



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 691 OF 2012**

**[Formerly Eldoret Hccc No. 35 of 2011]**

**KIPLAGAT KOTUT.....PLAINTIFF**

**VERSUS**

**ROSE JEBOR KIPNGOK.....DEFENDANT**

**RULING**

It is a cardinal principle in law that litigation must come to an end and that when an appeal or application is pending in the Court of Appeal, this court becomes *functus officio*. Judgment in this matter was delivered on 27<sup>th</sup> November, 2014. Kiplagat Kotut lodged the appeal in the Court of Appeal and judgment was delivered by the Court of Appeal.

The judgment delivered by the Court of Appeal is said to have had errors. The error was detected by the Court of Appeal and the Court of Appeal proceeded to correct the errors by issuing a second judgment. Rose Jebor Kipngok now intends to appeal against the decision of the Court of Appeal to the Supreme Court. She seeks orders of stay of execution and or further execution and or collection of any of purchased goods and or property belonging to the applicant pending the hearing and determination of the appeal before the Supreme Court.

The respondent, Kiplagat Kotut through counsel, Mr. Korir opposes the application and states that this court is *functus officio*.

I have considered the application, replying affidavit and rival submissions and do find that the application is based on the provision of Article 159 of Constitution of Kenya, 2010 Order 42 Rule 6 and 7 of the Civil Procedure Rules, 2010.

In a nutshell, there is no appeal pending in the Court of Appeal and therefore, Order 42 Rule 6 does not apply.

The Court of Appeal has heard a similar application for stay of execution pending appeal to the Supreme Court and was reluctant to give the applicant stay of execution pending it's ruling.

Coming back to this court is an abuse of court process as there is another application pending in the Court of Appeal and the matter is properly seized by the Court of Appeal. I do agree with Mr. Korir that the application is misplaced as this court is *functus officio*.

The applicant cannot be helped by Article 159 of the Constitution of Kenya as this court has no basis to apply the Article when there is an appeal pending in the Supreme Court.

The Authority of *Egup Agencies Ltd Vs I & M Bank Ltd (2017) eKLR*, does not assist the applicant because in the case, the plaintiff/applicant/Judgment debtor (just like the applicant herein) filed a notice of appeal and prior to filing an application under Rule 5(2) (b), filed an application for injunction. In this case, the horse has already bolted and is in the Supreme Court, there is no appeal in the Court of Appeal as it has been determined.

I have perused the decisions in *James Jona Muchemi and Partners Ltd Vs Barclays Bank of Kenya Ltd (2011) eKLR*, which was an application for injunctive order pending appeal in the Court of Appeal.

Dr. Chebii has misapprehended the decision in *Erinford Properties Ltd Vs Chesire County Council*. The issue in this case was whether a Judge who has dismissed an injunction application can at the same time grant one pending appeal in the Court of Appeal. This was not a case of stay of execution but an injunction. In this case, the applicant is seeking for stay of execution pending the ruling of the Court of Appeal and pending appeal to the Supreme Court. I do find that the application has no basis.

The upshot of the above is that the application is dismissed with costs.

**Dated and delivered at Eldoret this 7<sup>th</sup> day of August, 2019.**

**A.OMBWAYO**

**JUDGE**