



Chivatsi v Chipa & 2 others (Representatives of Sabaki Pefa) (Environment and Land Appeal E19 of 2023) [2024] KEELC 1689 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1689 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E19 OF 2023
FM NJOROGE, J
MARCH 18, 2024**

BETWEEN

KATANA KESI CHIVATSI APPLICANT

AND

BISHOP DR GEORGE CHIPA 1ST RESPONDENT

BISHOP DR THOMAS C TEMBO 2ND RESPONDENT

PASTOR JOSEPH KAHASO BIGOZO 3RD RESPONDENT

REPRESENTATIVES OF SABAKI PEFA

RULING

The Application.

1. For determination is the Applicant's Notice of motion dated 2nd November 2023 seeking the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this application inter partes, there be stay of execution of the ex parte judgment of the lower court delivered on 17th May 2023 in CMELC No E30 of 2020.
 - c. That pending the hearing and determination of this appeal there be stay of execution of the ex parte judgment of the lower court delivered on 17th May 2023 in CMELC No. E30 of 2020.
 - d. That the costs of this application be in the appeal.
2. The application is premised on the grounds on its face and in the supporting affidavit of Omagwa Angima the Appellant's advocate who gave the background of the application as follows: the plaintiff



filed a plaint contemporaneously with an application seeking orders of temporary injunction which application was fully heard and dismissed; after the ruling was delivered, the respondents did not take any action in the matter until after about 8 months; the appellant was later served with a hearing date but due to inadvertence on the part of the appellant's advocates, they failed to file defence and also attend court and the matter proceeded and judgment was entered for the respondent.

The Response.

3. The Respondents filed a replying affidavit sworn by Joseph Kahaso Bigozo the 3rd Respondent who stated that they filed CMELC No. E30 of 2020 on 20th November 2020 and the Applicant was served with summons to enter appearance to which he entered appearance but did not file a defense. He stated that the Applicant's advocate has always been served with mention notices which they always acknowledge receipt of but they failed to appear in court. When the matter came up for hearing on 28th March 2023, the Applicant's advocate did not attend despite having been duly served and a return of service filed thus the matter proceeded ex parte. It was further stated that despite having failed to attend the hearing they were subsequently served with a mention notice; that the applicant filed a motion seeking to set aside judgment but the same was dismissed on 24th October 2023; that no explanation has been given for inaction on the part of the applicant and no sufficient cause has been given to warrant intervention of the court; that it has not been demonstrated that the applicant would suffer any substantial loss; that the applicant is not entitled to apply for review and subsequently appeal against the same order as it is having a second bite at the cherry; that it would be unjust for the respondents to be prevented from using the property while they have a judgment in their favour in respect thereof which event would occasion them great prejudice.

Analysis and Determination

4. The application was disposed of by way of written submissions which I have taken into account as well as the authorities relied upon. The issue for determination is whether the stay of execution sought is meritorious.
5. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides:
 6. “(2) No order for stay of execution shall be made under subrule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
7. The first issue I deal with is whether the applicant is entitled to appeal. First, he elected to apply before the trial court for setting aside of the judgment and failed. Now the applicant appeals against the ruling of the magistrate's court on the application that had sought to set aside the judgment. He is not appealing the judgment but rather the decision refusing to set aside the judgment. In this regard I think that he is fully entitled to appeal against the ruling on his application and he is not seeking a second bite at the cherry as stated by the respondents.



8. Is he then entitled to the orders of stay of execution sought? In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in [such] a wayas not to prevent the appeal, if successful, from being nugatory.....”

9. First I must state that the application, the ruling and the judgment referred to herein have dearth of material on the happenings that led to the suit and the appeal. No pleadings have been annexed, even by the applicant, and it is a great puzzle as to how the applicant wishes this court to understand the nature of the case and the defence that he has to the respondent’s claim in the lower court. All that this court has been made aware of through the respondent’s replying affidavit is that in 2020 the applicant expressed his intent to leave the church and cease ministering therein, whereupon he was required to surrender all church documents in his possession which he did save the agreement for the purchase of the church land. From the respondent’s replying affidavit, it appears that the lower court case is a dispute regarding ownership of that land but scanty details have been given. In the circumstances deciding on his application for a stay is an uphill task for this court. I find that no risk of substantial loss has been established by the applicant.
10. Further, the Applicant’s reason as to why they seek stay is inadvertence on the part of his counsel which includes failing to file a defence at or appear before the lower court. The respondents on the other hand have demonstrated that the Applicant’s counsel has always been served with court dates all the time. The Applicant’s counsel, despite entering appearance did not even file a defence at the lower court. It is trite that an advocate’s mistake should not be visited upon a litigant. However, in this instance I am of the view that it was not inadvertence but lackadaisical behavior on counsel’s part for which unfortunately the applicant stands to suffer. Allowing the application would make a mockery of the justice process. I do not find the reasons raised in the application are sufficient to warrant a stay of execution that will have the effect of denying the respondents enjoyment of the fruits of their judgment.
11. In the upshot the application dated 2/11/2023 fails for want of merit and the same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

