



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 123 OF 2007**

**PETER K AYIRO. .... PLAINTIFF/DECREE HOLDER**

**VERSUS**

**MASH BUS SERVICES LTD. ....DEFENDANT/J.DEBTOR**

**AND**

**MASH EAST AFRICA LTD. .... OBJECTOR**

**R U L I N G**

By a Notice of Motion dated 3<sup>rd</sup> day of August, 2015, the Applicant/Objector herein, moved the court for several orders as set out in the said Application. For avoidance of doubt, the Applicant sought the following orders: -

- 1) The Application be certified as urgent and it be heard ex parte in the first instance.
- 2) There be an order of stay of execution/proceedings and/or advertisement/sale of the objector's attached properties pending the hearing of the application inter partes.
- 3) There be an order of stay of execution/proceedings or advertisement/sale of any of the objector's attached properties during the pendency/subsistence of the stay orders issued in Nairobi HCCC No. 465/2011 (OS).
- 4) The Objector's/Applicant's properties i.e. Motor Vehicle Registration Nos. KBK 444D, KBE 330P, KBD 400P and KAW 020B proclaimed and/or attached in execution of the decree carried out by the Respondent/Decree-Holder/Plaintiff be lifted and the properties released forthwith to the Objector pending the hearing and determination of the Application inter-parties.
- 5) The Objector/applicant be granted leave to Appeal the ruling of Honourable Justice Mbogholi delivered on the 27<sup>th</sup> day of May, 2015.
- 6) The Plaintiff/Decree holder/respondent be condemned to settle the Auctioneers charges.
- 7) Costs of the Application be provided for.

The Application came up for hearing on the 19<sup>th</sup> day of October, 2015 when parties recorded a consent to wit: -

- a) By consent prayers 1, 2, 3 4 and 6 of the Application be marked as overtaken by events.
- b) The Objector/Applicant be and is hereby granted leave to Appeal against the ruling of Honourable Justice Mbogholi delivered on the 27<sup>th</sup> May, 2015.
- c) The consent order compromised the Application and the only issue the parties could not agree on was prayer (7), on who is to bear the costs of the application. The court heard the parties on that issue.

Mr. Mukasa for the Applicant argued that the award of costs is discretionary and pleaded with the court to exercise its discretion for the reasons that, the decretal sum together with the Auctioneers charges had been settled and that the Defendant has not suffered any prejudice. He urged the court to direct each party to bear its own costs.

On her part, M/s Muriu for the Decree Holder, while she did not dispute that awarding of costs is discretionary, referred the court to the provisions of Section 27 of the Civil Procedure Act which provides in the relevant part that the costs of the proceedings will follow the event. In her submission, the court can only depart from that provision if there are good reasons to do so. She argued that no good reasons were given to court on the basis of which the court can depart from it.

She further argued that while the Application was filed under Certificate of urgency on 3<sup>rd</sup> August, 2015, it was not served upon them until 24<sup>th</sup> September, 2015 which was almost 1½ months thereafter. In the intervening period, the parties had appeared before the court on 26<sup>th</sup> August, 2015 and argued how the motor vehicle that had been attached would be released. On the said date, there was no mention of the present Application and on the 25<sup>th</sup> August, 2015, the advocate for the Decree Holder/Respondent wrote to court returning the Warrants of attachment duly executed, the decretal amount having been paid.

It was until a month later when the present Application was served upon the Decree Holder/Respondent yet the Applicant knew that the same had been overtaken by events.

Upon being served with the Application the Respondent filed grounds of opposition and attended court on 19<sup>th</sup> October, 2015 for the hearing of the Application yet the Applicant knew at all material times that the same had been overtaken by events. She urged the court to make an order on costs in favour of the Decree Holder/Respondent.

Mr. Mukasa in his reply argued that his inability to serve the Application earlier was due to the fact that the Respondent's offices were consistently closed and hence he was unable to effect service.

He further argued that the Civil Procedure Rules require service of an Application be effected at least seven (7) days before the hearing date and in view of the aforesaid provision, he did comply. He therefore, submitted that each party should bear its own costs.

I have carefully considered the arguments put forth by both counsels for the Applicant and the Respondent. I have also had an opportunity to peruse the court record and especially the proceedings of 20<sup>th</sup> August, 2015 before Honourable Justice Mabeya.

Section 27 of the Civil Procedure Act allows the court a wide discretion to make orders on costs provided the costs of any action, cause or other matter or issue shall follow the event, unless the court or the Judge shall for good reason otherwise order.

I note that by the time the Application was served upon the Respondent, the Applicant knew that the same had been overtaken by events yet it dragged the Respondent to court. The Respondent having been served with the Application had to file grounds of opposition and attend court for hearing which was absolutely unnecessary. It would not be fair considering the circumstances of this case, to let the Respondent go uncompensated in terms of costs. The Respondent/Decree Holder is awarded the costs of the Application

and the same to be borne by the Applicant.

Dated and delivered at Nairobi this 12<sup>th</sup> day of November, 2015.

.....

**LUCY NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Plaintiff/Decree Holder

.....For the Defendant/J/Debtor

..... for the Objector/Applicant