



REPUBLIC OF KENYA



**Makokha & 2 others v Neema ya Mungu Investment Company Limited (Civil Case 2 of 2020) [2023] KEHC 24586 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24586 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL CASE 2 OF 2020  
SC CHIRCHIR, J  
OCTOBER 26, 2023**

**BETWEEN**

**ERICK BARASA MAKOKHA ..... 1<sup>ST</sup> APPELLANT**

**CHRISTENSEN MILLISCENT AKELLO ..... 2<sup>ND</sup> APPELLANT**

**PENINAH KATU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**NEEMA YA MUNGU INVESTMENT COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. By a Notice of motion dated 13/10/2022, the Applicant seeks for the following orders:-
  - a. Spent
  - b. That this honourable court be pleased to issue stay of execution of judgment issued by Hon. W. Musyoka on 26<sup>th</sup> November 2021 in Kakamega HCCC No. E002 of 2020 and decree pending hearing of this application.
  - c. That there be issued stay of execution of the judgment order and any other consequential orders issued by Hon. W. Musyoka on 26<sup>th</sup> November 2021 in kakamega HCCC No. E002 of 2020 pending the hearing and determination of the appeal filed by the appellant.
  - d. That the costs of this application be in the cause.
2. The application is supported by the following grounds;
  1. That the appellant has arguable appeal with high chance of succeeding.



2. That if the orders sought herein are not granted, the respondent will proceed with execution of the said judgment and consequential orders to the detriment of the appellant and this application and the appeal will be rendered nugatory.
  3. That it is in the interest of justice that this application be allowed.
  4. The Appellant will suffer substantial loss unless a stay of execution is granted.
  5. The respondent will not suffer any prejudice if this application is allowed.
  6. This application has been brought without unreasonable delay.
3. The Respondent opposes the Application.
  4. The Application is opposed on grounds that the court is *fuctus officio* as the parties had entered into a consent dated 8<sup>th</sup> June 2022 concerning the stay of execution of the judgment and certificate of the costs; that pursuant to the said consent which was adopted in court on 22<sup>nd</sup> June 2022, the parties had agreed to stay the execution and the certificate of costs on condition that the applicants pay the said costs in instalments with the first payment of Kshs. 300,000/= being due 7 days from the date of the consent .
  5. The respondent states that the applicant only paid the first instalment but defaulted on the 2<sup>nd</sup> and the third payment.
  6. The respondent further states that after the default in payment, he attempted to carry out execution by taking out warrants of attachment, but the execution of the warrants were frustrated by the Applicant forcing the Respondent to seek for an order of committal to civil Jail. The Applicant did not come to court to show cause.
  7. The respondent points out that the Applicant has not sought to review the consent order and as such the order remains in place.
  8. It is finally stated that the present Application has been filed by an Advocate who was not on record and no leave was sought before the said firm could represent the Applicant

### **Applicant's submissions**

9. The Applicant submits that the it would suffer substantial loss of over Kshs. 1,056,995 including cost and interest, if the orders sought are not granted, and that the respondents have not demonstrated the ability to repay if the Appeal succeeds.
10. It is further submitted that the Applicant is willing to offer a personal guarantee and a Title as security for stay of execution pending the determination of the appeal .
11. The Appellant further submits that there has not been any inordinate delay in bringing the Application since the judgment being appealed against was delivered on 26.11.2021.
12. The respondent in their submission dated 23<sup>rd</sup> June 2023 raised five issues for determination as follows;
  - a. whether the court is *fuctus officio*,
  - b. Whether the firm of M/S Kakonya and co. advocates is properly on record
  - c. whether the court should dismiss the application



- d. whether the applicants are in contempt of court's order and if affirmative what are the consequences
  - e. who shall pay the costs
13. Firstly the Respondent submits that this court is *fuctus officio*. the respondent claimed that the parties entered into an agreement on 8<sup>th</sup> June 2022 which was adopted in court on 22<sup>nd</sup> June 2022. The agreement was on stay of execution upon certain terms. Thus, the same court cannot entertain another Application for stay by the applicant. They have relied on the case of Election petitions No. 3,4 &5 *Raila Odinga v IEBC & others* (2013) in this regard.
  14. The respondent further submits that the firm of M/S Kakonya and co. advocates have failed to comply with order 9 rule 9 of the *Civil Procedure Rules* and thus the application should be dismissed. They relied on the case of *Jyoti Jigish v Dickson Odingo Chiro & 2 others* (2022) eKLR where the court dismissed the application for failure to comply with the aforesaid provisions of *Civil procedure Rules*.
  15. The Respondent has relied on other several Authorities which I have perused.

### **Determination**

16. I have considered the Application and the Respondent's response. I have also taken into consideration the parties' submissions and the Authorities relied on.
17. Let me first address the preliminary issues as this will determine whether this court needs to go into the substance of the Application
18. It is not in dispute that the application before the court is one filed post- judgment and therefore the provisions of Order 9 rule 9 of the *Civil Procedure Rules* needed to have been complied with.
19. Order 9 rule 9 of the *Civil Procedure Rules* provides as follows:
  - “Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –
    - a. upon an application with notice to all the parties; or
    - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intended to act in person as the case may be.”
20. The provision is very unambiguous and mandatory in nature. where judgment in a suit has been passed and there is a change of advocate or a party decides to act in person such change will only be effected by an order of the court upon an application with notice to the advocate on record or by a consent between the previous and the new Advocate.
21. In *Lalji Bhimji Sanghani Builders & Contractors v City Council Of Nairobi* [2012] eKLR Odunga J, struck out the application since the defendant had not complied with Order 9 Rule 9 of the *Civil Procedure Rules* and while so doing the Judge sated :
  - “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of the



procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate”.

22. In *Monica Moraa v Kenindia Assurance Co. Ltd.* [2010] eKLR; Sitati J held :

“there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate .... The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached...”

23. I have stated earlier that Order 9 rule 9 is coached in mandatory terms. The words used are:

“such change or intention to act in person shall not be effected without an order of the court.”

24. Failure to comply with Order 9 rule 9 of the *Civil Procedure Rules* renders this Application incompetent and the same is hereby struck off

**DATE, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

E.Zalo- Court Assitant

No appearance by the parties

