



**Tingre v Okola (Civil Appeal E043 of 2022)
[2023] KEHC 22748 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E043 OF 2022
WM MUSYOKA, J
SEPTEMBER 28, 2023**

BETWEEN

LYDIA NYATEGI TINGRE APPELLANT

AND

BRIGIT VIVIAN OKOLA RESPONDENT

(Being an appeal from the ruling and order of Hon. EC Serem, Senior Resident Magistrate, SRM, delivered on 21st November 2022, in Busia CMCCC No. E081 of 2020)

RULING

1. I am determining a Motion, dated June 22, 2023, which principally seeks stay of execution of the decree in Busia CMCCC No E081 of 2020. The grounds upon which it is premised are on the face of the Motion, and the facts on which it is predicated, are set out in the affidavit sworn in support, by the appellant, on June 22, 2023.
2. The background is that a decree was obtained by the respondent as against the appellant in Busia CMCCC on No 081 of 2020. The appellant was aggrieved, hence the appeal herein. It is averred that a formal decree has been extracted, and was in the hands of Lufree Auctioneers, who were likely to execute at any time, as the property of the appellant had been proclaimed. Copies of the formal decree and certificate of costs, warrants of attachment in execution and of sale of property in execution, are attached, dated November 21, 2022, June 7, 2023 and June 8, 2023, respectively.
3. The application is opposed. There is an affidavit in reply, sworn by the Advocate for the respondent, Ms Okwaro Winnie Anono, on June 30, 2023. It is averred that the Advocates for the appellant were improperly on record. It is further averred that there are subsisting stay of execution orders made by the trial court, in a ruling delivered on February 29, 2023. It is averred that there was no appeal against that ruling. It is further averred that there was another pending application, before the trial court, for



extension of time. The appellant is accused of forum shopping. A copy of the ruling of February 29, 2023 is attached.

4. Directions were given on July 3, 2023, for canvassing of the application, by way of written submissions. Both sides have complied, for they have filed their respective written submissions, and I have read through them, and noted the arguments made.
5. The firm of BM Ouma & Company, Advocates, filed the application the subject of this ruling, and I believe that it is of them that it is said they are not properly on record. The argument is grounded on Order 9 Rule 9 of the Civil Procedure Rules, where change of Advocates can only be effected with leave of court, after judgment. I believe that Order 9 Rule 9 does not apply here. This is a fresh cause, where judgment is yet to be delivered, on the appeal. Order 9 Rule 9, in the present circumstances, can only apply with respect to proceedings before the trial court, where there is a pending judgment. No Advocate can come on record there, without leave of court. In this appeal cause, there is no judgment, and leave of court is not necessary, before a party can change Advocates or choose to act in person.
6. The second issue is more fundamental, whether I should grant the stay orders sought. The appellant was not candid with the High Court, for it was not disclosed that a stay application was successfully mounted before the trial court. Stay was granted, subject to certain conditions being satisfied. There was no disclosure of that stay order, nor an account of what has happened with that stay order. I have seen the ruling of February 20, 2023, it granted final stay orders, pending appeal, subject to conditions. I have not seen an order, either of the trial court, or of the High Court, vacating that order. So, what the appellant is doing is seeking the same order here at the High Court, despite the same having been granted by the trial court, and that order is still in existence.
7. That smacks of abuse of court process. The appellant cannot have her cake and eat it. She cannot proceed as if the stay order granted by the trial court does not exist. I cannot possibly make orders parallel to those made at the trial court. The mere fact that a party feels that the orders made by the trial court are onerous does not justify having those orders ignored, so that the party moves the higher court as if the orders made by the trial court do not exist. She has to work with the subsisting orders. She can seek review of the orders, or extension of time to comply, but she cannot ignore the said orders, and approach the High Court in a manner suggesting that those orders do not exist.
8. In view of what I have stated above, there can be no merit in the Motion, dated June 22, 2023. It is for dismissal, and I hereby dismiss the same, with costs. Interim stay orders were given on June 22, 2023. In view of the dismissal of the Motion, the said orders are hereby discharged.
9. To move the matter forward, I direct the appellant to file and serve the record of appeal within 30 days, and the Deputy Registrar to call for the original trial records right away. The matter shall be mentioned for directions within 45 days. Orders accordingly.

RULING IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28TH DAY OF SEPTEMBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Ms. Anono, instructed by Mukisu & Company, Advocates for the respondent.

