properly before the court. The judgement being appealed against was delivered on 12th September 2024, the Memorandum of Appeal is dated on 26th of September 2024. The Appeal was filed within time.
8. On the issue of stay, Order 42 Rule 6(1) and (2) of the Civil Procedure Rules,2010 provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless –
 - (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
9. The first issue is whether the application has been filed without unreasonable delay. I note that the Judgement sought to the appealed was delivered on 12th September 2024 according to the Memorandum of Appeal. The Applicant made reference to a judgment and decree but the same was



not supplied for this court to address its mind to it. I also note that the Application was not supported by any affidavit.

10. The Supreme Court in the case of DR. Wilfrida Arnodah Itolondo vs Attorney General and 9 others [2021] e KLR rendered itself as follows;

“The effect of this finding is that the Petition No. E004 of 2021 is null and void for being filed out of time and without leave hence, struck out. Therefore, in the absence of a substantive appeal on record, we are unable to grant the orders of stay of execution of the Order on costs in Civil Appeal No.120 as sought.

11. The court in Mary Wanjiru Kanyua Vs Muchai Ng’ang’a[2004] eKLR stated as follows;

“The nett result would be that if the originating summons was not supported by an affidavit, there would be no other conclusion other than that the said originating summons was incurably defective. To borrow the words of Shah J.A. in Civil Application No. NAI 270 of 2001 Lt. Colonel Joseph Mweteri Igweta V Mukira M’Ethaa & Another,

“Yes, if a procedural defect is fundamental to the proceedings a case of nullity may arise and a nullity, of course, is not curable because what is null and void ab initio remains so”.

12. Consequently, this court cannot deal with the other conditions for grant of an order of stay because of the nullity on record. The notice of motion application has no legs to stand on and as such, it is struck off as incompetent.

13. It is so ordered.

RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 18/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

