



Abdi v Sang' (Suing as the administrator of the Estate of the Late Merch Chepkoech (Dcd) (Civil Appeal 5 of 2019) [2023] KEHC 22700 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 5 OF 2019
GL NZIOKA, J
SEPTEMBER 27, 2023**

BETWEEN

ABDI OMAR ABDI APPELLANT

AND

LILIAN CHEBET SANG' (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MERCH CHEPKOECH (DCD) RESPONDENT

RULING

1. The subject application herein is dated, 9th March 2021. It is brought under the provisions of; section 1A, 1B 3A and 95 of the *Civil Procedure Act*, (Chapter 21) Laws of Kenya and Order 9 Rule 9(a), Order 45 Rule 1, Order 42 Rule 6, Order 42 Rule 21, Order 50 Rule 6, and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law.
2. The applicant is seeking for the following orders: -
 - a. Spent
 - b. That the Honourable court be pleased to grant leave to the firm of; Kimondo Gachoka & Company Advocates to come on record as Advocates for the appellant/applicants herein in place of the firm of; Kairu & MCcourt Advocates.
 - c. That pending the hearing and determination on this application inter-parties there be a stay of execution of the judgment delivered on 15th January 2019 in CMCC 727 of 2016 Naivasha, Lilian Chebet Sang (Suing as a personal representative of the Estate of Mercy Chepkoech (Deceased) -vs- Abdi Omar Abdi and all consequential and incidental orders and proceedings.
 - d. That pending the hearing and determination on the application inter-parties there be a stay of the orders issued on 22nd February 2021 authorizing release of; Kenya Shillings Three Million



Two Hundred and Fifty Nine Thousand Eight Hundred and Ninety Shillings, (3,259,890/=) deposited in court as security pending hearing and determination of this instant appeal.

- e. That this appeal being; Naivasha HCCA No. 5 of 2019 Abdi Omar Abdi -vs- Lilian Chebet Sang (Suing as Personal Representative of the Estate of Mercy Chepkoech (Deceased) be and is hereby reinstated for hearing and determination in the normal way.
 - f. That this Honourable court do make any such further order (s) and issue any other relief it may deem just to grant in the interest of justice
 - g. That the costs of the application be in the cause.
3. It is supported by the grounds thereto and an affidavit of even date sworn by Fredrick Ragui Kariuki, an Advocate of the High Court in the firm of; Kimondo Gachoka & Co. Advocates who has conduct of this matter. He avers that, on 12th March 2021, the appellant was unable to file a Record of Appeal in this matter as the appeal had been struck out. That, he was not aware of any application seeking for striking out or dismissal of the appeal.
 4. That, the appeal was fixed for directions on 19th May 2021 but was dismissed before the directions were given. He avers that the appellant has never lost interest in this matter and that a decretal sum of; Kshs 3,000,000 has already been deposited in court as such the respondent will not suffer any prejudice. Further, the appellant has an arguable appeal and should be accorded an opportunity to prosecute the same.
 5. However, the respondent opposed the application vide a replying affidavit sworn by herself in which she avers that, the appeal was filed on 29th January 2019 but the Record of Appeal was not filed until the application for striking out the appeal was heard and determined on 22nd February 2021.
 6. That, there is no reason given for delay in filing the Record of Appeal and neither has the alleged Record of Appeal been annexed to the application herein to prove it exists. Further the application for striking out the appeal was properly served vide the email address of the appellant's lawyers and was re-send on 17th & 18th February 2021 as per the copies annexed to the replying affidavit. Furthermore, a new email address was obtained and application on 19th February 2021.
 7. As such, the appellant had notice of application and the mention date of 18th January 2021, when the matter was fixed for hearing and failed to oppose the application and/or attend to its hearing. That the attempt to seek for directions and/or file a Record of Appeal on 19th May 2021 was after the event.
 8. The respondent further avers that, the appellant does not have clean hands to approach the court for any orders, as he has not fully complied with the order to deposit the total decretal sum in court having deposited only Kshs 3,000,000 instead of Kshs 3,259,890.
 9. Finally, the respondent avers that, the appellant has not advanced any good reasons for delay in prosecuting the appeal, and if the application is allowed, she will suffer prejudice. That the application lacks merit and should be dismissed.
 10. The appeal was disposed of by filing of submission. The appellant submitted that, under Article 50 of [the Constitution](#) of Kenya, 2010 every person has a right to a fair trial and that the appeal herein was not ripe for dismissal. He cited several authorities mainly by courts of similar jurisdiction in support of the argument that, the courts have been consistent in interpreting Order 42 Rule 35 of the [Civil Procedure Rules](#), and are hesitant to dismiss an appeal.
 11. The respondent submitted that section 95 of [Civil Procedure Act](#) relied on by the appellant's law firm does not arise, as they waived their right under Order 9 Rule g(a) of [Civil Procedure Rule](#) when they



filed a Notice of change. Furthermore, Order 42 Rule 35(2) of Civil Procedure Rule ought to have applied when the application dated 11th February 2021 was filed, as such it is an afterthought as the appeal has already been dismissed.

12. The respondent reiterated that if the application is allowed they will suffer prejudice and that the appellant has no arguable appeal and therefore security deposited in court be released.
13. Pursuant to the aforesaid, I have considered the application in the light of the materials availed and the court record and I note therefore that, the matter herein originated vide Chief Magistrate Civil Case No. 727 of 2016 at Naivasha. Therefore, it has been pending for the last seven (7) years.
14. Further, the Judgment therein was delivered on 15th January 2019 over 4 years ago. The memorandum of appeal dated 28th January 2019 was filed on the same date but to-date no Record of Appeal has been filed.
15. Furthermore, after judgment the appellant was ordered to deposit the decretal sum of; Kshs 3,259,890 plus costs and interest in court within 21 days. He did not comply within the time limit set. Thereafter he deposited a lesser sum of; Kshs 3,000,000 on 10th May 2019 instead of 16th April 2019 and without the leave of the court. It is therefore clear that, the appellant has approached the court with unclean hands, and more so, when the trial court vide a ruling dated 2nd July 2019 pointed out to him the none compliance with the order to deposit security.
16. Be that as it may, I find that as regards the issue of representation, the firm of; Kimondo & Gachoka Advocates are already in the matter and have been given audience. The respondent has served them with several correspondences. To re-visit the issue of their appearance will serve no purpose. The matter should proceed on substantive issues.
17. As regards the prayer for stay of Judgment, delivered on 15th January 2019, the same can only be granted if the appellant complies with the terms and/or conditions of stay which required him to deposit the total decretal sum plus costs and interest. He has not. He who goes to equity must do so with clean hands. For there to be stay of execution of judgment he must comply with the orders of stay and deposit the balance of the decretal sum within fourteen (14) days of the date of this order. It is so ordered.
18. Furthermore, the appeal will only be reinstated if the afore is complied with and in addition the following order that: -
 - a. The record of appeal which is alleged to have been ready on 19th May 2021, be served within forty-eight (48) hours after deposit ordered above.
 - b. The appeal be canvassed and disposed of within one month of admission (if so admitted) and after service thereof.
 - c. The costs of the application herein be paid before the appeal is heard and determined.
 - d. In default of the compliance of the aforesaid orders, the decretal sum be released to the respondent within 21 days of default and without further recourse to court.
19. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 27TH DAY OF SEPTEMBER 2023

GRACE L. NZIOKA

JUDGE

In the presence of:



Mr. Ng'ang'a for the applicant

Ms Okeyo for the respondent

Ms Ogutu: Court Assistant

