



REPUBLIC OF KENYA



Dancan K. Owino t/a Bio Path Healthcare v Breeze Petroleum Station Limited (Civil Appeal E042 of 2022) [2024] KEHC 12623 (KLR) (22 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E042 OF 2022
WM MUSYOKA, J
OCTOBER 22, 2024**

BETWEEN

DANCAN K. OWINO T/A BIO PATH HEALTHCARE APPELLANT

AND

BREEZE PETROLEUM STATION LIMITED RESPONDENT

(An appeal arising from ruling of Hon. Lucy Ambasi, Chief Magistrate, CM, delivered on 22nd November 2022, in Busia CMCCC No. E139 of 2022)

RULING

1. I delivered a judgment herein, on 19th April 2024, dismissing the appeal herein, on the basis that the appellant herein authored his own misfortune, by sleeping on his rights, through failure, repeatedly, to act to file his papers and to attend court, as when it was required of him. He was aggrieved by that determination, and he filed a notice of appeal, dated 22nd April 2024. He thereafter filed a Motion, dated 25th April 2024, which is the subject of this ruling.
2. That Motion seeks stay of execution of the judgment of 19th April 2024, pending hearing and determination of the appeal that he intends to file at the Court of Appeal. It is averred that some money had been deposited in court in 2023, as a condition for stay pending the hearing of the appeal that was dismissed on 19th April 2024. It is averred that if the stay sought is not granted, he may suffer substantial loss, as he has no information on financial status of the respondent, with respect to whether it would be in a position to refund the decretal sum, if paid to it, should the intended appeal prove successful. It is further argued that the respondent would not suffer prejudice, as part of the decree has already been executed.
3. The respondent has reacted to the application, through filing a replying affidavit.
4. The application was argued orally, on 14th May 2024.



5. The appellant stated that he was aggrieved by the judgment of this court, and intended to appeal to the Court of Appeal, hence he filed a notice of appeal. He contended that a deposit that had been made here previously, as a condition for stay pending the hearing and determination of the dismissed appeal, ought not be released to the respondent, for that would expose him to loss. It was argued that the respondent had not demonstrated the loss that it would suffer, should stay be granted. The principles, upon which stay pending appeal could be granted, were cited as that the power to grant it was discretionary, it should be granted in a manner that would facilitate the appeal, substantial loss should not involve a lot of money, among others.
6. The respondent replied that there was nothing to stay, as the decree sought to be appealed against was negative, for it was a dismissal of the appeal, and that what cannot be executed ought not be stayed. On the money deposited in court, it was submitted that that was meant to secure the hearing of the appeal that was dismissed, and the appellant was heard on that appeal. It was submitted that the applicable rules in this instance would be the Court of Appeal Rules, which require the filing of an intention to appeal, under Rule 77(1) of those Rules. It was further submitted that the appellant had not demonstrated that there was an arguable appeal.
7. The appeal intended to be filed is at the Court of Appeal. Consequently, the Rules to apply ought to be the Court of Appeal Rules, and not the Civil Procedure Rules. The Court of Appeal Rules envisage filing of a notice of intention to appeal. No such notice has been filed, for what I have seen is a notice of appeal. However, the effect of the 2 documents would be the same, communicating an intention to file an appeal. It would amount to a fetish to elevate that technicality of procedure to the plane suggested by the respondent, by arguing that there has been no compliance, yet some document has been filed, signifying an intention to challenge the judgment herein on appeal.
8. The more fundamental issue is that, for appeals at the Court of Appeal, an intending appellant ought to demonstrate that they have an arguable appeal. I have perused the affidavit sworn in support. It does not seek to demonstrate that there is an arguable appeal, for it merely asserts that the intended appeal is arguable, and has reasonable chances of success. The points to be raised and argued, in that appeal, have not been disclosed, and an attempt has not been made to demonstrate that such points would be arguable.
9. Additionally, the stay sought is of a decree which is negative. I am invited to stay execution of the judgment of 19th April 2024. That judgment merely dismissed the appeal. There is nothing to execute there, except for costs, and there has been no demonstration that the costs have been taxed, and the respondent herein is in the process of executing, with respect to them. The decree, available for and capable of execution, is that issued by the trial court, in Busia CMCCC No E139 of 2022. An order, staying execution of the judgment of 19th April 2024, would be in vain, for that judgment is incapable of execution.
10. In view of everything said above, I find no merit, whatsoever, in the Motion, dated 25th April 2024, and I hereby dismiss the same, with costs.
11. A lot has been said about the money that was deposited herein, to secure the hearing of the appeal that was dismissed on 19th April 2024. That deposit was intended for the cause herein. This cause is now spent, following the delivery of the judgment on 19th April 2024, and that deposit is now available for release to the respondent, barring an order from the Court of Appeal
12. This ruling should have been delivered at the end of the month of May this year. A number of intervening factors and events, inclusive of a bereavement, occasioned the delay. I regret the same, and I sincerely apologise to the parties for that.



DELIVERED VIA EMAIL, DATED AND SIGNED, IN CHAMBERS, AT BUSIA, ON THIS 22ND DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Ngesa, instructed by Gitobu Imanyara & Company, Advocates for the appellant.

Mr. Okutta, instructed by Ouma-Okutta & Company, Advocates for the respondent.

