



**Chege v Ngira & another (Suing as Legal Representatives of Nelson Macharia Maina)
(Civil Appeal E056 of 2022) [2023] KEHC 20826 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E056 OF 2022
TW CHERERE, J
JULY 27, 2023**

BETWEEN

WILSON GAKUNYI CHEGE APPELLANT

AND

NAOMI WAMBUI NGIRA 1ST RESPONDENT

STANLEY NGIRA 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF NELSON MACHARIA MAINA

*(Being an appeal from the judgment and decree in MERU CMCC
NO. 102 OF 2016 by Hon. M.Odhiambo (RM) on 08th April, 2022)*

JUDGMENT

Background

1. Judgment in Meru CMCC No 102 of 2016 was on October 3, 2017 entered in favour of respondents as against the appellant for Kes 3,126,175/- plus costs and interest.
2. Subsequently by an order dated April 24, 2018, the court disallowed the appellant's application for stay of execution of the judgment and for leave to liquidated the balance of the decretal sum of Kes 1,847,569/- in instalments of Kes 50,000/- per month
3. Appellant in a second bid to obtain an order for stay of execution of the judgment on October 13, 2021 filed yet another application seeking orders for stay of execution of the judgment and subsequent notice to show cause, recalculation of interest and striking out of the firm of Wangai Nyuthe & Co Advocates from acting for the plaintiffs.
4. By a ruling dated April 8, 2022, the court agreed with the appellant that the decretal sum indicated on the decree and on the NTSC was erroneous and directed that a fresh decree. The court found no merit



in the application for recalculation and waiver of interest and disqualification of the firm of Wangai Nyuthe & Co Advocates from acting for the plaintiffs.

The Appeal

5. The appellant dissatisfied with the lower court's decision filed this appeal mainly on the ground that the dismissal was not merited.
6. I have considered the appeal in the light of the affidavit evidence on record and submissions filed on behalf of the parties. By a letter dated April 23, 2018, appellant instructed his advocate J.K Kibicho to withdraw the appeal he had filed in respect of the judgment herein to give an opportunity for the parties to compromise the judgment.
7. I have also considered a letter to the appellant by the firm of Wangai Nyuthe & Co Advocates to the appellant which is dated April 30, 2018 which was a week after appellant instructed his advocate to withdraw the appeal.
8. In *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (judgment) the court stated that:

“Burden of proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the plaintiff does not discharge this legal burden, then the plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed.”
9. At the hearing, the appellant did not tender any evidence to the effect that the firm of Wangai Nyuthe & Co Advocates had instructed him to withdraw the appeal. The letter relied upon by the appellant was written a week after appellant instructed his advocate J.K Kibicho to withdraw the appeal and there is no evidence that it was influenced by the firm of Wangai Nyuthe & Co Advocates.
10. From the foregoing, I do not find it difficult to agree with the learned trial magistrate that applicant failed to demonstrate that he was misled to withdraw the appeal by the firm of Wangai Nyuthe & Co Advocates. The finding by the learned trial magistrate that conflict of interest on the part of by the firm of Wangai Nyuthe & Co. Advocates had not been demonstrated was in my considered view well founded.
11. Regarding interest, no evidence was placed before the trial court for waiver of interest on the decretal sum and the decision by the learned trial magistrate's that the prayer was unmerited was equally well founded.
12. A successful party such as the respondents have a legitimate expectation to enjoy the fruits of their judgment without delay. Having considered the appeal in its totality, I find that it is devoid of merit and is filed with the sole purpose of delaying the execution of a lawfully issued judgment.
13. The appeal is hence dismissed with costs to the respondents.

DATED AT MERU THIS 27TH DAY OF JULY 2023

WAMAE. T. W. CHERERE



JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Ngige for Ngigi Karomo & Associates Advocates

For Respondents - Mr. Mahugu for Wangai Nyuthe & Co. Advocates

