



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 07 OF 2019

JOANNES MUTUA.....APPELLANT/APPLICANT

-VERSUS-

CHARLES NZUKI SENG'ETE.....RESPONDENT

RULING

1. The Appellant/Applicant filed the application dated 12th February 2019 under Sections 1A, 1B & 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010. He seeks an order of stay of proceedings in **Kilungu CMCC No. 171 of 2016, Charles Nzuki Seng'ete –Vs- Joannes Mutua**, pending the hearing and determination of this appeal. He also prays for costs.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Atonga Sethia Isabwa on 12th February 2019. He is basically decrying the ruling delivered on 20th December 2018 in which the learned trial magistrate ordered him to close his case without calling witnesses.
3. The application is opposed through a replying affidavit sworn on 21st February 2019 by Counsel Muthoni Ndwiga. The gist of the opposition is that the decision to decline the adjournment was proper in light of the previous conduct of the Appellant.
4. The Appellant deposes that the appeal has overwhelming chances of success and if the order of stay is not granted it will be rendered nugatory and he will have been condemned unheard.
5. On the other hand the Respondent highlights what happened on the various dates that the matter came up for hearing and he adds that on the material day, the matter came up for hearing and the Appellant's counsel sought leave to file an additional witness statement. Leave was declined but he was allowed to proceed with other witnesses but he refused.
6. In order to determine whether the application is merited it would be imperative to consider the proceedings in the trial court, which I have done without necessarily highlighting them in this Ruling. The reason for electing not to analyze the proceedings here is that doing so would actually be determining the Appeal before it is heard which would be prejudicial to the parties.
7. The issue in this application and in the appeal is whether the learned trial magistrate was justified in condemning the Appellant unheard. That issue must be determined before the matter in the Magistrate's court can proceed. Allowing the case to proceed in the lower court will result in the appeal being overtaken by events and would be nugatory in the event that the appeal is successful.
8. It would therefore be in the interest of justice that the matter before the lower court is stayed pending the hearing and determination of this Appeal.
9. I therefore allow prayer No. 3 of the Notice of Motion dated 12th February 2019, which is to the effect that there shall be stay of proceedings in **Kilungu SPMCC No. 171 of 2016 – Charles Nzuki Seng'ete –Vs- Joannes Mutua** pending the hearing and determination of the appeal herein.
10. The lower court file with typed proceedings has already been forwarded to this court for processing. I therefore direct the Appellant to move with speed to have the appeal admitted and heard within the shortest time.
11. Costs of the application shall be in the cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED THIS 6TH DAY OF JUNE, 2019 IN OPEN COURT AT MAKUENI.

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HON. H. I. ONG'UDI

JUDGE