



Thuo v Sande aka Sande Jani Abwo Ramadhan & another (Suing as the Administrators of the Estate of the Late Moses Sande Amwai) (Civil Appeal E278 of 2022) [2023] KEHC 18264 (KLR) (Civ) (8 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E278 OF 2022

JN MULWA, J

JUNE 8, 2023

BETWEEN

DANIEL MWANGI THUO APPLICANT

AND

JANE ASAMI ABWAO SANDE AKA SANDE JANI ABWO RAMADHAN & JACOB AMWAYI SANDE (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE MOSES SANDE AMWAI) RESPONDENT

RULING

1. By an application dated May 13, 2022, the Applicant Daniel Mwangi Thuo sought several orders from the Court which can be summarized into two:

Leave to appeal against the trial Courts Order stated April 6, 2022; and a stay of proceedings in the said case Milimani CMCC No 6674 of 2019 pending hearing of this application, and the intended Appeal.

2. The application is premised upon provisions of Article 159(2) (d) of the *Constitution* and sections 1A, 1B and 3A, 75 of the *Civil Procedure Act* and Order 42 Rule 6, and order 43 of the *Civil Procedure Rules*.

The supporting affidavits are sworn by one Peris Gichohi and George Morara, Advocate for the Applicant both on the May 13, 2022.



3. In opposing the application, a Replying Affidavit sworn on May 27, 2022 was filed by the Plaintiff Jane Asami Abwao.

Both parties have also filed their submissions dated July 23, 2022 and August 19, 2022 respectively which the court has duly considered.

4. A brief background to the application is that the suit before the trial court had been adjourned at least six times at the instance of the Applicant, and that on the April 7, 2022, the case proceeded with the Plaintiff closing her case, and the defendant calling one witness, upon which the defendant sought leave of the court to adjourn to call his second witness, which after some arguments, the trial Magistrate rendered that the then intended witness was not among the Applicants list of witnesses as per a list dated October 7, 2019, nor were the documents intended to be produced by the said witness, a Police Officer, filed.
5. Notwithstanding, the Court trial granted the Applicant's Advocate time to call the said witness by asking him to log on to the platform after about two hours but that was not done, necessitating the trial court to close the Defendants case, and order submissions to be filed by the May 17, 2022 on which a judgment date was reserved for July 28, 2022.
6. The order of closure of the applicant's case on April 6, 2022 is the subject of the intended appeal, exhibited by the draft Memorandum of Appeal annexed to the Supporting Affidavit as "PG-2".
7. The Applicant in the instant Notice of Motion speaks of court orders dated April 6, 2022 (prayer no.2) that he seeks to be set aside when he states that his defence was closed by the trial court on its own motion.

However, the said order of April 6, 2022 has not been annexed to the two affidavits. Even at the Advocate Morara's affidavit, no such ruling was annexed. Mr Morara Advocate averred that the case proceeded for hearing on April 7, 2022 and that is when after one witness testified, the second could not, due to what he terms as technical problems in logging onto the virtual platform.

An order for April 7, 2022 is also not exhibited.

8. The question to pose at this stage is whether there is in existence any court order dated April 6, 2022 which is the subject of the intended appeal.
9. In his submissions, the Applicant has dealt with the matter of review of the orders dated April 6, 2022 so as to set them aside; and to re-open the case.

In the instant application, no order for review was sought at all as provided under Order 45 of the Civil Procedure Rules.

The applicant cited provisions of section 75 of the *Civil Procedure Act* that provides: -

75(3): An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

10. Further Order 43 Rule 3 of the Civil Procedure Rules provides: -

(3) An application for leave to appeal under Section 75 of the Act shall in the first instant be made in the court making the order sought to be appealed from,



either orally at the time when the order is made, or within fourteen days from the date of such order.

11. The law is therefore plain and clear that the requirement of making the initial application for leave to appeal must be made before the trial court that makes the order.

Citing provisions of Article 159 (2)(d) of the Constitution may not be enough when there are clear provisions that underpin a particular issue.

12. Indeed, the court in Diamond Trust Bank Ltd vs Invesco Assurance Co Ltd & Another [2021] eKLR rendered itself in respect of the two provisions of the law on procedure that: -

“..... if each and every litigant was allowed to blatantly ignore the laid down procedures, the Civil Procedure Rules would be rendered worthless because parties who should have approached the lower court at the 1st instance would move to the high court citing the unlimited jurisdiction of the High Court...”

13. It is therefore clear that failure to make the application under Order 43 Rule (3) of the CPR and Section 75 of the Act, whose provisions are mandatory in nature, and a prerequisite before an appeal can be lodged renders the application before this court procedurally fatal – Stephen Nyasani Menge v Rispan Onsare ([2018] eKLR).

14. Even if the provisions of Article 159 (2)(d) of the Constitution were to be applied, there is still no order dated April 6, 2022 annexed to the supporting affidavit, nor the one dated April 7, 2022 as it would appear to the court, from reading of the parties affidavits, that the hearing of the case proceeded on April 7, 2022 when due to the reasons stated by the applicant, the applicants case was terminated.

15. Coming to the conditions that an Applicant ought to satisfy for leave to appeal to be granted, is the arguability and probability of success of the intended appeal.

16. Upon perusal of the reasons stated as the basis for the intended appeal, the court notes that the documents that the police officer allegedly denied his day in court were not filed together with the defendants list of documents, and further the advocate for the applicant was not sure as to whether the police officer he intended to call to testify was the Investigating Officer or not; meaning, in my view, the defendant was least prepared to proceed with the case after the testimony of the first police officer.

17. As to the order for stay of proceedings in the lower court, this falls under the purview of Order 42 Rule 6 CPR, and Section 3A of the Civil Procedure Act.

18. To grant or deny a stay of proceedings is a serious and grave interruption in the right of a party towards the trial of their case.

The courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

19. The sole consideration by the court in such circumstances would be whether it is in the interest of justice to order or deny the orders. See the following for the above propositions: -

Global Tours & Travel Ltd; Nairobi HC Winding up cause No 43 of 2000; High Court Civil Application No E 209 of 2022, Tiny Bees Credit (K) Ltd vs Patrick Macharia Nderitu & Another (2022) eKLR.

20. In this matter, the hearing of the case was concluded before the trial court, and directions to file submissions given as well as a judgment date.



In my view, to forestall the above by allowing a stay of proceedings would no doubt prejudice the Respondent, taking into account the numerous adjournments of the case at the instance of the Applicant. By the above events it is clear that the defendant was not ready to proceed with its case to conclusion, even after adjourning it for six times previously. There must be conclusion of cases once the hearing starts, unless there are very clear reasons for adjournments. Upon careful interrogation of the grounds for the application, the court finds no plausible reasons to allow the application.

21. For the foregoing, I find and hold that the Applicant has not laid a firm basis upon which his application dated May 13, 2022 can be allowed. It is therefore dismissed with costs.
22. Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JUNE, 2023.

JANET MULWA

JUDGE.

