



**Muthoni v Kingoria (Civil Appeal E203 of 2022)
[2023] KEHC 23555 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E203 OF 2022
DO CHEPKWONY, J
SEPTEMBER 29, 2023**

BETWEEN

WILFRED UWENDA MUTHONI APPELLANT

AND

STEPHEN KIMATHI KINGORIA RESPONDENT

RULING

1. This matter came up for mention on September 20, 2023 for parties to confirm compliance of directions agreed on in a consent entered between their respective counsel, recorded and adopted as an order of this court on June 19, 2023.
2. On June 19, 2023, the matter had been scheduled for interparties hearing of the Notice of Motion application dated September 26, 2022 in which the Applicant was seeking stay of execution orders. However, counsel for the parties informed court that they had agreed to compromise the said application so as to proceed with the appeal and had a consent recorded and adopted as an order of the court in the following terms:-
 - a. The parties confirmed that a joint interest-earning account in the names of both Advocates for the parties had been opened wherein a sum of Kshs 1,817,250.00 being the decretal sum amount in the Judgment delivered on August 31, 2022 had been deposited.
 - b. There be a stay of execution of the Judgment and all other consequential orders and or decree by Hon G Omodho, Principal Magistrate (PM) in Kiambu CMCC No 422 of 2018, pending the hearing and determination of the Appeal.
 - c. The Deputy Registrar to call for and avail the original record of proceedings within 14 days to enable the Record of Appeal be compiled and filed.



- d. The Appellant is granted 45 days leave to file and serve Record of Appeal.
 - e. Failure to comply with order (d) above, the appeal would stand dismissed.
3. On September 20, 2023, it was clear that the original record of proceedings from the trial court and Record of Appeal were not on the court record. The Respondent's Counsel then urged the court to dismiss the Appeal since the Record of Appeal had not been filed. On his part, the Appellant stated that the Deputy Registrar had not availed the lower court file to enable him prepare the Record of Appeal and therefore the failure to do so was beyond his control.

Analysis and Determination.

4. Having listened to both counsel in their respective arguments in respect of the court order which was as a result of a consent between the counsel for parties, it is worth pointing out that it is trite law that court orders should not be seen to have been issued in vain and the parties are required or expected to obey or comply with, unless with good reason. This was the position in the case of *Republic –vs- County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] eKLR, where the Court held:-

“ 30. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal”

5. In the instant case, the orders that were to be obeyed and or complied with arose from a consent between counsel for the parties which was recorded and adopted on June 19, 2023. The explanation for non-compliance with the said orders/directions by the Appellant's counsel is that the Deputy Registrar had not availed the original record of proceedings from the trial court, which was beyond his control. Indeed, as part of the court orders/directions issued on June 19, 2023, the Deputy Registrar was directed to call for and avail the original record of proceedings from the trial court. The court record will confirm that the Deputy Registrar had called for the original record of proceedings earlier vide a letter dated September 22, 2022 addressed to the Chief Magistrate, Kiambu Law Courts.
6. Nonetheless, it is worth pointing out that the duty to compile, file and serve a Record of Appeal lies with the Appellant. It then follows that the Appellant is thus required to follow up with the trial court for the original record of proceeding to be supplied to him/her/it to enable the computation, filing and service of the Record of Appeal. The Deputy Registrar is only called upon to avail the said record for the benefit of the High Court and for purposes of facilitating the hearing and determination of the appeal.
7. From the submissions by the Appellant's counsel, one can clearly see a party who was waiting for the Deputy Registrar to furnish the original record of proceedings. And indeed, there is no evidence of communication between the Appellant, her counsel and trial court to show that in the 45 days they had agreed to file and serve a Record of Appeal, there was effort made to follow up on the trial court's proceedings in the matter.
8. Furthermore, from the time of the directions/order on June 19, 2023 to September 20, 2023 when parties were to confirm the Record of Appeal as filed and served, it was about 90 days period, which was beyond the 45 days timeline but had been agreed on, and this was only because of the court having gone on vacation from August 1, 2023 to September 15, 2023. The court is wondering why the Appellant



never approached court with an application or vide a letter to explain the challenges, if any, she was experiencing in obtained the trial court's proceedings, so as to seek extension of time. Clearly, the Appellant had exhibited laxity in the manner she had handled the appeal which has been pending unprosecuted since it was lodged in September, 2022, at the expense of the Respondent who has a legally obtained Judgment.

9. There being a consent which was adopted as an order of this court with a default Clause on June 19, 2023, and the Appellant having defaulted on the terms of the court without any plausible or tangible reason or explanation, this court is inclined to invoke the terms of the default Clause which provides for dismissal of the appeal. That being the case, the appeal filed on September 12, 2022 be and is hereby dismissed with costs to the Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 29TH DAY OF SEPTEMBER, 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Munene holding brief for Mr. Ayieko for the Respondent

Court Assistant - Martin

