



**Anytime Limited v Onyiego & another (Miscellaneous Application
E586 of 2022) [2023] KEHC 21145 (KLR) (Civ) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION E586 OF 2022

JN NJAGI, J

JULY 26, 2023

BETWEEN

ANYTIME LIMITED APPLICANT

AND

ERIC MANYARA ONYIEGO 1ST RESPONDENT

ISAAC KIBET SHIKAMI 2ND RESPONDENT

RULING

1. The Applicant herein has filed a notice of motion dated October 3, 2022 seeking for orders of stay of execution of the judgment and decree in Nairobi Chief Magistrate's Court Civil Suit No. 1174 of 2020 pending the hearing and determination of Milimani High Court Civil Appeal NO. E781 of 2022.
2. The application is premised on the grounds that the lower court entered ex parte judgment against the applicant for failure by the Applicant to enter appearance and filing a defence. That the Applicant filed an application dated May 28, 2022 seeking to set aside the ex parte judgment but the said application was dismissed by the trial court vide a ruling delivered on the September 15, 2022, consequent to which the Applicant filed the aforementioned appeal.
3. The instant application is supported by the affidavit of Ashok Madala, a director of the Applicant sworn on the May 3, 2022. The deponent deposes that auctioneers have already proclaimed the business assets of the Applicant company. That he is apprehensive that if execution is allowed to proceed it may lead to the end of the commercial existence of the Applicant. That the Applicant is ready and willing to abide by all reasonable conditions that the court may attach to an order staying the execution of the decree pending the hearing of the appeal. That the Respondents will not suffer any undue prejudice if the orders sought are granted.



4. The application was further supported by the affidavit of counsel for the Applicant, W. Kevin Michuki sworn on November 22, 2022 in which he deposed that their office wrote a letter to the Office of the Deputy Registrar, Magistrate's Courts inquiring on the authenticity of the ruling purported to have been delivered on September 15, 2022. That they received a response vide a letter dated October 27, 2022 indicating that Hon. Gathogo Sogomo had indicated to the Office of Deputy Registrar, Magistrate's Courts that the ruling in question was not written, printed, signed and /or delivered by him. Further that Hon. Sogomo had noted that the purported ruling was devoid of the name and rank of the judicial officer who signed the document at its foot and as such the ruling is an outright forgery. Counsel annexed a copy of the said letter to his further affidavit and marked it as "WKM-2".
5. The application was opposed by the 1st Respondent vide the replying affidavit of his advocate, Robert Mochache, sworn on the November 17, 2022 wherein counsel deposed that the Applicant was duly served with summons to enter appearance. That the 1st Respondent will be prejudiced by orders for stay of execution since the accident in which the 1st Respondent was seriously injured is admitted. That the application does not meet the threshold for grant of stay of execution pending appeal. That the appeal is defective ab initio as the Applicant has enjoined his co-defendant at the primary suit and therefore the appeal should be struck out. That in the event that the court was inclined to allow the application the Applicant should be ordered to pay the 1st Respondent at least Ksh.1,500,000/=, pay the auctioneers charges and be ordered to deposit the balance in an interest earning account in the names of both advocates for the parties.
6. I may at this stage point out that this court, (Meoli J.), on the October 15, 2022 ordered the Applicant to deposit into court a sum of Ksh.1,000,000/= as a condition for granting of interim orders for stay of execution. The Applicant did comply with the order and deposited the stated sum into court.
7. The application was canvassed by way of written submissions. The advocates for the Applicant submitted that the ruling of September 15, 2022 has been brought into question and does not comply with Order 21 Rule 3 of the Civil Procedure Rules, 2010 on the writing and delivery of judgments. That in face of the material controversy in the impugned ruling, there is sufficient cause for this court to stay any further proceedings till the determination of the indictments lodged against the ruling. The Respondent did not make any comment on this crucial issue. In my view the court should first determine the issue of the validity of the ruling delivered in court on the September 15, 2022 before determining the application dated October 3, 2022.
8. Order 21 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows:
 1. Judgment, when pronounced [Order 21, rule 1.]

In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.

Rule 2 provides thus:
 2. Power to pronounce judgment written by another judge [Order 21, rule 2.]
 1. A judge may pronounce a judgment written and signed but not pronounced by his predecessor
 2. A judge of the High Court may pronounce a judgment written and signed but not pronounced by another judge of the High Court.

Rule 3 provides that:



3. Judgment to be signed [Order 21, rule 3.]
 1. A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.
 2. A judgment pronounced by a judge other than the judge by whom it was written shall be dated and countersigned by him in open court at the time of pronouncing it.
9. The footnote to the impugned ruling in this matter indicates as follows:

Ruling signed and delivered virtually on 15th September 2022 in the presence of (hand written not legible)

For (signature)

Honourable G Sogomo

Principal Magistrate
10. The impugned ruling thereby purports to have been written by Hon. Gathogo Sogomo and delivered on his behalf by somebody whose name and rank is not indicated in the ruling. Hon. Sogomo vide a letter from the Deputy Registrar Magistrates` Courts denied to have written the ruling. Indeed, there is no indication in the ruling that it was written and signed by Hon. Sogomo. A judicial officer who writes a judgment and is not in a position to deliver it is required to sign the judgment for delivery by another judicial officer. The judicial officer who delivers a judgment written by another judicial officer is required to sign the judgment at the time of delivery and indicate his/her name.
11. Going by the letter from the Deputy Registrar, Magistrates` courts, it would mean that Hon. Sogomo is not the one who wrote the ruling dated September 15, 2022. That puts into question the validity of the ruling. The court however, cannot go by the letter from the Deputy Registrar to determine the validity of the ruling. The court will require to have an affidavit from Hon.Sogomo stating whether or not he is the one who wrote the ruling.
12. In view of the foregoing, I make the following orders:
 - (1) Hon. G. Sogomo to furnish this court with his sworn affidavit stating whether or not he is the one who wrote the ruling in Nairobi CMC Civil Case No.1174 of 2020 delivered in court on September 15, 2022.
 - (2) The Court`s Deputy Registrar to serve Hon. Sogomo with the said order.
 - (3) Hon. Sogomo to comply with the order within two weeks of service of the order.
 - (4) The ruling herein is deferred till the court determines the validity of the ruling dated September 15, 2022.
 - (5) Matter to be mentioned in court on September 26 2023.

Orders accordingly.

Delivered virtually, dated and signed at MARSABIT this 26th July 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Chasya HB for Mr. Ochieng Opiyo for Applicant



Mr. Mochache for 1st Respondent

Court Assistant – Jarso

RULING MISC. E586 OF 2022 3 | Page

