



REPUBLIC OF KENYA



KENYA LAW
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**Onduko v Mose (Civil Appeal E021 of 2023)
[2023] KEHC 25840 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E021 OF 2023
WA OKWANY, J
NOVEMBER 30, 2023**

BETWEEN

NELSON ONDUKO APPELLANT

AND

JARED OKARI MOSE RESPONDENT

(Being an Appeal from the Ruling of Hon. W. C. Waswa – RM Nyamira dated and delivered on the 31st day of May 2023 in the original Nyamira CMC CC No. 124 of 2018)

RULING

1. This ruling is in respect to the Application dated 17th August 2023 wherein the Appellant seeks orders for stay of proceedings in Nyamira CMCC No. 124 of 2018 pending the hearing and determination of the appeal herein.
2. The Application is premised on the following grounds: -
 1. The rulings delivered on 31st day of May, 2023 and 17th day of August, 2023 respectively, might not be complied with within 14 days as ordered by the Honourable court.
 2. The Applicant is a mere peasant or farmer who cannot be able to raise the full decretal sum amounting to Kshs. 512,265/= within 14 days from the date of the ruling delivered on 31st day of May, 2023 and 17th day of August, 2023, respectively.
 3. That the Applicant has filed an appeal before the Nyamira High Court, Civil Appeal No. E021 Of 2023, hence if the orders sought for herein shall not be granted the said appeal shall be rendered nugatory.



4. That the Applicant shall suffer substantial loss and damages if the prayers sought for are not granted as he shall not have chance to defend the suit before the Nyamira Chief Magistrate Court, Civil Suit No. 124 Of 2018, as default judgment was delivered against him.
5. That the Applicant has high chances of success in the pending appeal before the high court.
6. That this application has been made without undue delay and same being made in good faith.
3. The Respondent opposed the application through his Replying Affidavit dated 16th September 2023 wherein he explains the circumstances that led to the entry of *ex parte* judgment against the Applicant before the Lower Court and the Applicant's subsequent application, before the said court, to set aside the *ex parte* judgement. He avers that the Lower Court allowed the application to set aside the *ex parte* judgment, but on condition that the Applicant deposits the entire decretal sum in court within 14 days. He avers that the Applicant did not comply with the said conditions for setting aside the *ex parte* judgment but instead filed the instant application for stay of proceedings.
4. The Respondent avers that the Applicant has not come to court with clean hands and has not furnished the court with sufficient grounds for the granting of the orders sought.
5. The application was canvassed by way of written submissions which I have considered.
6. I note that the Applicant's initial application for stay of proceedings before the Lower Court was allowed on 16th August 2023, but on condition that he deposits the decretal sum in court. This is therefore the 2nd time that the Applicant is seeking orders for stay of proceedings.
7. The circumstances under which an order for stay of proceedings can be issued were discussed in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR as follows: -
 - a. There must be an appeal pending before the higher court.
 - b. Where such stay is sought in the Court hearing the case as opposed to the higher court to which the Appeal has been filed and there is no express provision of the law allowing for such application, the Applicant should explain why the stay has not been sought in the higher court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the court to which an appeal is preferred because such a court is familiar with its docket and is therefore in apposition to deliberate any order it gives accordingly.
 - c. The applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable.
 - d. The applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted.
 - e. The applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal.
 - f. The applicant must demonstrate that the application for stay was filed expeditiously and without delay.
8. The Respondent submitted that the Lower Court had already granted the application for stay of proceedings on condition that the Applicant deposits the entire decretal sum in court. It was submitted



that since the Applicant has not complied with the said order on deposit, he is not entitled to the orders that he now seeks.

9. My observation is that the Applicant is either unable or unwilling to comply with the court's orders for the deposit of the decretal sum in court.
10. This unwillingness is shown by his action of contesting the court's orders for the said deposit upon being granted orders to set aside the exparte judgment and orders for stay of proceedings.
11. The actions by the Applicant portray him as a litigant who is quick to seek the court's discretionary orders to set aside exparte judgment and to stay proceedings but is unwilling to comply with the conditions set for the granting of such orders.
12. Having noted that the Lower Court already granted the Applicant orders for stay of proceedings, I find that this court cannot entertain a second application for stay of proceedings.
13. In sum, I find that the present application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the appeal.
14. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 30th DAY OF NOVEMBER 2023.

W. A. OKWANY

JUDGE

