



REPUBLIC OF KENYA



**KENYA LAW**  
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**Malombe v Ngui (Civil Appeal E199 of 2024)  
[2024] KEHC 15167 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E199 OF 2024  
MW MUIGAI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**DOMINIC MWENDWA MALOMBE ..... APPELLANT**

**AND**

**CATHERINE KOKI NGUI ..... RESPONDENT**

**RULING**

**Notice Of Motion**

1. Vide an application dated 25.07.2024 under Section 3 and 3A, 79G,95 of the *Civil Procedure Act* and Order 22 Rule 22 (1), Order 51 Rule 1 ,Order 50 Rule 1 & 5 of the Civil Procedure Rules, the Applicants seeks the following orders, that;
  - a. Spent
  - b. Spent
  - c. This Honourable court be pleased to grant stay of execution of the judgment of 6<sup>th</sup> February 2024 in Machakos SCCC Case number E620 of 2023 pending the hearing and determination of the Appeal.
  - d. The costs of the application be in the cause.
2. The Application is supported by the Affidavit of Dominic Mwendwa Malombe who stated that judgment was entered against him on 06.02.2024 for Kshs 780,000. He stated that he was unable to raise the decretal sum as a lumpsum and proposed to pay the same in monthly instalments of Kshs 50,000 but the negotiations did not bear any fruits. That the Respondent applied for warrants of attachment



3. It was deposed that he took time to study the judgment and by the time he was giving instructions to his advocate, the time for filing the application had lapsed. He stated that they were appealing against the quantum which they found excessive. In addition, that the insurer was willing to abide by the terms as the court may order and are willing to provide security for the entire decretal sum.
4. The Applicant stated that he filed an application on 31.05.2024 to pay the said amount in monthly instalments of Kshs 50,000 and on 22.07.2024, the Honourable court dismissed his application which order he now he seeks to appeal. It was deposed that warrants have been issued and through Crater View Auctioneers, the Applicant is apprehensive that they will proceed with attach and sell its property. He indicated that he was willing to comply with the orders of stay issued by the court.

### **Replying Affidavit**

5. Catherine Koki Ngui filed a Replying affidavit dated 16.09.2024 and contended that the application is laden with half-truths and glaring misrepresentations in an attempt to mislead this honourable court and the same should be dismissed.
6. It was contended that the application was a delay tactic and the court should not be misdirected to deny the Respondent from enjoying the fruits of their judgment. It was deposed that no reasons had been given to warrant grant of the orders ought. Further, that the Applicant has not attached any financial statement to substantiate that he is not financial stable to settle the costs of the suit.
7. She stated that to allow the applicant to pay Kshs 50,000 per month meant that the sum would be paid for over 12 months and she would be compelled to retain her advocates incurring additional costs in the process leading to a situation where he would end up paying more money on the suit than what he is owed. She asked the court to dismiss the application
8. The application was canvassed by way of written submissions.

### **Applicants Submissions Dated 03.10.2024**

9. The Applicant relied on the case of Butt vs Rent Restriction Tribunal (1982) KLR 417 & Elena Doudoladova Korir vs Kenyatta University [2014] e KLR and submitted that the appeal has high chances of success as the same is premised on the grounds that the learned magistrate disregarded the Appellant's/ Applicant's evidence in his application dated 31/05.2024. In addition to reiterating the contents of his affidavit, he stated that he already paid Kshs 50,000 to the Respondent vide his advocate on 23.09.2024
10. It was submitted that the ruling on the application was delivered on 22.07.2024 and this application was filed on 25.07.2024 thus has been brought without unreasonable delay.

### **Respondent Submissions Dated 4.04.2024**

11. The Respondent submitted on two main issues. First, while relying on the case of Giella vs Cassman Brown, James Wangalwa & another vs Agnes Naliaka Cheseto [2012] e KLR, Cater & sons Ltd vs Deposit Protection Fund Board & 2 others Civil Appeal no 291 of 1977 it was that submitted that the applicant has not met the requisite conditions for granting stay of execution under order 42 rule 6 of the Civil Procedure Rules, 2010.
12. Secondly, It was submitted that the Applicant has not met the principles laid down as regards what amounts to sufficient cause. It was submitted that the applicant has not provided any financial statement to show that she is facing any economic challenges. That the application must fail for reasons that the applicant has not shown bona fides in liquidating the decretal sum. Reliance was placed



on the cases of Freight Forwarders Limited vs Elsek & Elsek (K) Limited (2012) e KLR, Lavington Security Limited, Hildegard Ndelut vs Letkina Diaries Limited & Another and Diamond Star General Trading LLC vs Ambrose D O Rachier carrying on business as Rachier & Amolli Advocates [2018] e KLR

### **Determination**

13. I have considered the Application, the Replying affidavit and the submissions thereto and find that the issue for determination is whether the court should issue stay of execution orders.

14. Stay of execution pending appeal is provided for under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.”

15. The first issue is whether the application has been filed without unreasonable delay. The subject ruling which is the subject of this application was delivered on 22.07.2024 while the subject application was filed on 29.07.2024. I find that the application was filed within time.

16. Secondly, the Applicant has stated that he stands to suffer loss if the orders sought are not granted as the Respondent is in the has applied for warrants of attachment through Crater View Auctioneers. Substantial loss was discussed in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, as:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of



substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

17. In this case, the Applicant has not demonstrated what substantial loss will be occasioned upon him and his allegations remain just that. The Applicant appears to want to force the Respondent and the Trial court to adhere to his terms of payment. If indeed the Applicant wants to settle the decretal sum then he must negotiate in good faith and not bulldoze the process.
18. On the issue of security, the Applicant indicates that he is ready to comply with the orders of the court in the application while the Respondent on the other hand indicates that he is being denied from enjoying the fruits of the judgement. In addition, the ability or inability of the Respondent to pay the decretal sum is not in issue. The Applicant indicates that he wants to pay the decretal sum in a manner that is not favourable to the Respondent.
19. This Court has a duty to balance the rights of both parties. I note that the said order was not annexed in full thus the court cannot address its mind fully to it. The question that begs is whether this court can issue stay of execution on a negative order. This issue was discussed in the case of *Chege v Gachora (Civil Appeal 265 of 2023)* [2024] KEHC 1994 (KLR) where the court stated as follows;

“In essence the impugned ruling is a negative order and is incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

20. Similarly in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga v Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order



made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....”

20. Guided by the above cases, I find that the order being a negative order meaning it did not order any of the parties to do anything or restrain from doing anything is incapable of execution means that the court cannot order stay of execution of that negative order.

### **Disposition**

21. In the circumstances, the application dated 25.07.2024 is dismissed with costs to the Respondent. It is so ordered.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 28/11/2024 AT MACHAKOS HIGH COURT. (VIRTUAL CONFERENCE.**

**M.W.MUIGAI**

**JUDGE**

