



REPUBLIC OF KENYA



**Mwihuri v Waithaka (Civil Appeal 18 of 2018)
[2023] KEHC 731 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 18 OF 2018
FN MUCHEMI, J
FEBRUARY 9, 2023**

BETWEEN

ANDREW GITHINJI MWIHURI APPLICANT

AND

LYDIA WANGARI WAITHAKA RESPONDENT

*(Orders made by Matheka J pending the hearing and
determination of CM Criminal Case Number 2523 of 2021)*

RULING

Brief facts

1. The application dated February 24, 2022 seeks for orders for stay of execution of the orders of this court in its judgment in Civil Appeal No. 18 of 2018 as consolidated with Civil Appeal No. 58 and 59 of 2018 until the determination of Nyeri CM Criminal Case No. 2523 of 2021.
2. The respondent opposed the application in his replying affidavit dated March 7, 2022.
3. The application was heard orally before court on 5/12/2022.

Applicant's Case

4. It is the applicant's case that judgment was delivered on 3/6/2021 by this court on behalf of Judge H. I. Ongudi on 21st May 2021 who heard the appeal. The applicant states that he was never served with the applications filed in this appeal thus seeking for orders to set aside all the rulings and orders in CMCC No. 509 of 2012. He further contends that the respondent herein was directed to serve him by the court.
5. The applicant avers that he was never served with any documents and only came to learn later that a false return of service was filed in court to the effect that the process server effected service on him at



his home on 5/4/2019 at 11.14 am. The applicant further avers that upon perusing his diary to check his whereabouts, he discovered that on 5/4/2019 at 11.14 am he was at ridgeways Nairobi at the CID Headquarters recording his statements. He further states that based on the false affidavit of service the court granted the orders in the said applications.

6. He further states that he filed an application dated 21/2/2020 protesting against false affidavits filed by the process server Christopher Wanjohi following which the process server was charged and taken to King'ong'o Prison Remand pending trial for the offence of perjury.
7. The applicant is apprehensive that he was been condemned unheard infringing on his constitutional right to a fair hearing. He further states that no prejudice will be suffered by the respondent if the prayers sought are allowed.

The Respondent's Case

8. The respondent opposes the application and states that the applicant has always been served with the court process in the matter and that the applicant filed submissions in this appeal which were considered before judgment was delivered. The respondent contends that the applicant has not filed any appeal against the judgment of this court. In any event, the respondent argues that the applicant has not satisfied the requirements for grant of stay of execution. Moreover, the judgment was delivered on 3/6/2021 and thus the respondent states that it has been more than one and a half years since the delivery of the judgment. As such, there has been unreasonable delay in filing the instant application which has not been explained.
9. The respondent argues that the applicant shall not suffer any substantial loss if the orders herein are not granted. Moreover, the applicant has not given any security for the performance of the decree. The respondent argues that there is nothing to stay as the judgment of the court only set aside the lower court judgment and ordered a fresh hearing. The applicant never bothered to go to the lower court to prosecute his matter.
10. The respondent states that she is not aware of any criminal case and in any event, she is not a party to the alleged criminal case and thus it cannot be a basis of any stay of execution in this appeal which has been determined. The respondent states that the applicant has not attached any criminal case records to his application to prove that there is such a case.

Whether the applicant has satisfied the conditions set out for stay of execution pending appeal.

11. The applicant has no legal representation and thus filed this application as such seeking orders for stay of execution of the orders made by Matheka J pending the hearing and determination of CM Criminal Case Number 2523 of 2021. It is important to note that no appeal has been preferred against the said judgement. The reference to the application as one for stay pending appeal is a misnomer in that order 42 only deals with applications where an appeal is pending hearing and determination in the High Court. The applicant seeks to stop proceedings in the High Court whereas no proceedings are going on since the appeal in this case was concluded. The provisions of Order 42 are therefore, not applicable herein.
12. The appeal in the matter herein arose from an application to set aside the judgment and decree issued on March 14, 2018 and the instant appeal was consolidated with HCCA No. 58 and 59 of 2018 arising from a ruling and order dated 4th June 2014 and judgment and decree dated 28th June 2017 all emanating from CMCC No. 509 of 2012. Before the court delivered its judgment on the appeal, the court granted stay of execution pending appeal and directed that the respondent deposit a sum of Kshs. 3,984,000/- in a joint account of both counsels to be withdrawn at the determination of the appeal.



13. The respondent thereafter filed an application on 5th April 2019 seeking for the variation of security for the performance of the decree to a sum of Kshs 2million. The applicant alleges that he was never served with this 2nd application. The court allowed the application since it was not opposed and set the matter scheduled for mention on June 10, 2019. On April 16, 2019, the applicant filed an application seeking to set aside or vary of the orders made on March 7, 2019 on the basis that he was not served with the said application.
14. The court declined to set aside or review its orders and directed that the applicant had not been condemned unheard as the main appeal was yet to be heard. The appeal was subsequently disposed of by written submissions which were filed by both parties. The court delivered its judgment on 3/6/2021 and set aside the rulings dated June 4, 2014 and March 14, 2018 as well as the judgment and decree of June 28, 2017 in CMCC No. 209 of 2012. The court further directed that the matter be remitted back to the trial court for directions for a fresh hearing to be conducted. The court ordered that the case to be heard and determined within 12 months from the date of delivery of the judgment before another magistrate other than the one who had dealt with the case.
15. I have perused the said judgment and noted that the court in making its determination considered submissions by both the appellant and the respondent herein. As such, the arguments made by the applicant that he was not given an ample opportunity to ventilate his case during the hearing of the appeal is baseless. Furthermore, the court had already dealt with the matter of the alleged false return of service and declined to set aside or review the orders it made. This court therefore cannot sit on its own appeal by staying the orders/judgement of a judge of concurrent jurisdiction.
16. It is imperative to note that the appeal was dismissed and as such there are no orders or proceedings to be stayed even assuming that this court had jurisdiction to determine the said application.
17. Furthermore, this court became functus officio after determining the appeal and cannot revisit this matter.
18. The applicant can only await the determination of the pending criminal case against the process server and decide on the next course of action.
19. It is my finding that this application is incompetent, misconceived and cannot be entertained.
20. The application dated 02/02/2022 is hereby struck off with no order as to costs.
21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF FEBRUARY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 9th day of February, 2023

