



**Mukuha v Naivas Ltd (Commercial Case 23 of 2013)
[2025] KEHC 3259 (KLR) (Commercial and Tax) (3 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 23 OF 2013
CJ KENDAGOR, J
FEBRUARY 3, 2025**

BETWEEN

NEWTON KAGIRA MUKUHA APPLICANT

AND

NAIVAS LTD RESPONDENT

RULING

1. The Court delivered a judgment against the Applicant for Kshs.8,102,918.21 on 31st October, 2013. The Respondent claimed that the Applicant failed to settle the decretal sum and brought Notice to Show Cause dated 25th October, 2016 requiring the Applicant to show cause why he should not be committed to civil jail. The Court delivered a ruling on 19th June, 2023 in which it held against the Applicant and issued a warrant of arrest against him. The Applicant wishes to appeal the said ruling but 30 days have since lapsed after the ruling. He brought the current application dated 19th April, 2024 seeking this Court's leave to lodge an appeal/reference against the Ruling.
2. He sought the following orders;
 - a. Spent.
 - b. That this honourable Court be pleased to grant leave to the Applicant to lodge an appeal/reference against the ruling delivered by the Honourable M.N. Osoro Deputy Registrar dated 19th June, 2023.
 - c. That the leave so granted do operate as a stay of execution pending the hearing and determination of the intended appeal.
 - d. That costs be provided for.



3. The application was accompanied by a supporting affidavit dated 19th April, 2024 sworn by the Applicant. In the affidavit, the Applicant stated that the delay in filing the appeal within good time was occasioned by his advocate's firm on record that was instructed within good time but did not act as instructed. He also claims that he has made substantial payments towards satisfaction of the decree amounting to Kshs.8,200,000/=. He stated that the ruling of the Deputy Registrar failed to consider admissions by the Respondent of payments towards settlement of the impugned decree. He claimed that the Respondent had admitted that he had paid Kshs.5,268,000/= towards the settlement of the decree.
4. He also filed a supplementary affidavit dated 7th January, 2025. He explained that the delay in filing the intended appeal was not intentional but was occasioned by his previous Advocates on record who failed to follow my instructions to lodge the intended appeal and became uncooperative. He also stated that the he took all diligent steps to appeal the impugned ruling and order and that the lapse of time is not inordinate in the circumstances. He claimed that the execution of the impugned decree and certificate of costs will cause him substantial loss.
5. The Respondent filed Grounds of Opposition dated 1st October 2024 in which it opposed the Applicant's application. They argued that the application is bad in law and an abuse of the Court's process. They claimed that there was nothing to appeal because the Warrants of Arrest issued under the Ruling were set aside on 6th July, 2023.
6. The Application was canvassed by way of written submissions

The Appellant's Written Submissions

7. The Appellant submitted that he has a good and sufficient cause for filing the appeal out of time. He submitted that the delay in filing the intended appeal was not intentional but was occasioned by his previous Advocates on record who failed to follow his instructions to lodge the intended appeal. Based on this, he argued that the delay was occasioned by circumstances beyond his control and that it is only fair and just that the leave be granted to lodge the appeal out of time, otherwise he will suffer irreparable loss and damage.
8. He also submitted that he has an arguable appeal and that the intended appeal has a high probability of success as the issues raised are arguable. He submitted that the trial Magistrate erred in law by applying wrong principles in accessing the balance of the decree to be satisfied and generally on the issues raise through the reference before the court thereby arriving at the wrong conclusion and consequently condemns the Applicant to satisfy the decretal sum trice.
9. He also submitted that he has met the threshold for grant of stay of execution pending appeal. He argued that the Respondent will not be prejudiced and in any event, they shall be compensated by way of costs. He stated that he was willing to abide on any condition imposed by the Honourable Court in respect to depositing any security for the performance of the decree. He relied on *Thuita Mwangi vs Kenya Airways Ltd (2003) eKLR*, *Belinda Murai & Others vs Amos Wainaina (1978) KLR 278*, and *Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR*.

The Respondent's Written Submissions

10. The Respondent submitted that the Application is an abuse of the Court process. The Respondent argues that the Warrants of Arrest issued on 19th June, 2023 were set aside on 6th July, 2023 and thus there is nothing to appeal against. They relied on *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR*.



Issues for Determination

11. I have considered the application, the Grounds of Opposition, and submissions by both counsels for the parties and I am of the view that the issues for determination are;
 - a. Whether the Prayer for Leave to Appeal is merited.
 - b. Whether a stay of execution pending the hearing and determination of the intended appeal is merited.

Whether the Prayer for Leave to Appeal is merited

12. Under (Order 22, Rule 19) of the Civil Procedure Rules, the Deputy Registrar is empowered to hear and determine Notice to Show Cause applications. According to (Order 49, Rule 7), a decision of the Deputy Registrar made under (Order 22, Rule 19) is appealable to a judge in chambers. The Rule provides that the Memorandum of the appeal, setting out the grounds of the appeal shall be filed within 7 days of the decision of the registrar. The Applicant herein did not file the Appeal within the 7 days provided by law and hence sought the leave of this Court to file the intended appeal.
13. I have seen the Applicant's Notice of Motion dated 19th April, 2024, a supporting affidavit dated the same date, and a Supplementary affidavit dated 7th January, 2025. In my view, the Applicant raises an issue on the extent of indebtedness. He argues that he has fully satisfied the decree and that the decision of the Deputy Registrar is in effect forcing him to pay for the decree for the 2nd time. He claims to have made some payments in cash to one Simon Gashwe Mukuha (deceased) one of the directors of the Respondent.
14. The question of the extent of Applicant's indebtedness also arose before the Deputy Registrar, and she held as follows;

“This is a ruling on the Notice to Show Cause dated 25th October, 2016 following judgment on admission for Kshs.8,102,918.21/= delivered on 31st October, 2013. In response the Judgment Debtor filed a replying affidavit sworn on 28th October, 2022 stating so far he paid Kshs.5,268,000/=. The Decree Holder thereafter filed a supplementary affidavit sworn by David Kimani, an M.D of the 2nd Decree Holder in which they do acknowledge receiving the stated amount. The Judgment Debtor deferred he made some payments to one Simon Gashure (Now Deceased) but he doesn't provide any proof, nor an acknowledgment of payment. On the other hand, the Decree Holder has attached a statement of acknowledgment DKM-1 to show payments made by the Judgment Debtor at the O.S amount of 8,273,198.50/= (as at June, 2022).”

15. I note that the amount in dispute is a substantial amount. In the interest of justice, I shall grant the Applicant leave to appeal the said ruling and have a Court relook and revisit the question on the extent of indebtedness.

Whether a stay of execution pending the hearing and determination of the intended appeal is merited

16. The Applicant also prayed that the leave so granted do operate as a stay of execution pending the hearing and determination of the intended appeal. I have relooked at the history of this matter with a view to ascertaining whether this prayer is merited in the circumstances.



17. I note that the Respondent has argued that there is nothing to appeal against because the Warrants of Arrest issued on 19th June, 2023 were set aside on 6th July, 2023. In his Grounds of Opposition dated 1st October, 2024, the Respondent stated as follows;
- “b. The Applicant in a bid to set aside the Warrants of Arrest, filed an Application dated 20th June, 2023 seeking as such. The application was then scheduled for hearing on 6th July, 2023.
 - c. On 6th July 2023, when the Applicant’s Application dated 20th June, 2023 came up for hearing before Hon. Mary Osoro, the Respondent was not opposed to the Applicant’s Application, ergo, the Application was allowed as prayed with an order that costs would abide in the outcome.
 - d. The Ruling of 19th June, 2023 delivered by Hon. Mary Osoro which Ruling the Applicant seeks to appeal against is spent, the orders therein having been set aside on 6th July, 2023, there is nothing to appeal against.”
18. I have relooked at the Court file and the typed Court proceedings to determine whether the Warrants of Arrests were indeed set aside as claimed by the Respondent. The available record does not show whether the Court sat on 6th July, 2023 as claimed by the Respondent. This is not available both on the typed proceedings and the handwritten proceedings. In addition, even the available handwritten and typed proceedings do not show whether the Court set aside the Warrants of Arrests as claimed by the Respondent. Thus, this Court cannot confirm the said orders of the Court and their terms thereof.
19. I also note that there are existing interim orders given by the Court on 12th September, 2023 with respect to the Auctioneers Application dated 7th September, 2023 and the Debtors application dated 7th September, 2023 concern execution and the extent of indebtedness. Interim orders of stay of execution were issued pending the hearing and determination of the respective applications. It directed the parties to appear before the Deputy Registrar for the hearing and determination of the Applications. The available proceedings do not show whether the same applications were ever dispensed with. However, this Court presumes that the same interim orders are still in force until the said applications are heard and determined.
20. Due to the above reasons, I find that the Applicant’s prayer that the leave operates as stay is not merited in the circumstances. However, the parties are at liberty to raise the issue of stay of execution, if need be, before the Court handling the appeal for appropriate orders.

Disposition

21. The Application succeeds partially and these are the final orders;
- a. The Applicant is granted leave to lodge an appeal/reference within 14 days of this ruling.
 - b. The prayer that the leave so granted do operate as a stay of execution pending the hearing and determination of the intended appeal is hereby declined.
 - c. Parties are at liberty to raise the issue of stay of execution, if need be, before the Court handling the appeal for appropriate orders.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 3RD DAY OF FEBRUARY, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court assistant: Beryl

Mr. Newton - Applicant, present

No attendance for the Respondent

