



Chame v Adongo & another; Pioneer General Insurance Ltd & 2 others (Interested Parties) (Civil Appeal E005 of 2023) [2024] KEHC 7898 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL APPEAL E005 OF 2023**

**JN NJAGI, J
JUNE 21, 2024**

BETWEEN

KASA HAIGE CHAME APPLICANT

AND

ESTHER ADONGO 1ST RESPONDENT

FREDRICK NJERU NDUKU 2ND RESPONDENT

AND

PIONEER GENERAL INSURANCE LTD INTERESTED PARTY

OFFICE OF THE ATTORNEY GENERAL INTERESTED PARTY

NATIONAL ADMINISTRATION POLICE INTERESTED PARTY

RULING

1. The Applicant herein has filed an application dated 20th February 2024 seeking for orders that:
 - (1) Spent
 - (2) Spent
 - (3) Spent
 - (4) This Honourable court be pleased to grant stay of execution in Marsabit CMCC No.E013 of 2022 Esther Adongo Wanyama pending the hearing and final determination of the appeal herein.
 - (5) This Honourable court make such further/other orders it may deem just and expedient in the circumstances of this case.



- (6) Costs be in the cause.
2. The application was based on grounds on the face of the application and supported by the affidavit of the applicant. The applicant avers that he has an arguable and meritorious appeal. That the delay in filing the application is not inordinate or deliberate as the applicant timeously filed this application immediately after filing the appeal. That the respondents have proclaimed his property. Further that the applicant stands to suffer substantial loss and damage having believed that the subject matter of the suit was being or had been conclusively dealt with but auctioneers have obtained warrants of attachment against him.
 3. The Applicant was also based on the ground that the respondent shall not suffer any hardship or prejudice as she has received substantial payments from Ms Pioneer Insurance Co Ltd and a further Ksh.3,000,000/= from his insurers together with the compensation made to him arising from his employment.
 4. The applicant further contended that his right to be heard shall be rendered nugatory and academic in the event that stay orders are not granted.
 5. The application was opposed by the respondents vide the replying affidavit of the 1st Respondent, Esther Adongo Wanyama wherein she deposes that the application is frivolous, vexatious and a flagrant attempt to abuse the court process. That the application is unmerited as similar prayers had earlier been sought and declined by this court when the appellants sought leave to appeal out of time in Marsabit High Court Misc. Civil Application No. E008 of 2023. That the court declined the application because the appellant did not offer security. That the same application is back in court to seek the same orders without any security for the appeal. That the application is an attempt to hoodwink this court to issue order it had earlier declined. Therefore, that the application should be declined.
 6. The application was canvassed by way of written submissions. Counsel for the appellant submits that the appellant was granted leave by this court to file appeal out of time. That upon the same being granted he immediately filed this application seeking for stay of execution pending the hearing and determination of the appeal herein. That the application for stay pending appeal was dismissed by this court as there was no appeal pending. That the same was not heard and canvassed conclusively on merits. Therefore, that the present application is properly before this court and is not res judicata.
 7. Counsel submits that the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the right of the applicant who is exercising his undoubted right of appeal is safeguarded, and if successful is not rendered nugatory. That if stay is refused the appeal herein will be rendered nugatory.
 8. On security, counsel for the appellant submitted that the issue of security is a matter of law and not one of fact. That it is for the court to set the nature and kind of security to be provided. That the applicant does not have to state the nature of security to be given as that lies at the discretion of the court. That stay is conditional to security being provided and it is upon the court to set the conditions upon which it is to be granted.
 9. The appellant submitted that he had met conditions for grant of stay of execution. That the petitioner has asserted in his supporting affidavit that the respondent is of no known means and has not indicated that she has the ability to refund.



Determination

10. The petitioner is seeking for orders for stay of execution pending the hearing and determination of the appeal pending herein. The application is opposed by the respondent on the ground that the application is similar to an earlier application in Misc. Application No.E008 Of 2023 which was dismissed by this same court on the 31st January 2024.
11. I have perused the said Miscellaneous application, No.E008 of 2023 dated 20th December 2023. The petitioner was seeking the following in prayers 4 and 5 of the application:
 - (4) That this Honourable court be pleased to grant leave to the Applicant to file his appeal (out of time) against the judgment in Marsabit CMCC No.E013 of 2022, Esther Adongo Wanyama v Fredrick Nduku & Kasa Haide Hame, and that the memorandum of appeal filed herein be deemed to have been properly filed.
 - (5) This Honourable court be pleased to grant stay of execution in Marsabit CMCC No.E013 of 2022 pending the hearing and final determination of the (proposed) appeal.
12. The petitioner in the present application is seeking for:
 - (4) This Honourable court be pleased to grant stay of execution in Marsabit CMCC No.E013 of 2022 Esther Adongo Wanyama pending the hearing and final determination of the appeal herein.
 - (5) This Honourable court be pleased to grant stay of execution in Marsabit CMCC No.E013 of 2022 Esther Adongo Wanyama pending the hearing and final determination of the appeal herein.
13. It is obvious that there is no difference between the prayers that the Petitioner was seeking in the earlier application and in the present application. The only difference is that the prayers sought in the earlier application was in respect to the “(proposed) appeal” while in the present one is in respect to the “appeal herein.” This amounts to the same thing.
14. This court comprehensively dealt with the application dated 20th December 2023 that was seeking for stay of execution pending the hearing and determination of the proposed appeal and gave reasons for declining to grant the orders sought. The reasons were that the petitioner had not demonstrated that he would suffer substantial loss if orders for stay pending hearing and determination of the (proposed) appeal were not granted and that the petitioner was not willing to provide security for due performance of the decree. What the petitioner is appearing to be doing now, in disguise is to appeal against those orders in the wrong forum. Even then he has not offered any security for due performance of the decree. This reinforces the earlier finding of the court that he is unwilling to provide security. Nowhere in his supporting affidavit does he state that the respondent is not in a position to refund the decretal sum in the event that his appeal is successful.
15. It has to be noted that the final orders issued by the court in Miscellaneous application, No.E008 of 2023 can only have been in reference to the proposed appeal as these were the only prayers that were pending determination, the court having already granted interim orders for stay of execution pending hearing of the application. The submission by counsel for the petitioner that the court did not conclusively deal with the application is a misrepresentation of the true position of the matter. More so, the argument that this court dismissed the application for stay pending appeal because there was no appeal pending is misleading. The court was dealing with the proposed appeal and not with the appeal as there was no appeal at the time.



16. The upshot is that I do not find any merit in the application dated 20th February 2024. The same is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 21ST JUNE 2024

J. N. NJAGI

JUDGE

In the presence of:-

Mr. Ochieng -for Appellant/Applicant

Miss Omuya holding brief for Mr. Opondo for Respondents

Appellant - Present

Respondents - Absent

Court Assistant- Jarso

30 days R/A.

