



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISC. CIVIL APPLICATION NO. 25 OF 2015

MARK OUCHE OBONYO.....APPLICANT

VERSUS

PATRICK OKWARA GIRADO.....RESPONDENT

RULING

1. On 4th March 2015, the Applicant filed a Chamber Summons seeking the following prayers:-

1. **This application be certified as urgent**
2. **Service be dispensed with the first instance.**
3. **That a stay of execution in CMCC No. 430 of 2012 be granted pending the hearing and determination of this application.**
4. **The court be pleased to grant leave to the defendant/judgment debtor to appeal out of time against the judgment made by the Hon. Mr. J.N. Maragia on 11th November 2014 in BUSIA CMCC NO. 430 OF 2012.**
5. **The said leave do operate as a stay of all proceedings**
6. **The costs of this applications be provided for**
7. **Any other orders that meets the ends of justice.**

2. Forty days later, on 14th April 2015, the Applicant filed a Notice of Motion of even date seeking the following prayers:-

1. **This application be certified as urgent and be heard on priority basis.**
2. **Service be dispensed with in the first instance.**
3. **There be a stay of further execution of the decree in Busia CMCC No. 430 of 2012 Patrick Okwara vs Mark Ouche Obonyo pending the hearing of this application inter partes**
4. **There be a stay of further execution of the decree in Busia CMCC No. 430 of 2012 Patrick Okwara vs Mark Ouche Obonyo pending the hearing and determination of this application.**
5. **This Honourable court be pleased to grant leave to the Applicant/judgment debtor to appeal out of time against the judgment delivered on 11th November 2014 in Busia CMCC No. 430 of 2012 Patrick Okwara Vs March Ouche Obonyo**
6. **Pursuant to prayer (5) above the Applicant be allowed to lodge his appeal out of time.**
7. **The said leave to operate as a stay of all proceedings in Busia CMCC No. 430 of 2012 Patrick Okwara vs March Ouche Obonyo**

3. Six days later, on 20th April 2015 the Applicant filed a notice of Withdrawal of the Application of 4th March 2015. At the hearing of the Application of 14th April 2015, the Respondent opposed the grant of

that Application and in doing so Counsel raised three issues. One of which is that the Notice of Motion dated 14th April 2015 is an abuse of court process as the Chamber Summons that originated these proceedings had been withdrawn. Counsel argued that the originating process ranks in the status of a plaint and withdrawal of the Chamber Summons terminates the proceedings.

4. Counsel for the Applicant argued that the current application stands on its own and that it should be determined on merit. I was asked to find that there is no abuse of the court process as there is only one application for determination.

5. It may be prudent for me to consider this argument first because if I find merit in the Respondent's contention then I must strike out the Notice of motion dated 14th April 2015 without much ado and without deciding the merit of it.

6. In the Application that commenced these proceedings, the Applicant, in the main, sought two orders. One is the leave of the court to file an Appeal against the Judgment of the Hon. J.N. Maragia of 11th November 2014 in Busia CMCC 430 of 2012 out of time. The second is that there be stay of those proceedings pending the hearing and determination of that Application. The procedure for moving a High Court for enlargement of time to file an appeal in civil matters is not specifically provided for by the Civil Procedure Act or Rules. A party must therefore fall back to the provisions of order 51 Rule 1 of the Civil Procedure Rules which provides:-

“All Applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.”

7. The Applicant moved court on 4th March 2015 by way of Chamber Summons. That was the manner in which the process originated. The Applicant then filed the second application on 14th April 2015 this time a Notice of Motion. On my reading of the second Application the Applicant, in an addition to seeking enlargement of time, sought a stay of further execution of the judgment. From this second application it was apparent that there had been partial execution of the judgment and merely staying proceedings would not afford the Applicant adequate protection.

8. The originating process of these proceedings was no doubt the Chamber Summons of 4th March 2015. The process was in a sense akin to a Plaint. It founded these entire proceedings. If there was a change of circumstances and the Applicant needed to reflect these in the proceedings then the Applicant should have applied for leave to amend the application of 4th March 2015. Another option would have been to withdraw the proceedings entirely and to launch another.

9. Once the Applicant withdrew the application that originated these proceedings, that is, the Application dated 4th March 2015, then the substratum of the proceedings was removed. That terminates these proceedings entirely and there is nothing upon which the Notice of Motion dated 14th April 2015 could rest.

10. Although keenly aware that I am enjoined to exercise Judicial authority without undue regard to procedural technicalities, I am unable to excuse such a substantial defect as the one before me. I am unable to hear and determine an Application in proceedings that were terminated and no longer exist. For this reason I do hereby strike out the Notice of Motion dated 14th April 2015 with costs. It is not necessary for the court to decide on its merit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 25th DAY OF MAY 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

OILE.....COURT CLERK

Morande h/b for Opinde.....FOR THE APPLICANT

**.....FOR THE
RESPONDENT**