



Ongonge t/a Menya Associate v Atieno & 3 others (Civil Appeal 99 of 2022) [2023] KEHC 3737 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 99 OF 2022
HK CHEMITEI, J
APRIL 27, 2023**

BETWEEN

LENARD MENYA ONGONGE T/A MENYA ASSOCIATE APPLICANT

AND

MERCY ATIENO & 3 OTHERS RESPONDENT

RULING

1. The notice of motion application dated December 13, 2022 by the applicant prays for stay of execution of the judgement and decree dated January 27, 2022 in Molo CMCC No.81 of 2019 pending the hearing and determination of the appeal herein. The applicant as well prays for the costs of the application.
2. The application is supported by the sworn affidavit of Sophie Omollo the Legal Officer First Assurance Company Limited.
3. She deponed that exparte judgement was entered against the applicant on January 27, 2022 without his knowledge and when they learned of the same they proceeded to apply for its setting aside. The trial court however refused their prayers and they thereafter filed the appeal herein and sought stay of execution. The said court again denied them the prayers.
4. What then followed was the filing of this application in which they argued that unless the same is granted they stand to suffer loss and the appeal rendered nugatory. She said that the applicant is willing to provide any security pending the determination of the appeal.
5. The respondents through the replying affidavit of Mercy Atieno Ochieng sworn on January 17, 2023 have vehemently opposed the application. They deponed that the same is meant to delay the fruits of the judgement which they have been waiting for, for the last 5 years.



6. She further deponed that the application was res judicata since the trial court had heard a similar application and dismissed it. She prayed that if this court is inclined to grant the applicant's request then it ought to provide sufficient security pending appeal.
7. The court directed the parties to file written submissions so as to dispose the application. They both complied and the court has perused the same as well as the attendant authorities.
8. The applicant's submissions basically gravitate around the provisions of order 42 rule 6 of the Civil Procedure Rules where he prays that he shall suffer irreparable harm should the orders not be granted. He said that he has an arguable appeal and that he was willing to deposit any necessary security.
9. He also refutes the argument by the respondents that the matter is res judicata as the issue in question has not been litigated upon.
10. The respondents on their part have submitted that the application runs contrary to the provisions of section 7 of the Civil Procedure Act, namely, that the same is res judicata. They submit that the trial court had dealt with similar application and dismissed it. They pray that the same be dismissed.
11. The court having read the application together with the supporting affidavit is of the considered view that the same is not res judicata. What was argued before the trial court were two applications, namely, the application to set aside the ex parte judgement which was denied and the application for stay pending appeal which was also denied.
12. The application therefore before me is new in the sense that it is seeking stay of the execution of the decree pending appeal after the trial court denied the applicant. The strength of this application in my view is the memorandum of appeal which is before this court as well as the fact that this is a new court altogether and which court has not adjudicated a similar matter. Essentially it is an appeal against the decision of the lower court which in my view is perfect.
13. Is the application meritorious.? The answer lies in the provisions of order 42 rule 6 of the Civil Procedure Rules which states that;

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“(2) No order for stay of execution shall be made under sub rule (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.”
14. This court is satisfied that the application has been made expeditiously. As to whether the appeal is meritorious, the same shall be decided at the opportune time but not within this application.
15. The respondents have obviously waited for the fruits of the judgement for long. However, in view of the fact that the applicant has sought the intervention of this court to be granted a chance to present his part of the case, i do not think that denying the same will be efficacious. Whatever the reasons for not responding to the matter at the trial court will be determined during the appeal process.
16. The court takes notice of the fact that there was a consensus to the fact that the applicant can provide security pending appeal. This is one of the grounds provided by order 42 rule 6 of the Civil Procedure cited above.
17. In the premises, the court shall accede to their proposal and order as hereunder.



- (a) There be stay of execution of the judgement and decree dated January 27, 2022 in Molo CMCC No 81 of 2019 pending the hearing and determination of the appeal herein.
- (b) The applicant within 30 days from the date herein shall deposit in a joint interest earning account of the two counsels for the parties on record the sum of kshs 859,282 and in default execution to issue.
- (c) The respondents shall have thrown away costs of kshs20,000 payable within 30 days from the date herein and in default execution to issue.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 27TH DAY OF APRIL 2023.

H. K. CHEMITEL.

JUDGE

