



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 14 OF 2020**

**STEPHEN KAMAU NGUBU.....APPELLANT**

**VERSUS**

**FAITH MUGURU MACHARIA.....RESPONDENT**

***[Appeal from the Ruling by S. K. Nyagah, Resident Magistrate, in***

***Murang'a CMCC No. 19 of 2017 delivered on 24<sup>th</sup> August 2020]***

**RULING**

1. There are two *rival* applications before the court. On the one hand, the appellant seeks for *stay of execution* of the decree pending appeal. On the other hand, the respondent prays that the appeal be *struck out* for want of leave.
2. The disputants oppose each other's motion through replying affidavits sworn on 12<sup>th</sup> October 2020 and 11<sup>th</sup> September 2020 respectively.
3. I directed that both motions be heard together. Learned counsel filed submissions. Those by the appellant are dated 12<sup>th</sup> October 2020 while those of the respondent are dated 2<sup>nd</sup> November 2020.
4. The appellants' notice of motion is dated 1<sup>st</sup> September 2020 and supported by a deposition sworn on even date. It is stated to be brought under section "3A of the **Civil Procedure Act** and all other enabling provisions of the law". There are three live prayers: For stay of execution of the decree; lifting of the warrants issued to *Chador Auctioneers*; and, for stay of the sale of the appellant's vehicle registration number KCF 612B.
5. The appellant contends that he has an arguable appeal and that unless stay is granted, it will be rendered nugatory. He avers that he will "*suffer irreparably*" if the vehicle is sold as he uses it for his pastoral duties at the ACK Church. He has also sued his insurer in Murang'a CMCC 115 of 2020 for a declaration that it should meet the decree. At paragraph 13 of his affidavit he deposes that he had requested the respondent's counsel to render an account to enable him "*raise funds*" but counsel did not respond.
6. However, each of those three prayers is sought "*pending the hearing of this application interparties*". It is a classic case of poor draftsmanship: There is *no* further prayer for any relief pending the hearing of the *main appeal*. The application having been heard *interparties*, I find that the instant motion is now plainly *redundant*.
7. There is also an important matter of jurisdiction raised by the respondent in the motion of 11<sup>th</sup> September 2020: that no *leave* was sought to bring the appeal. The ruling giving rise to this appeal was delivered by S. K. Nyagah, Resident Magistrate, in Murang'a CMCC No. 19 of 2017 on 24<sup>th</sup> August 2020. The learned magistrate dismissed the appellant's motion for stay of execution dated 16<sup>th</sup> July 2020.
8. The ill-fated motion was brought under Order 22 Rule 22 of the **Civil Procedure Rules**. This is evident from the heading of that motion and the opening paragraph of the impugned ruling. Doubt is completely removed by the original record of the lower court placed before me. The riposte by the appellant is that no such leave was required; and, that the issue is a mere technicality.
9. I find that by dint of section 75 (1) of the **Civil Procedure Act** and Order 43 Rules 1(1)(k) and (2) & (3) of the **Civil Procedure Rules**, the appeal did not lie as of right from the order by the lower court. Leave had to be obtained beforehand. The appellant readily concedes that he did not do so. It follows that the memorandum of appeal dated 24<sup>th</sup> August 2020 was filed out of *jurisdiction* and is a *nullity*. The overriding objective encapsulated in **Article 159** of the **Constitution** and sections 1A and 1B of the **Civil Procedure Act** cannot salvage this appeal.
10. I thus have no hesitation in striking out the appeal. The appellant's notice of motion dated 1<sup>st</sup> September 2020 collapses with it. It follows as a corollary that the respondent's counter motion succeeds.

11. My final orders shall be as follows:

- a) That the *appellants'* notice of motion dated 1<sup>st</sup> September 2020 is hereby *dismissed*.
- b) That the *respondent's* notice of motion dated 11<sup>th</sup> September 2020 is hereby *allowed*.
- c) That the entire *appeal* be and is hereby *struck out* with costs to the *respondent*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A THIS 2ND DAY OF DECEMBER 2021.**

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

Mr. Mbugua holding brief for Mr. Njoroge for the appellant instructed by T. M. Njoroge Advocate.

Mr. Mbuthia for the respondent instructed by J. N. Mbuthia & Company Advocates.

Ms. Dorcas Waichuhi, Court Assistant.