



REPUBLIC OF KENYA



KENYA LAW
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Endere v Ochiri for the Estate of Pauline Kasesya Mwinzi (Civil Appeal 686 of 2019) [2023] KEHC 19864 (KLR) (Civ) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19864 (KLR)

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

CIVIL

CIVIL APPEAL 686 OF 2019

AN ONGERI, J

JULY 6, 2023

BETWEEN

FRANK KIBET ENDERE APPELLANT

AND

**JOHN KENYATTA OCHIRI FOR THE ESTATE OF PAULINE KASESYA
MWINZI RESPONDENT**

RULING

1. The application coming for consideration in this ruling is the one dated 22/11/2021 brought under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, Order 1 Rule 1 and 3 CPR Section 1A, 1B, and 3A of the *Civil Procedure Act* seeking the following orders:
 - i. That this application be certified urgent and its service be dispensed with in the first instance.
 - ii. That there be a stay of execution of the judgment and decree dated 3rd November 2021 pending the hearing and final determination of this application inter partes or until further order of the court.
 - iii. That there be a stay of execution of the judgment and decree dated 3rd November 2021 pending the hearing and final determination of the appeal already lodged by the appellant/applicant there from in the Court of Appeal.
 - iv. That provision be made for the cost of this application.
2. The application is based on the grounds on the face of it and supported by the affidavit of the 1st respondent Dr. Frank Kibet Endere sworn on 22/11/2021 in which he deposed that this court delivered judgment against him on 3rd November 2021 and he has since instructed his advocates to file an appeal. He averred that he is desirous of applying to the Kenya Medical Practitioners and Dentists



- Council for my annual practice licence for the year 2022 but he will be unable to do so unless a stay of the judgment is granted.
3. He stated that his right of appeal would be rendered nugatory unless the order of stay sought is granted and that he is willing to provide such security as the court may deem fit.
 4. The parties filed written submissions as follows; the appellant in his submission indicated that judgement was delivered on 3rd November 2021 and that the application herein was lodged on 22nd November 2021 and therefore was within reasonable time. That as regards substantial loss, the judgment requires the appellant Kshs. 150,000 to the Kenya Medical Practitioners and Dentists Council and also negotiate and reach a settlement with the family of the deceased for compensation. That therefore compliance with either and/or both stipulations would undoubtedly cause substantial financial loss to the appellant.
 5. The appellant argued that compliance would render the already filed appeal nugatory and that the appellant would be unable to apply for and/or maintain his professional practice license if the order of stay is not granted. That finally he is ready and willing to provide security that this court deems fit.
 6. The cross appellant submitted that the appellant has not demonstrated that there exists an arguable appeal with high chances of success nor satisfied the pre-requisite conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 to enable grant of stay of execution of the Judgment and Decree.
 7. The cross appellant indicated that there is no substantive case before the Court of Appeal as the appellant has never filed an appeal since making this Application which is almost two years now and is therefore not desirous of pursuing the same.
 8. The cross appellant further submitted that the jurisdiction to hear and determine any Application for stay of execution pending appeal where a Judgment has been rendered by the High Court lies with the Court of Appeal hence the Application dated November 22, 2021 is fatally defective. Once a Court has pronounced the final Judgment, it becomes functus officio and must down its tools.
 9. The cross appellant submitted that the said Application was brought under the wrong provisions of the law since Order 42 Rule 6 of the *Civil Procedure Rules* is the guiding provision governing grant of stay of execution for appeals from lower Courts to the High Court. The proper provisions under which an application for stay of execution pending appeal in the Court of Appeal should be made is under Rule 5(2) (b) of the *Court of Appeal Rules*, 2022. The appellant should have lodged the Application at the Court of Appeal in accordance with Rule 5 (2)(b) of the *Court of Appeal Rules*, 2022. That the filing of an Application for stay of execution before the same Court that made the decision under challenge, is equivalent to asking the Court to sit as an appellate Court against its own Judgment and determine that the appeal has chances of success
 10. The sole issue for determination is whether the applicant should be granted stay pending appeal to the Court of Appeal.
 11. The application is brought under Order 42 Rule 6 states as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the Applicants unless the order is made, and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicants”.

12. The respondent argued that the appellant should have lodged the Application at the Court of Appeal in accordance with Rule 5 (2)(b) of the Court of Appeal Rules, 2022.

13. I find that stay of execution can be granted by the court from which the appeal is preferred or to the appellate court.

14. In the case of Nairobi City Council v Tom Ojienda & Associates (Civil Appeal (Application) E080 of 2022) [2022] KECA 1326 (KLR) (2 December 2022) (Ruling) the Court of Appeal stated as follows;

“To succeed in an application made under rules 5(2) (b) of the Court of Appeal Rules, an applicant must satisfy the twin principles that are enumerated in many decisions of this court, namely:

- (i) An applicant must demonstrate that they have an arguable appeal; and
- (ii) That the intended appeal or appeal if successful, will be rendered nugatory if the execution of the decree, order or proceedings is not stayed”.

15. Order 42 Rule also provides that;

“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.”

16. I find that it is in the interest of justice to allow the Applicant a chance to exercise his right of appeal.

17. I accordingly allow the Application dated 22/11/2021 and I grant the applicant stay of execution of this court’s judgment and decree issued on 3rd November 2021 pending the appeal to the Court of Appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 6TH DAY OF JULY, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

