



REPUBLIC OF KENYA



**Langat t/a Kolato Autioneers v Kibinge (Civil Appeal
42 of 2022) [2023] KEHC 2244 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 42 OF 2022
HK CHEMITEI, J
MARCH 16, 2023**

BETWEEN

ISAAC KIPYEGON LANGAT T/A KOLATO AUTIONEERS APPLICANT

AND

HARUN WAINAINA KIBINGE RESPONDENT

RULING

1. In his Notice of Motion dated September 22, 2022 the applicant prays for the following orders;
 - (a) That the court be pleased to set aside the order of the subordinate court made on 25th August 2022 requiring the applicant to deposit kshs.1,600,000 in an interest earning account in the joint names of both advocates within 30 days pending the hearing and determination of this appeal and in its place order that title deed for that parcel of land known as Shawa/Gicheha BLOCK 18/35 (Chepkwony Farm) in the name of the applicant be deposited in court as security pending the hearing and determination of this appeal.
 - (b) In the alternative, this court be pleased to order that the appellant do furnish security in the form of bank guarantee from a reputable bank within 60 days or within such period as the court may deem fit to order.
2. The applicant as well prayed for the costs to be provided.
3. The application is supported by the affidavit of the applicant sworn on the same day together with the annexures thereon.
4. The issues raised in the affidavit are easily understood. The applicant was sued by the respondent and judgement was given in the latter's favour for an aggregate sum of kshs. 1,600,000. The applicant being dissatisfied filed this appeal and proceeded to file an application for stay of execution of the said



- judgement. The trial court gave a conditional stay namely, that the applicant deposits the decretal sum in a joint interest earning account in the names of the counsels on record within 30 days.
5. The applicant submits that the same is too onerous as he will be required to sale some of his assets which has a higher value than the decretal sum awarded to the respondent. He stated that the value of the land was much higher than the amount in question.
 6. The respondent opposed the application vide the replying affidavit sworn on October 5, 2022 in which he accused the applicant of avoiding at all costs to have him enjoy the fruits of the judgement by filing several sets of applications which are essentially a delaying tactic.
 7. He went on to state that he was not a man of straw and that he would in any event be in a position to refund the amount if indeed the appeal is allowed. In any case, he went on, the amount in question would still be secure in the joint account as at the time of the finalisation of the appeal. He prayed that the application be disallowed.
 8. The parties were directed to file written submissions which the court has perused together with the cited authorities and there is no point to reproduce them here. Essentially all are gravitating around the provisions of Order 42 rule 6 of the *Civil Procedure Rules*.
 9. The court has perused the application and the submissions by the parties. The issue is clearly whether or not the court should substitute the orders by the trial court requiring the applicant to deposit the decretal sum in a joint interest earning account. The respondent on his part submits that the matter was res judicata as the trial court had made a determination over the same.
 10. The applicant however in his further affidavit deponed that he had withdrawn his application dated 7th September 2022 which had offered the land as a security and therefore the matter was not res judicata.
 11. In the absence of the ruling by the trial court placed before this court and rebuttal by the respondent it is not easy to confirm this position.
 12. Nevertheless, the issue before this court is in a sense a review of the trials court directive that the decretal sum be deposited in a joint interest earning account pending the determination of the appeal.
 13. The applicant in my view has not demonstrated how he has been unable to raise the said sum of money so as to comply with the order. Secondly this court cannot simply review the decision by the trial court unless it comes by way of appeal.
 14. I respectfully do not think that the applicant has come within the grounds advance by Order 42 rule 6 of the *Civil Procedure Rules* regarding the grounds of stay pending appeal. In other words, there is no evidence of any prejudice to be suffered as the sum will still be available should the appeal succeeds.
 15. I also note that it has been about one year since the trial courts judgement and any reasonable litigant would have by now set aside the amount so ordered by the court in compliance.
 16. In the premises, this court does not find the application meritorious and the same is hereby dismissed. The costs shall await the outcome of the appeal.
 17. The applicant is hereby granted 30 days from the date herein to comply with the trial courts orders.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 16TH DAY OF MARCH 2023.

H. K. CHEMITEI.

JUDGE

