



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 44 of 2012**

**JOSEPH SEREM ..... APPELLANT**

**VERSUS**

**PETER KIBISU ..... RESPONDENT**

**(Being an appeal against the judgment/decree of the Hon. I. Maisiba (Resident Magistrate) delivered on 23rd March 2012 in Eldoret Chief Magistrate's Court Civil Case No. 143 of 2011)**

**RULING**

The Notice of Motion is dated 25th June, 2012 brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Sections 3A and 63 (e) of the Civil Procedure Act and all the enabling provisions of the law. The main prayer is for stay of execution of Judgment in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 143 OF 2011** pending the hearing and determination of the appeal and for costs. It is premised on the following grounds:

1. The learned Magistrate erred in law and fact in failing to consider the evidence adduced by the Appellant and relying entirely on the evidence from the Respondent.
2. The learned Magistrate erred in law and in fact in relying on unreliable documents.
3. The learned Magistrate erred in law and fact on reaching his Judgment when the Respondent herein had not proved his case within the required standards.
4. The learned Magistrate erred in law and fact in failing to look at and/or put into consideration the Appellant's submissions.
5. The the learned Magistrate erred in law and fact in failing to award costs to the Appellant.

It is also supported by the affidavit of Joseph Serem the Appellant/Applicant sworn on 25th June 2012. It is disposed in this affidavit that Judgment was delivered on 23rd March, 2012 and the Respondent is in the process of execution, that the application has been brought without undue delay, Applicant is ready and willing to furnish security pending hearing of the appeal, that he is a person of low income whereas the Respondent is unemployed and in any event no prejudice will be suffered by the Respondent if orders sought are granted.

The applications is opposed vide a Replying Affidavit sworn by the Respondent Peter Kibisu sworn on 17th July, 2012. In summary he depones that the application lacks merit, is brought in bad faith and should be dismissed. The main grounds for the prayer of dismissal are that subsequent to the subordinate

court delivering its Judgment parties entered into a consent reviewing the Judgment sum downwards, which consent order was adopted by the Court. That a consent order/Judgment can only be reviewed by the consent of the parties and that the Applicant has not fulfilled the prerequisite conditions set out under Order 42 Rule 6. That further since a similar application had been dismissed by the subordinate court, the Applicant cannot file a similar application before this Court.

In rejoinder, the Respondent has filed a Supplementary Affidavit sworn on 6th August 2012. He depones that the application in the subordinate court was dismissed on technicalities. He further depones that the consent order was not honoured by the Respondent and instead execution began through which he paid in excess of Ksh. 20,000/=.

I have carefully considered the submissions filed by the respective Counsel and all the documents annexed to submissions and affidavits in support of or opposition to this application. There is no doubt that Advocates for the Appellant and Respondent signed a consent Judgment/Order dated 25/6/2012 and on 30th October 2012, the same was adopted as Judgment/Order of the subordinate court. The said Judgment was negotiated by the Appellant so as to bring down the Judgment sum to a figure that he would afford to pay. Accordingly the sum payable exclusive of costs is Kshs. 270,000/=. The effect of this consent is that it reviewed the earlier (original) Judgment of the subordinate court.

It is on the basis of this consent Judgment that Counsel for the Respondent submits that an appeal should not lie and so even this application pegged on existence of an appeal lacks merit. He relies on Section 67 (2) of the Civil Procedure Act which provides:-

**“No appeal shall lie from a decree passed by the Court with the consent of the parties”**

This being the case, this Court must address itself as to the time or point when an appeal is deemed to be on record. It is common knowledge that an appeal exists from the date a Memorandum of Appeal is filed. In this respect, an appeal has been in existence since 23rd April, 2012 when the Memorandum of Appeal was filed. The consent Judgment was filed subsequent thereto on 25th June, 2012. Therefore, the latter estopped the Appellant from filing an appeal in line with the provisions of Section 67 (2) of the Civil Procedure Act. Be that as it may, an appeal is already on record and it is up to the Appellant to decide whether or not to prosecute it.

This application is filed on the same date that the consent Judgment was signed. Possibly the Appellant may have realized the mistake of entering into a consent. The best bet he could undertake after this was to negotiate on mode of liquidating the Judgment sum as opposed to coming to Court to seek an order of stay.

I view his application as an abuse of the Court process. That is why the law has cautioned Judgment Creditors against Judgment Debtors who are bent on punishing the former from enjoying fruits of their Judgment.

Having ruled that it would not make sense for me to get into whether the Appellant has satisfied the provisions of Order 42 Rule 6, save to say that it is noted that Court does not consider him a man of little means. He was able to meet costs at once and in fact partly paid the Auctioneers Fees. I further note that he negotiated for the sum he would be capable of liquidating. Court cannot come to his aid when he has not come with clean hands. He should honour what he bargained to pay. After all, the law estoppes him from appealing for reasons I have stated herein above. I do however wish to state that an application of this nature can be entertained in Court notwithstanding that a similar one had been filed in the subordinate court.

In sum I find that this application lacks merit and is an abuse of the Court process and I dismiss it with costs to the Respondent.

**DATED and DELIVERED at ELDORET this 14th day of December, 2012.**

**G. W. NGENYE - MACHARIA**  
**JUDGE**

**In the presence of:**

No appearance for the Applicant

M/s. Kosgei holding brief for Ombima for Respondent