



**Darson Trading Limited v Oketch (Civil Appeal E004 of 2023)
[2023] KEHC 19280 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E004 OF 2023
WM MUSYOKA, J
JUNE 30, 2023**

BETWEEN

DARSON TRADING LIMITED APPELLANT

AND

DANIEL ONYANGO OKETCH RESPONDENT

(An appeal arising from orders made by Hon. PA Olengo, Senior Principal Magistrate, SPM, in Busia CMCCC No. 352 of 2021, on 17th February 2023)

RULING

1. I am called upon to determine an application, dated 22nd February 2023. It seeks stay of execution of an ex parte judgment given on 30th August 2022 pending inter partes hearing of the application, and stay orders pending filing of appeal after supply of proceedings and copies of the decree and the judgment. A copy of the judgment indicates it was for a money decree, and that the matter proceeded ex parte in default of appearance and defence. The applicant challenges the service. He has attached a ruling, delivered on 17th February 2023, where the judgment of 30th August 2023 was set aside, and leave was granted to file defence, subject to deposit of the whole decretal sum in court within 7 days, the filing of the defence within 7 days, throwaway costs, and in default execution to ensue.
2. The respondent replied. He argues that the application is *res judicata*, given that a similar application was filed at the trial court, and was determined in favour of the appellant. He avers that the orders made on 17th February 2023 have not been complied with. The respondent followed up his reply with a notice of preliminary objection, to effect that the application, dated 22nd February 2023, was *res judicata*. He also filed grounds of opposition, where he raises the issue of *res judicata*, disobedience of court orders, and the application being frivolous.
3. I note that the appellant has filed a record of appeal, and what he is challenging are the orders of 17th February 2023, which allowed his application, dated 3rd January 2023. I find it curious that he is urging



the appellate court to allow the application, dated 3rd January 2023, in terms of being granted leave to file his defence and counterclaim, yet the trial court had granted him those orders in the ruling of 17th February 2023, which he is now challenging on appeal. In fact, the impugned ruling was not on an application, dated 3rd January 2023, as alleged in the memorandum of appeal, but on an application, dated 12th January 2023.

4. The relevant portion of the impugned ruling reads:

“ ... I hereby exercise my discretion and allow the Defendant’s application dated 12/1/2013
... on following conditions.

a. ...

b. That the Defendant to file her statement of defence plus other relevant pleadings within 7 days from the date herein.

b.”

5. The relevant prayers in the application, dated 12th January 2023, state as follows:

“ 1 ...

2 That this Honorable Court set aside the Judgement in default entered herein
... on 30th August 2022.

3 ...

4 That this Honourable Court do grant leave to the Defendant an opportunity to defend the suit herein as it has a good defence raising triable issues as per the draft Statement of defence attached deemed filed upon payment of court fees.

5 ...”

6. Prayers 2 and 4 in the application, dated 12th January 2023, are among those that were granted in the ruling of 17th February 2023. The judgment was set aside, and leave to file a defence and counterclaim was granted, so why is the appellant asking the same prayer in his appeal.

7. I am being invited to grant stay pending appeal. I do not think that I should grant the same. Firstly, the appeal invites this court to grant orders under a non-existent application, dated 3rd January 2023. Secondly, the orders sought in the appeal have already been granted by the trial court. This is what Mr. Okutta, the Advocate for the respondent, was alluding to, when he argued that the application was *res judicata*. Thirdly, the trial court made orders on 17th February 2023, that the appellant is yet to obey or comply with. The appellant has no choice when it comes to compliance with court orders. It cannot pick and choose which orders to obey or comply with, and which not to obey or comply with. Fourthly, there is abuse of court process, where a party is seeking orders that have already been granted by the trial court.

8. I note that the appellant is unhappy with the conditions imposed to the setting aside and leave to defend. The answer to such unhappiness does not lie with ignoring the court orders, and proceedings as if they were never made. The policy is that the party complies first, even as it moves the court for review or appeal. Non-compliance with court orders, even as one proceeds to appeal, is not an option.

9. The appellant has not come to court with clean hands. It is not deserving of exercise of discretion in its favour. There can be no merit in the application, dated 22nd February 2023, given the non-compliance



with the orders made by the trial court. The appellant cannot have its cake and eat it. I dismiss the application, dated 22nd February 2023, with costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 30TH DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Osoro, instructed by Osoro Juma & Company, Advocates for the appellant.

Mr. Okutta, instructed by Ouma-Okutta & Associates, Advocates for the respondent.

