



Kibera & another v Mudoga (Suing as Administrator ad Litem of the Estate of Innocent Kamadi Anyangi) (Civil Appeal E134 of 2021) [2024] KEHC 8566 (KLR) (15 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E134 OF 2021
DO CHEPKWONY, J
JULY 15, 2024**

BETWEEN

FRANCIS KIBERA 1ST APPELLANT

UNIVERSITY OF NAIROBI 2ND APPELLANT

AND

NATHAN ANYANGE MUDOGA (SUING AS ADMINISTRATOR AD LITEM OF THE ESTATE OF INNOCENT KAMADI ANYANGI) RESPONDENT

RULING

1. What is before this court for determination is the Notice of Motion application dated 23rd November, 2023 which seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That there be stay of execution of the ruling and decree delivered on 19th September, 2023 pending the hearing and determination of the intended appeal arising in Kiambu Civil Appeal No. E134 of 2021.
 - d. That this Honourable court be pleased to make such further orders to meet the ends of justice.
 - e. That costs of this application be in the intended appeal.

2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Donald B. Kipkorir sworn on the instant date, wherein the Applicant avers that in the court's Ruling of 19th September, 2023, the Appeal was struck out, and an Appeal has been lodged at the Court of Appeal which has a high chance of success. According to the Applicant/Appellant, what was pending for



the court's determination is Judgment and not the Preliminary Objection which had already been dismissed by Hon. Lady Justice Kasango on 15th June, 2022 .

3. The Applicant's argue that they have moved the court expeditiously, had already deposited the entire decretal sum in a joint interest earning account held in the names of both parties pursuant to court order issued on 30th June, 2020 and that the Respondent is unlikely to suffer prejudice or damage which cannot be compensated by an award of costs. The Applicant holds that he stands to suffer substantial loss if the application is not allowed and that the Appeal will be rendered nugatory. He contends that the purpose of the mention notice dated 20th November, 2023 is seeking to have the entire decretal sums released from the joint interest-earning account that is held in both names of counsel for the parties. The Applicants have thus urged the court to allow the application.
4. The Respondent opposed the application through the Replying Affidavit of Edwin Omulama Onditi sworn on 1st December, 2023, wherein he contends that having delivered a ruling, this court is functus officio which position was crystallised with the filing of the Notice of Appeal dated 28th September, 2023. The Respondent argues that the Applicants ought to have filed an application for stay of execution immediately after the delivery of the ruling and not two months without any explanation.
5. The Respondent argues that the proper avenue for the present application would have been at the Court of Appeal. He further argues that the Application contains falsehoods and therefore the appeal has zero chance of success. The Respondent on the other hand avers that he has only filed one Notice of Preliminary Objection dated 15th August, 2022 which was what the court correctly disposed in the Ruling of 19th September, 2023.
6. The Respondent holds that the only other preliminary objection raised was the one raised orally by the deponent of the Supporting Affidavit which was in respect to Notice of Motion application dated 8th September, 2021 filed by the Respondent but which was unopposed, and urged the court to allow the same thus causing the Applicant's Counsel to raise an objection in which the court delivered a ruling on 15th June, 2022, dismissing it. Therefore, it is the Respondent contention that the Ruling of this court was sound in law and did not ignore the ruling of Lady Justice Kasango of 15th June, 2022 as alleged since the Rulings were separate and on distinct matters.
7. The Respondent therefore argues that he was within his rights to move the court to release the funds in the joint interest earning accounts without further delay.
8. The Respondent also filed Notice of Preliminary Objection dated 29th December, 2023 on the grounds that negative orders such as the one issued by the court on 19th September, 2023 and which struck out the Appeal cannot be stayed.
9. On 27th November, 2023, the parties were directed to dispose of the application by way of written submission, which as at the time of writing this ruling, only the Applicants had filed theirs which are dated 9th February, 2024 the court has noted the arguments therein.

Analysis and Determination

10. Having read through the Notice of Motion application, the Supporting Affidavit, the Replying Affidavit, the Notice of Preliminary Objection alongside written submissions, this court finds the main issue for consideration is whether the application has merits to warrant the orders sought.



11. Having read through the pleadings filed herein the court notes that the application is seeking to stay of execution of Ruling delivered on 19th September, 2023 which had dismissed the Appeal and which in essence is a negative order. On negative orders, the court in the case of *Catherine Njeri Maranga v Serah Chege & Another* [2017] eKLR, held as follows: -

“...The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was before coming to court and therefore the issues of substantial loss that he is likely to suffer and the appeal being rendered nugatory does not arise”

12. Also, the Court of Appeal in the case of *Kausbik Panchamatia & 3 Others... v...Prime Bank Limited & Another* [2020]eKLR also held;-

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”

13. It is the trite that negative orders cannot be stayed as there is essentially nothing to stay. For this reason, this court need not address the tripartite conditions for stay of execution as enshrined under Order 42 Rule 6 of the *Civil Procedure Rules*. It therefore follows that the Notice of Motion application dated 23rd November, 2023 lacks merits and it is hereby dismissed with costs to the Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU VIA

ELECTRONIC MAIL THIS ...15TH ...DAY OFJULY....., 2024.

D. O. CHEPKWONY

JUDGE

