

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPL.NO. E462 OF 2020

STEPHEN ONYANGO APONDI.....PLAINTIFF

-VERSUS-

CHRISPO THEURI WAMBUGU.....DEFENDANT

RULING

The applicant filed an application dated 9th November, 2020 seeking an order staying execution of the judgment/Decree delivered on the 9th October, 2020 in CMCC 1333 of 2019 pending the hearing and determination of Civil Appeal No. E286 of 2020. That application was certified as urgent and was listed for hearing on 24th November, 2020. Counsel for the applicant failed to appear and the application was dismissed with no orders as to costs.

The dismissal triggered the filing of the application dated 30th November, 2020 which seeks to set aside the orders of 24th November, 2020 which dismissed the earlier application and have it reinstated. The application also seeks orders of stay of execution and stay of further proceedings in CMCC 1333 of 2019. The application is supported by the affidavit of Lena Mwangi, Advocate.

Mr. Ndolo appeared for the applicant. It is Counsel's submissions that on 24th November 2020. Miss Mwangi was unable to log into the system and this led to the dismissal of the application due to non-attendance. The mistakes of an advocate should not be visited on the client. No prejudice will be suffered by the respondent. An appeal was filed and if the application is not reinstated, the appeal will be rendered nugatory. The respondent filed a replying affidavit sworn on 14th December, 2020.

Mr. Musili appeared for the respondent. Counsel maintain that the application is fatally defective as it was drawn and filed by Ms Kairu & McCourt who are not on record instead of the firm of Kimondo Gachoka. No notice of change of advocates was filed. The main application was not prosecuted as the applicant's advocate did not log in.

The application seeks to reinstate an earlier one that was dismissed. The affidavit of Miss Lena Mwangi in support of the application states that the matter came up for virtual hearing on 24th November, 2020. Counsel for the applicant had internet issues and was unable to join the virtual court through the link provided. There is a pending appeal and if the first application is not reinstated, the applicant stands to suffer irreparable damage.

The issue of representation was confirmed on 9/12/2020 when the current application came up for hearing. Miss Mwangi informed the court that it is the firm of Kimondo Gachoka & Co Advocates who are on record for the applicants. However, I have noted that there is also an application dated 30th November, 2020 from the firm of Kairu & McCourt Advocates. The two firms are all located at the 10th floor of Hazina Towers. In view of the fact that there is no dispute as to who is on record for the applicants and in the interest of justice, I do find that the issue of representation should not be the reason for the dismissal of the current application.

The applicants are seeking reinstatement of the application dated 9th November 2020. It is confirmed that the applicant has filed an appeal which is pending. The court has been hearing cases virtually and the contention by Counsel for the applicant that she tried to log in using the provided link but could not cannot be dismissed. This is not the first time counsel has not been able to log into the virtual hearing. The first application was dismissed on 24th November, 2020 and the current one was filed on 30th November, 2020 and came up under Certificate of urgency on 1st December, 2020. I do find that the application was filed without undue delay. The application dated 9th November 2020 was coming up for hearing for the first time and was dismissed. I am satisfied that the applicant has been eager and willing to prosecute his case. The explanation given for non-attendance is understandable.

I do find that the application dated 30th November 2020 is merited and the same is hereby granted in the following terms:-

- 1) The application dated 9th November 2020 is hereby reinstated and the order of 24th November 2020 is hereby set aside.
- 2) There shall be stay of execution of the judgment/decree in CMCC 1333 of 2019 for a period of 30 days hereof.
- 3) Cost for the application to the respondents.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2021

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S. CHITEMBWE

JUDGE