



Lupere v Mukoba (Civil Appeal 44 of 2017) [2023] KEHC 19767 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA**

CIVIL APPEAL 44 OF 2017

SC CHIRCHIR, J

JULY 6, 2023

BETWEEN

BENSON LUPERE APPELLANT

AND

PAUL NASIKE MUKOBA RESPONDENT

RULING

1. The Applicant's Notice of motion dated 11.109.2022 seeks for the reinstatement of the present appeal and for stay of execution pending appeal.
2. The Application is premised on the grounds appearing on the face of the Application and the affidavit in support, sworn by the Applicant.
3. The Appellant's case is that he was not aware about the date of the hearing, apparently due to his advocate's failure to enter the date in the diary. He also points out that he had already filed the submissions in respect of the Appeal. He therefore states that the Appeal was ready for judgement, and should not have been dismissed in the circumstances.
4. He further states that at the time of dismissal, there was an order of stay of pending appeal of the decree in Butere PMCC NO. 268/2013; and that now that the Appeal has been dismissed the Applicant stands the risk of execution proceedings.
5. The Application is not opposed.

Determination

6. I have considered the Appellant's Notice of motion, the supporting Affidavit and the material on record. The records show that on 26.1.2021. the court directed that the Appeal be canvassed by way of written submissions. Each party was given 30 days and the matter was scheduled for mention on 29.3.2021 but the mention did not take place on that day. The matter was scheduled for further mention on 24.6.2021 but parties did not appear, and the mention was again, adjourned.



7. However, prior to the mention of 24th June 2021, the appellant had filed submission. The submissions were filed on 22.6.2021.
8. Through a Notice dated 22nd June 2022, the court summoned the parties to show cause why the Appeal should not be dismissed for want of prosecution. The hearing of the notice was scheduled for 19.7.2022. On the said date, the Respondent was present but the Appellant was absent, and the Appeal was dismissed for want of prosecution.
9. It is an undisputed fact that, on 19 .7. 2022 when the Appeal was dismissed, the Appellant had already filed submissions in respect to the appeal and the filing was done pursuant to the directions that had been given by the court on how the Appeal would be prosecuted.
10. To the extent that the court had indicated that the Appeal would be canvassed by way of written submissions, then I agree with the Appellant that the court only needed to list the matter for Judgment. It was erroneous to consider the appeal as unprosecuted while the submissions were on record and while the court had sanctioned the said mode of prosecuting the Appeal.
11. I have also considered the Applicant's explanation as to why he did not attend court on that day, that is , that his counsel had failed to make the entry in the diary. This submission is not contested.
12. Consequently, I am satisfied that the Application is merited and it is hereby allowed. The Appeal is hereby reinstated.
13. I further take note of the fact that there were orders of stay pending Appeal which were in place at the time of dismissal. I also hereby reinstate the said orders.
14. In conclusion, I make the following orders:
 - a). The Appeal herein is reinstated
 - b). There is a stay of execution of the Judgment in Butere CMCC No. 268 of 2023 pending the determination of the appeal
 - c). The respondent is hereby granted time to file submissions within 14 days from the date of this ruling.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF JULY 2023

S. CHIRCHIR

JUDGE

In the presence of; -

