



Kinaga t/a The Great Hope Sec School v ED Partners Africa Limited (Civil Appeal E791 of 2022) [2023] KEHC 24139 (KLR) (Civ) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24139 (KLR)

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

**CIVIL
CIVIL APPEAL E791 OF 2022**

**CW MEOLI, J
OCTOBER 26, 2023**

BETWEEN

MOSES OGWENO KINAGA T/A THE GREAT HOPE SEC SCHOOL APPELLANT

AND

ED PARTNERS AFRICA LIMITED RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 12th October, 2022 brought by Moses Ogweno Kinaga t/a The Great Hope Sec. School (hereafter the Applicant) supported by the grounds set out on its body and the depositions in the affidavit of the Applicant. The motion seeks to stay execution of the judgment delivered by the Small Claims Court (the trial court) on 16th September, 2022 in Nairobi SCCOMM No. E3460 of 2022 pending the hearing and determination of an intended appeal against the aforesaid judgment.
2. In his supporting affidavit, the Applicant stated that the trial court delivered judgment in favour of Ed Partners Africa Limited (hereafter the Respondent) and against him, thereby requiring him to pay the decretal sum of Kshs. 750,000/- and which judgment he desires to challenge in the appeal. The Applicant further stated that following delivery of the judgment, his erstwhile advocate purported to concede to the judgment and offered a proposal on payment of the decree to the Respondent's advocate, without his instructions. That unless the stay order is granted, he stands to suffer substantial loss which would render the appeal nugatory.
3. The Respondent resisted the Motion by filing the Grounds of Opposition dated 22nd February, 2023 raising a total of 11 grounds. Therein, the Respondent essentially challenged the competence of the appeal and arguing that the court lacks jurisdiction to entertain the appeal by dint of Section 38 of the *Small Claims Court Act* No. 2 of 2016. The Respondent also challenged the Motion on the



premise that the Applicant did not attach a copy of the impugned judgment and hence the conditions for granting a stay of execution have not been met in the present instance. On those grounds, the Respondent proposed that the Motion be dismissed with costs.

4. The Applicant rejoined with a further affidavit sworn on 7th March, 2023 wherein he deposed that the Motion is competently before the court. He equally deposed that the Respondent was prematurely seeking to argue the appeal at this stage through the Grounds of Opposition and that the issue of jurisdiction was similarly raised by the Respondent through a preliminary objection which is yet to be heard.
5. When the parties attended court for hearing of the Motion, the court directed that they file and exchange written submissions thereon. Submitting in support of the Motion, the Applicant who is acting in person, relied primarily on the provisions of Order 42, Rule 6 of the *Civil Procedure Rules* concerning the conditions for granting stay of execution. The Applicant further submitted that he is yet to be supplied with typed copies of the impugned judgment and proceedings. It was also his submission that he has made part payment towards offsetting the outstanding loan owing to the Respondent. For those reasons, the court was urged to allow the Motion.
6. On behalf of the Respondent, it was contended that the Applicant has not satisfied the conditions for the grant of stay of execution. Because, he has not demonstrated the manner in which he stands to suffer substantial loss, in line with the principles set out in *Pamela Awinyo T/A Alphano Medical Centre v Tom Sindani T/A Samulia Pharmacy* [2011] eKLR and the renowned case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR.
7. Counsel took the view that no arguable appeal exists and reiterated the Grounds of Opposition in arguing that the intended appeal offends Section 38 of the *Small Claims Court Act*. It was contended that the Applicant did not address the condition on provision of security by the Motion or in his submissions. The court was therefore urged to dismiss the Motion with costs, but should it be inclined to grant a stay, then the Applicant be ordered to deposit the decretal sum in a joint interest earning account.
8. The court has considered the grounds laid out on the body of the Motion, the affidavit material in support of the Motion, the Grounds of Opposition, and the rival submissions. No party has addressed the competency of the Applicant's motion and appeal based on the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* which provides:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.
9. It is apparent from the material on record that the Applicant was until judgment in the lower court and prior to filing his appeal represented by the firm of Oscar Otieno & Co. Advocates. No leave was sought or granted to the Applicant or consent filed in terms of the above provisions to allow the Applicant to act in person as purported in his undated notice to act in person. On that ground alone, both the motion and appeal are incompetent.
10. In addition, while the Respondent abjured arguing fully the preliminary objection on the appeal premised on the provisions of section 38 of the Small Claims Act, a perfunctory perusal of the



memorandum of appeal reveals that the grounds therein relate primarily to matters of fact rather than law. Consequently, the court will strike out the Notice of Motion dated 12th October 2022 with costs to the Respondent while directing the Applicant to regularize his memorandum of appeal within 14 days of today's date, failing which it will equally stand automatically struck out with costs to the Respondent.

DELIVERED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

Applicant: present in person

For the Respondent: Ms. Kadzo h/b for Mr. Kitila

C/A: Carol

