



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CIVIL APPEAL NO. 19 OF 2020

CHARLES MWANGI GITUNDU...APPELLANT/APPLICANT

VERSUS

CHARLES WANJOHI WATHUKU.....RESPONDENT

RULING

1. In this application dated 18/09/2020 the applicant seeks for stay of execution of the decree dated 18th may 2020 pending the hearing and determination of the appeal. The decree arose from the judgment of the Nyeri Chief Magistrate in CMCC No. 102 of 2014.
2. The application is brought under Order 42 rule 6 which sets out three conditions that an applicant must satisfy:-
 - a. That the application was filed without unreasonable delay;
 - b. That substantial loss on part of the applicant be shown to result if the order is not granted.
 - c. That security for the due performance of such decree or order has been given.
3. The applicant states that he was dissatisfied with the judgment and decree in CMCC No. 102 of 2014 and has since filed a memorandum of appeal that has already been served on the respondent. In the event that the decree is executed, the applicant states that he is likely to suffer substantial loss for the respondent will not be in a position to refund the decretal amount of over Kshs.983,000/= in the event that the appeal is successful. It is further argued the appeal may be rendered nugatory if the court declines to grant the orders. The execution process has already commenced and a notice to show cause has been taken out for committal of the applicant to civil jail of the applicant.
4. The applicant further argues that his appeal has high chances of success because the respondents suit in the lower court was marred with several problems including the fact that it offended the principle of *res judicata* and that of *estoppel* and that the whole claim was not proved to the standards required. According to the applicant, his appeal is mostly grounded on points of law. It is further argued that there exists other appeals against the estate held by the respondent. It is further deponed that the applicant has offered security by way of a bank guarantee or alternatively, to deposit the decretal amount in an interest earning account during the pendency of the appeal.
5. The respondent opposes this application on grounds that the applicant had filed a similar application in the lower court which was dismissed on 17/08/2020. It is deponed that the magistrate addressed all the issues raised in this application and that this application ought not to be entertained.
6. Further to that the respondent has deponed that he is a man of means and capable of refunding the decretal sum should the appeal succeed. The applicant states that he runs a vast estate and is not a dishonourable person as the applicant wants the court to believe.
7. The claim by the applicant that other appeals exist in respect of the same estate was said to be neither here or there since the said appeals do not affect this particular appeal.
8. Both parties filed submissions in support of their arguments, which this court has perused.
9. I begin with addressing the competency of this application. It is not in dispute that a similar application had been filed before the Chief Magistrate who dealt with the conditions set out under Order 42 Rule 6 and determined all the issues arising therein.
10. Section 7 of the Civil Procedure Act provides that if a matter has been determined by a court of competent jurisdiction between the same

parties, any suit subsequently filed with similar issues is *res judicata*. If one party in the former suit is not satisfied with the decision of the court, the remedy lies on appeal to a higher court. The Chief Magistrate's court is competent to determine an application under Order 42 Rule 6. If the applicant was dissatisfied with the orders dismissing his application for stay pending appeal, he ought to have appealed to this court but not to file a similar application. His application before the Chief Magistrate was filed on 04/06/2020 and was dismissed on 17/08/2020.

11. I find that this application offends the provisions of Section 7 of the Civil Procedure Act and is hereby declared *res judicata*. It is therefore incompetent and ought not to be entertained by this court.

12. This being the position, it follows that this court will not go into the merits of the application.

13. I hereby order that this application be struck out with costs.

14. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 11th day of March 2021.