



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E516 OF 2021

JOHN MWITI JULIUS.....APPLICANT

VERSUS

DANIEL MUSYOKA KITEMBUI (Suing as the Legal Representative of the

Estate of JOSEPH KITEMBUI MUSYOKA)RESPONDENT

RULING

1. The live prayers in the motion dated 20th August, 2021 by **John Mwiti Julius** (hereafter the Applicant) are seeking orders that:

”4. THAT pending the hearing and determination of the Appeal inter-partes, or for further orders of the court, this Honorable court be pleased to grant the Applicant herein interim stay of execution of warrants of attachment dated 17th August, 2021.

5...

6.. THAT pending the hearing and determination of the Appeal interpartes ...this Honorable court be pleased to extend interim orders of stay of execution of Judgment ...in Milimani in Civil Suit No.931 of 2018.

7. THAT the Application further seeks a declaration that the execution and proceedings to enforce the judgment and decree by the Honorable Resident Magistrate S.G Gitonga in Milimani Civil Suit No. 931 of 2018 be declared a nullity.

8. THAT further the Applicant herein further seeks to vary the conditions for stay and prays that the Honorable court do deem the Memorandum of Appeal as properly filed and duly filed on time.

9. THAT further the Applicant herein further seeks to vary the conditions for stay and prays that the Honorable court do deem the deposit of Kshs. 3,060,000/- as sufficient security, for a condition for stay, and that the balance of Kshs. 114,337.50/- be held in abeyance pending the hearing and determination of the Appeal.

10. THAT further, the Applicant herein further seeks to vary the conditions for stay and prays that the Honorable Court do deem the deposit of Kshs.3060,000/- as sufficient security, for a condition of stay, and the that the balance of Kshs. 114, 337.50 be held in abeyance, pending hearing and determination of the Appeal.

11. THAT the Honorable court be pleased to enlarge time within which to deposit the balance of Kshs. 114,337.50/-.” (sic).

2. The motion is expressed to be brought under Section 1A, 3 and 3A of the Civil Procedure Act, Order 42 Rules 6, and Order 51 Rule 1 of the Civil Procedure Rules. On grounds, among others that, **Daniel Musyoka Kitiembui** (hereafter the Respondent) has commenced execution proceedings in respect of the judgment in **Milimani CMCC No. 931 of 2018** whereas the Applicant has partially complied with the stay conditions issued by the court, and he is apprehensive that he will suffer “*irreparable loss and damage*” should the court fail to intervene and grant the orders sought.

3. The motion is supported by two affidavits, one by the Applicant, who asserts to be the registered owner of motor vehicle **KAZ 748J**,

insured by **Directline Assurance Company Limited**, at whose instance this claim is being defended, and the second affidavit by **Michelle Sagini**, counsel having conduct of the matter on behalf of the Applicant. The gist of Applicant's affidavit is that by a ruling delivered on 30th June, 2021 this court allowed his motion for leave to appeal out of time and stay of execution on condition that the entire decretal sum be deposited in a joint interest earning account, or alternatively, that a bank guarantee for the entire decretal sum be furnished within 60 days of the ruling. He further deposes that due to hard economic times, he managed raise part of the decretal sum, that is, Kshs. 3,060,000/- leaving a balance of Kshs. 114,337.50/-. He pleads for extension of time to fully comply.

4. The deponent further states that despite his efforts above, the Respondent has commenced execution proceedings, causing apprehension that if the prayers sought are denied, the Respondent will proceed to attach and sell his motor vehicle which is his only source of income, thus exposing him to "*irreparable loss and damage.*" He proposes, in the alternative, that the court ought to deem the sum of Kshs. 3,060,000/- already deposited as sufficient security and that the balance be held in abeyance pending determination of the appeal. Finally, he asserts to have an arguable appeal which will be rendered nugatory if the motion is not allowed.

5. Counsel for the Applicant on her part swore that she took over the matter from a former colleague and noted that the memorandum of appeal was not filed within 14 days as ordered by the Court and that she had proceeded to file the instant motion. She further states that the memorandum of appeal raises triable issues, and the court ought not to visit the failures of the erstwhile counsel on the Applicant. That the partial compliance had been communicated to the Respondent's counsel who was however adamant to proceed with execution, creating apprehensive that the Applicant stands to suffer "*irreparable loss*" if the court does not intervene.

6. The Respondent by his replying affidavit took the view that the motion is fatally defective, and the appeal is incompetent as it has been filed out of time without leave of the court and as such, the court lacks jurisdiction to entertain the matter; that the Applicant ought to have filed the motion for extension of time in **Misc. Application No. E447 of 2020** wherein the court had granted conditional stay of execution and leave to file an appeal out of time on 30th June, 2021. That the failure to comply with the said order meant that the stay order automatically lapsed. The Respondent avers that no sufficient reasons have been given by the Applicant for default and that the delay is prejudicial to the estate of the deceased. The Respondent thus urged the court to strike out the motion and appeal with costs.

7. Parties took directions to canvass the motion by way of written submissions. Only the Applicant complied. The Court having perused the rival affidavits, the submissions and ruling of **Chitembwe J** in **Misc. Application No. E447 of 2020** and delivered on 30th June 2021 is of the firm view that the learned Judge is best placed to determine the correct purport and interpretation of his orders of 30th June 2021, the consequences of default therewith, whether to vary the same, and whether to grant the other prayers in the motion dated 20th August 2021. It is unfortunate, and I apologize to the parties, that this realization has come at the tail end of the proceedings regarding the said motion. This Court had taken up the matter to avoid unnecessary delay during the absence of the learned Judge in late 2021 for reasons that need not be stated here.

8. Considering the above, and for the sake of good order, the Court will decline to determine the motion dated 20th August 2021 but will instead direct that the matter be listed on 3rd March 2022 before **Chitembwe J** for his directions and /or orders. In the meantime, and in the interest of justice, the Court noting that the Applicant has asserted to have already deposited a substantial portion of the decretal sum, will order that there be an interim order to stay execution of the judgment of the lower Court. The said order will last until 3rd March 2022. The Applicant is directed to serve evidence of the deposit upon the Respondent by that date.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF FEBRUARY, 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Gichohi h/b for Ms. Sagini

For the Respondent: Mr Musyoki

C/A: Carol