

by **Mr. Mutai** advocate.

When canvassing the application, **Mr. Kasamani** urged the Court to review the consent order because the advocate who entered into the said consent did not have the Appellant's instructions to compromise the matter.

The Applicant's position is that if there was any money paid to the Respondent, when an appeal was still pending, such money would be beyond the Applicant's reach, if the appeal was ultimately successful.

The Applicant then submitted that the trial court was wrong to have awarded damages to the Respondent, whereas no such claim was pleaded.

If anything, the pleadings are said to have demonstrated a claim for property. When canvassing the application, the Applicant conceded that the Court had already granted orders for stay of execution. However, her complaint was that the terms of the said orders, for stay of execution, were onerous. **Mr. Kasamani** also confirmed to the court that his client had filed another application for stay of execution. That other application was dated 24th August, 2011, and it was dismissed by **Karanja J.**, on 23rd November, 2011.

Notwithstanding that dismissal, of the other application, the Applicant insisted that this Court still had jurisdiction to entertain this new application.

In answer to the application, **Mr. Mutai**, the learned advocate for the Respondent submitted that the Appellant was not deserving of stay because she had already failed to keep her promise to make payments. She is said to have promised to make payments of the decretal amount, within 30 days from 17th January, 2012, but she did not keep her word.

From the record of the proceedings, it appears that the learned Judge directed that the proceedings before **Karanja J.** be typed, so as to enable the Court read the same, easily.

Those proceedings were eventually typed, and the same were placed before me. The parties have asked me to deliver my Ruling, premised on the submissions that they had made before **Azangalala J.**, on 22nd May, 2012. That explains why I have set out, above, the submissions made on that date.

In determining the application, I must now revert to the application dated 24th August, 2011, and to the Ruling delivered by **Karanja J.**, on 23rd November, 2011.

The Application dated 24th August, 2011, was for the setting aside of, or the stay of the execution of the orders issued for the arrest of the Appellant.

The Appellant disclosed that she had been arrested, in execution of the warrants for her arrest; and that she had only been released after paying Kshs 20,000/=.

However, because she had not made good the other payment, the Appellant feared that she would be arrested again.

After giving due consideration to that Application, **Karanja J.** noted as follows, in his Ruling dated 23rd November, 2011.

***“ However, in this case, the Applicant has not shown
sufficient grounds for the exercise of discretion in her
favour. She has not shown that she would suffer***

substantial loss if stay is not granted. As for the cancellation of the orders made against her, this is not the right forum for a Constitutional Reference. In any event, the Applicant was indulged and allowed to pay part of the decretal amount. She was at the same time given an opportunity to raise the balance. Instead, she did not utilize the opportunity, and came back to court by way of this application. This conduct shows that she has not acted in good faith and is not deserving of the discretion of a court of equity. In sum, the Application lacks merit. It must and is hereby dismissed with costs.”

It is obvious, from the foregoing, that this court already gave due consideration to an application for stay of execution, and dismissed it. The decision was arrived at after an evaluation of the merits of the application.

Thereafter, the Respondent became entitled to take steps to execute the Decree. When the Respondent set in motion the process for execution, the Appellant rushed to court, again. In principle, the fact that an earlier execution had been stayed cannot, of itself, be a bar to the new application for stay of execution.

But in considering the new application, the Court is obliged to take into account the earlier conduct of the Applicant, as well as the previous orders of the Court.

In her affidavit sworn on 24th August, 2011, the Appellant informed the court as follows, at paragraph 4 & 5;

“THAT on lodging the appeal herein, I filed an application for stay, which was granted on condition that I deposit half the decretal sum in court, while I pay the Plaintiff/Respondent the other half;

THAT in view of the foregoing, the decretal sum together with costs had accrued upto Kshs 448,940.00 (Annexed herewith

is a copy of the Notice to Show Cause dated 16th March, 2011, indicating the said decretal sum marked JMM 3).”

In effect, this court had already granted an order for stay of execution, as the Appellant readily conceded.

Execution was only levied after she failed to honour the conditions imposed by the trial court.

According to the Appellant, as stated in paragraph 24 of her affidavit sworn on 24th August, 2011;

“ THAT I have not willfully refused to settle the decretal sum since I have no means of employment or any means-generating projects.”

It would therefore appear that the Appellant is seeking a way to proceed with her appeal without having to fulfill the terms earlier imposed by the court. She says that she does not have the means to pay the decretal amount.

Financial embarrassment is not, of itself, sufficient ground to warrant an order for stay of execution. But that is not all. In this case, the Appellant also deponed thus; at paragraph 18 of her affidavit;

***“ THAT due to suffering I incurred while being
incarcerated at the Eldoret Central Police Station,
I entered into consent under duress to secure my
release, with the hope that I would be able to settle
the decretal sum as per the terms of the said consent.
(Annexed herewith is a copy of the said consent order
marked SMM7).”***

Under the terms of that consent, the Appellant was said to have already paid Kshs 20,000/=, and was due to pay Kshs 50,000/= by 29th July, 2011. Although that was a consent order, the Appellant did not pay the Kshs 50,000/= until 16th January, 2012.

To my mind, that portrays the Appellant as a very reluctant Judgment-debtor.

In my considered opinion, the Appellant has failed to show why she would need another order for stay, when, by her own admission, the court had already granted such an order.

In effect, even if the consent order entered into by her previous advocate, was not done with her knowledge, there still remains the earlier order cited at paragraph 4 of the Appellant's affidavit sworn on 24th August, 2011.

There is no justification in law or in fact for seeking other or further orders when the Appellant already has orders, which she has failed to comply with.

I therefore dismiss, with costs, the Appellant's application dated 11th April, 2012. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS 17TH DAY OF JANUARY, 2014.

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FRED A. OCHIENG

JUDGE.

