

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 124 of 2006

PETER OKIABERA OMWENGA.....APPELLANT

=VERSUS=

SAMUEL NYABIBA NYAKERI.....RESPONDENT

RULING

This is an application for stay of proceedings in Eldoret CMCC No. 1454 of 2004 between the parties. Hearing is scheduled for 12th November,2007. The grounds for the application include the argument that the hearing of the suit amounts to a contradiction with the existence of the appeal and that there will be a conflict prejudiced to the Applicant.

This application is not made by the Appellant as is the usual norm but by the Respondent in the Appeal. It is made under the provisions of Section 3 and 3A of the Civil Procedure Act. Basically, what the Applicant is saying that it is an abuse of the Court process for the suit to proceed while the Appeal is pending.

This case has peculiar facts and the parties are taking very unique positions. I would start by saying that the Plaintiff is the Principal owner of the suit in the lower Court though there is a Counter –claim, by the Defendant. A Plaintiff ought to be always ready to dispose of his/her suit expeditiously. It is true that the Defendant filed an appeal against the interlocutory application to strike out. But it is trite law that the filing of an appeal does not result in the automatic stay of proceedings. The Courts will not stay proceedings merely because an appeal is pending. The right person to lament that the hearing of a suit pending the hearing of an appeal will render an appeal nugatory is the Appellant himself. In this case, there is no such lamentation from the Appellant who is the Defendant. The Defendant wants the suit to proceed. In such circumstances, I do not see any conflict or contradiction in the hearing proceeding. The Chief Magistrate’s Court should proceed as if the Appeal is non-existent and thereafter render its verdict. What happens to the pending appeal is for the Appellant to bother about. The Respondent is at this stage protected in the knowledge that if the appeal is abandoned, he will get costs of the Appeal. As to what is likely to happen if the Plaintiff or Defendant shall be successful, that is a matter of conjecture at this stage and this Court will not go into a vain voyage of speculation.

I do hereby decline to grant the orders and the application is dismissed with costs to the Respondent/Appellant.

DATED AT ELDORET THIS 9TH DAY OF NOVEMBER 2007.

M.K. IBRAHIM,

JUDGE.