



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 44 OF 2020

ELIJAH OMANGA.....APPELLANT

VERSUS

ELIZAPHAN MAGETO OUKO.....RESPONDENT

RULING

1. On 18th August 2021 the appellant (**the applicant**) filed Motion under Order 45 Rule 1, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 95 of the Civil Procedure Act Chapter 21 Laws of Kenya. The applicant seeks the following orders:

- i. That the terms and conditions of the Order made on the 12th April 2021 be varied and or reviewed.
- ii. That in the result the appellant's appeal filed being HCCA No. 44 of 2020 is hereby reinstated to be heard and determined in the normal way.
- iii. That upon granting the above prayer there be a stay of execution of the judgment and/or decree issued on 12th April 2020 in Ogembo PMCC No. 175 of 2017 Elizaphan Mageto Ouko vs Elijah Omanga pending the hearing and determination of the Appeal
- iv. That the period of 30 days stay granted to the appellant on the 12th April 2021 to file and serve their Record of Appeal herein be and is hereby enlarged and/or extended to enable the Appellants fully comply.
- v. That costs of the application abide the outcome of the appeal.

2. The application is supported by the affidavit of **Irene Kabuteh** counsel for the applicant plus grounds stated on the face of the application. The application is opposed. The respondent filed an affidavit sworn by **Elizaphan Mageto Ouko** the respondent.

3. The background of this application is that on the applicant filed his memorandum of appeal on the 7th August 2020. On the 8/3/2021 the appellant was served with a NTSC why the suit should not be dismissed. The NTSC was scheduled for hearing on the 12/4/2021. On the said date the applicant's lawyer asked the court to give them time to file their Record of Appeal (ROA). The applicant was granted 30 days to file the ROA with that if no ROA was filed then the appeal would stand dismissed. Time was extended again on the 26/5/2021 to the 29/6/2021. On the 29/6/2021 the court informed the applicant that since no ROA was filed then the order of 12/4/2021 had taken effect and that the applicant was at liberty to file an application to reinstate the appeal. What followed thereafter was the application the subject of the ruling.

4. The applicant's counsel in her affidavit gave a detailed background on what lead to the dismissal of the appeal. She avers that pursuant to the order of 12/4/2021 she wrote to the Executive Officer of Ogembo Law Court on the 17th October requesting to be supplied with typed and certified proceedings and judgment to enable them prepare and file a ROA. That thereafter their clerk made efforts to check on the status of the said proceedings but to no avail and without the court proceedings the applicant could not comply with the court orders. She claims that the appeal raises triable issues which require a just proper evaluation and final determination on merits as opposed to dismissal on technicalities. That the decretal sum in the sum of Kshs.1, 055,200.00 is quite substantive in relation to damages and injuries sustained. That the appeal has not been admitted for hearing and determination in accordance with the provisions of Section 79B of the Civil Procedure Act. That the applicant has paid the respondent a substantial part of the decretal amount in the sum of Kshs.1, 055,200.00.

5. The respondent averred as follows in his replying affidavit; the application lacks merit as the applicant was given sufficient time to comply with the court orders. The applicant is on a fishing expedition and that with the dismissal of the appeal the court is *functus officio*.

6. The application was canvassed by way of written submissions. I have read and considered the said submissions. The appeal before me was not heard on merit the applicant has explained the circumstances that made him not to file the Record of Appeal. The court is therefore not *functus officio*. There is a letter dated 22 July 2020 attached that shows that the applicant sought proceedings. Though there is no other letter to show that the applicant's counsel made a follow, I will not punish the applicant for a omission done by his counsel. I will therefore exercise my discretion and allow the application as follows;

i. I set aside the order of dismiss of the appeal HCCA No. 44 of 2020 Elijah Omanga vs Elizaphan Mageto Ouko and reinstate the appeal for hearing and determination.

ii. A stay of execution to issue pending the hearing and determination of the appeal

iii. The applicant shall file and serve the Record of Appeal within 45 days from today

iv. Costs of the application shall abide the outcome of the Appeal.

v. Mention on the 24th February 2022 for directions.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF DECEMBER, 2021

R. E. OUGO

JUDGE

In the presence of;

Mr. Ndolo For the Applicant

Miss Moguche For the Respondent

Isindu Court Assistant