



**Kimunya v Mwaura (Civil Appeal E042 of 2023)
[2024] KEHC 1457 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E042 OF 2023
AK NDUNG’U, J
FEBRUARY 14, 2024**

BETWEEN

LUKE RUGARA KIMUNYA APPELLANT

AND

ESTHER KIBUI MWAURA RESPONDENT

RULING

1. This ruling resolves the notice of motion dated 15/01/2024 filed by the Respondent herein. The application seeks striking out of the Appellant’s notice of motion application dated 19/12/2023 as well as the appeal and that costs of the application and the appeal be borne by the Appellant.
2. The application is grounded on the grounds on the face thereof and is supported by an affidavit of Crispin N. Ngugi, the Respondent’s counsel. It is deponed that the Respondent was served with a motion filed before this court and dated 19/12/2023 which motion was strikingly similar and a duplication of another motion filed by the Appellant before the Chief Magistrates Court dated 18/12/2023. That the motion before this court was filed during the pendency of the motion filed before the Chief Magistrates Court which has already been determined in a ruling delivered on 11/01/2024.
3. Therefore, the motion before this court is an abuse of the court process and the Appellant’s action amounted to forum shopping for orders favourable to him in utter prejudice to the Respondent. Further, the appeal is based on same grounds as those advanced by the Appellant in the motion before the lower court and in light of the lower court ruling dated 11/01/2024, the appeal is overtaken by events. That this court has power to prevent abuse of its process by such vexatious litigants as the Appellant herein.
4. In response, the Appellant filed a document titled ‘supporting affidavit’ instead of replying affidavit. It is deponed that the orders issued on 21/12/2023 granting the Appellant stay orders did not order



the Appellant to serve the motion upon the Respondent as the mention that was set on 17/01/2024 was to confirm deposit of the funds as security. Therefore, the application was not served upon the Respondent as there were no directions to do so. That by virtue that the lower court revoked the irregular decree, this matter has been overtaken by events and should be withdrawn. That it is in the interest of justice that the appeal be withdrawn without costs as there were no directions to serve and none was served upon the Respondent. That the appeal was necessitated by erroneous decree which the lower court confirmed as having been irregularly issued vide a ruling dated 11/01/2024.

5. I have read through the application, the response by the Appellant and the documents attached by the Respondent. It is the Respondent's contention that the application before this court and the appeal is an abuse of the court process since the Appellant had filed a similar application before the lower court which has already been determined. That the appeal also sought for similar orders as those sought in the application before the lower court.
6. I have perused the Respondent's attachment and clearly, the Appellant's application dated 14/12/2023 and filed on 18/12/2023 is similar and a duplication of the application before this court dated 19/12/2023. The application before the lower court was seeking for similar orders as the application before this court. The lower court has already dispensed with the application before it vide a ruling dated 11/01/2024 and issued orders for the amendment of the decree that the Appellant was seeking to amend in the application before this court. The appeal as well was essentially based on the errors in the decree.
7. This court (Muya J) issued a conditional order of stay on 21/12/2023 in favour of the Appellant. It appears that the orders were issued irrespective of the fact that another similar application was pending before the lower court.
8. The Appellant in his response conceded to the fact that the application before this court has already been overtaken by events as well as the appeal and sought for the withdrawal of both with no order as to costs. He contended that when the application came up for hearing *ex parte*, this court (Muya J) did not order that the application be served upon the Respondent.
9. In filing the application before this court, the Appellant did not, disclose to this court that he had pending, before the trial court, application that is similar to the one filed. The Appellant obtained *ex parte* stay orders from this court which orders subsist up to date. The *ex parte* stay orders were issued following a blatant concealment of material facts.
10. The Court of Appeal in discussing the burden borne by a party who seeks *ex parte* orders in the case *Uhuru Highway Development Limited –vs- Central Bank of Kenya & others Civil Appeal no. 140 of 1995* stated thus:-

“..... it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials, including even material which is against his interest. The basis of this is obvious: It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. *Ex parte* orders whether they be injunction or whatever, form an exception to this rule and for a party to benefit from the exception there must be a good compelling reason for it.”
11. The Appellant was obligated when he approached this court make full disclosure of the fact that there was pending before the lower court a similar application.



12. The court in case *Heritage Insurance Company Limited v Patrick Kasina Kisilu (2015)* eKLR similarly disapproved such abuse when the Judge held:-

“To prevent abuse of the court of process where parallel proceedings are heard before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the *Civil Procedure Act* requires that the latter application be stayed to allow the hearing and determination of the earlier proceedings. The filing of an application before this court while a similar application is pending hearing and determination before a lower court of competent jurisdiction is, clearly, an abuse of court process.

13. Similarly in *Car House Limited & another v Erastus Kavita Musyoka [2022]* e KLR the court stated thus;

“To adopt a procedure where a party files an application and abandons it midstream and moves an appellate court for the same relief without withdrawing the earlier application may not only lead to an embarrassment but may be considered as playing lottery with judicial process. Section 6 of the *Civil Procedure Act* provides that:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

14. Following the above holdings, it is my finding that the Appellant’s application was incompetent and an abuse of the court process. Whether this court had ordered the application to be served upon the Respondent is a non-issue.

15. The result is that the application by the Respondent is an abuse of the court process. The Notice of Motion dated 15th January 2024 is allowed. Consequently, the Respondent’s Notice of Motion dated 19th December 2023 and appeal are struck out with costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF FEBRUARY 2024

A.K. NDUNG’U

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

