



Lake Victoria Services Board v Oduor & another (Miscellaneous Application 48 & 58A of 2022 (Consolidated)) [2023] KEHC 18609 (KLR) (19 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS APPLICATION 48 & 58A OF 2022 (CONSOLIDATED)**

WM MUSYOKA, J

JUNE 19, 2023

BETWEEN

LAKE VICTORIA SERVICES BOARD APPLICANT

AND

ERNEST OTSIENO ODUOR 1ST RESPONDENT

GEORGE OPONDO OLAYO 2ND RESPONDENT

RULING

1. These proceedings were initiated by way of a Motion, dated November 7, 2022, for stay of execution and leave to appeal out of time. The response to the Motion takes the form of a preliminary objection, dated January 30, 2023, on grounds that it is an abuse of court process; the matter had been settled by consent, which had not been vacated or set aside; another application for stay of execution pending before the trial court; and sufficient cause had not been established.
2. Directions were given on January 7, 2023, for disposal of the preliminary objection as part of the Motion. However, when the matter came up for hearing, the parties limited their oral submissions to the preliminary objection.
3. The respondent submits that consents had been recorded before the trial court, on October 31, 2022. It is argued that the applicant seeks leave to appeal, yet what it seeks to challenge on appeal are the subject of a consent, which cannot be appealed against. The applicant submits that the consent was limited to costs, and that there was no consent judgment.
4. I called for the original trial records. They were made available. I have perused through them. I have noted that a judgment was delivered on September 30, 2022. A consent letter was lodged herein on October 31, 2022, dated October 19, 2022. It is duly executed by the Advocates for both sides. The consent letter reiterates the contents of the judgment of September 30, 2022, and agrees on costs, at Kshs 170, 000.00. There is nothing on record indicating that the consent, comprised in the letter of



October 17, 2022, was ever adopted by the trial court as an order of the court. The mere filing of a consent letter does not make the consent in the letter an order of the court, it has to be adopted as such by a judicial officer for it to have the force of a court order.

5. Judgment herein was delivered by the court on September 30, 2022. It is not a judgment by consent of the parties, but by the court itself, where it evaluated the evidence adduced, and made a determination based on that evidence. The letter of October 17, 2022 came after that judgment had been delivered. It merely reiterated the contents of the judgment, it did not alter its terms, nor override or supersede it. The only new thing in the consent letter was the matter of costs, and, therefore, the consent contained in that letter was limited only to the costs. There was no consent judgment in it. Nothing, therefore, stops the applicant from appealing against the judgment on its merits.
6. On stay of execution, I have noted that there is pending, before the trial court, an application dated December 13, 2022, for stay of execution. Directions were given, on February 21, 2023, for disposal of the application, by way of written submissions. The parties complied with those directions, and a date for ruling was allocated, for June 8, 2023.
7. I agree with the respondent, that there is duplicity, with regard to the prayer for stay of execution. It is sought in the application before me, dated November 7, 2022, and also in that before the trial court, dated December 13, 2022. That is what abuse of process is about.
8. Under order 42 rule 6 of the [Civil Procedure Rules](#), stay of execution ought to be sought initially from the trial court, and the High Court should be approached only upon the trial court declining to grant the same. That would mean that stay ought not have been sought at the High Court before the trial court had been given a chance to rule on it. I should not rule on stay, as that matter is before the trial court, where a ruling pends.
9. For avoidance of doubt, the relevant portion of order 42 rule 6 of the [Civil Procedure Rules](#) states:

“Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2)...”
10. I shall determine the preliminary objection, dated January 30, 2023, on the following terms:
 - a. That the same is upheld, with respect to the prayer for stay of execution, that shall be determined by the trial court, and the original trial records shall be returned to that court, so that that court can rule on the application, in that matter, dated December 13, 2022;
 - b. That the same is disallowed, with respect to the prayer for leave to appeal out of time, and that the same shall be disposed of by way of written submissions, to be filed within 14 days of the date of this ruling; and
 - c. That this matter shall be mentioned thereafter for compliance and further directions.



11. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF JUNE
2023**

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Wangoda, instructed by LG Menezes & Company, Advocates for the applicant.

Ms. Achala, instructed by Abalo & Company Advocates for the respondents.

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