

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 246 OF 2018

JOHNSON MWANGI MARIU.....APPELLANT

VERSUS

LINDA WAGAH.....RESPONDENT

RULING

Both parties herein were involved in a civil suit No. 7273 of 2013 before the Resident Magistrate's Court, Nairobi. From the material presented herein, that suit was dismissed on 14th May, 2018 and the appellant ordered to pay costs thereof.

The dismissal of that suit followed non-appearance of the appellant's advocate on the date the suit was listed for hearing. The appellant was aggrieved by the dismissal order and therefore lodged a Memorandum of Appeal dated 28th May, 2018. It will be noted that the said Memorandum of appeal was lodged fourteen days from the date of the dismissal order.

On the same date that the Memorandum of Appeal was lodged, the appellant filed an application by way of Notice of Motion under Order 22 Rule 22 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. In that application he sought a stay of execution of the lower court suit (which had been dismissed) pending the hearing of the appeal.

The reasons for seeking the said order were that execution was imminent, and that the dismissal of the suit was caused by the ailment of his advocate; the suit was also dismissed when there was stay of proceedings following a High Court determination in HCCC No. 3 of 2016 at Malindi, which stayed all proceedings relating to land matters in the hands of subordinate courts. The appellant was also willing to deposit 50% of the costs sought by the respondent.

The application is opposed and the appellant filed a replying affidavit alongside grounds of opposition. Both parties have filed submissions which I have noted. Copies of the lower court pleadings have been annexed to the application and it is clear the subject matter involved is land.

Other than the allegation that the advocate for the appellant was unwell on the date the suit was dismissed, the respondent has also indicated that summons to enter appearance were not served for over a period of 2 years. That notwithstanding the order sought by the appellant is discretionary.

It is true that the provisions cited by the appellant, that is Order 22 Rule 22, are not applicable because the correct provisions are under Order 42 of the Civil Procedure Rules. The wrong citing of the provision of law however, should not disentitle a party from being heard.

I have looked at the Memorandum of Appeal lodged by the appellant and without delving into the merits or otherwise of the appeal, there appears to be an arguable appeal and therefore the appellant should not be locked out of the seat of justice at this stage. In any case, no prejudice has been alleged shall befall the respondent if the order sought is granted.

I am persuaded going by the material presented, that the appellant should be granted the orders sought on the following conditions;

there shall be a stay of execution pending the hearing and determination of the appeal. The appellant shall pay the respondent all the costs occasioned by this application which going by the record amount to Kshs. 61,880/= . The appellant shall also pay the costs of this application to the respondent. The said costs shall be paid within 14 days from the date of this ruling.

Dated, signed and delivered at Nairobi this 21st Day of February, 2019.

A. MBOGHOLI MSAGHA

JUDGE