



REPUBLIC OF KENYA



Yuko & another t/a Mapetech Enterprise v Nyali Capital Limited (Civil Appeal E130 of 2022) [2025] KEHC 2873 (KLR) (3 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E130 OF 2022
AB MWAMUYE, J
FEBRUARY 3, 2025**

BETWEEN

**MARTIN YUKO YUKO & PEREZ LOLLAH SHAMBE T/A MAPETECH
ENTERPRISE APPELLANT**

AND

NYALI CAPITAL LIMITED RESPONDENT

JUDGMENT

1. The Appellant brought this Appeal vide a Memorandum of Appeal dated 21st December, 2022 asking this court to set aside a ruling and order given by Honourable E. Obina, P.M., given at Kisumu on the 01/12/2021 in Kisumu Chief Magistrate's Court Civil Suit No. 444 of 2021. He also asked that this court sets aside the Respondent's Notice of Motion Application dated 19/01/2022. Finally, he asks for costs of this suit.
2. The grounds for the appeal are listed as; that the learned trial magistrate erred in fact (sic) in granting orders that were not sought in the application; the learned magistrate erred in fact and in law in granting orders that are akin to execution before judgment against the principle of natural justice and fair hearing; and that the learned magistrate erred in fact and in law failing to appreciate facts and law thereby arriving at an erroneous conclusion and/or finding.
3. The Respondent in their written submissions rejoin that the Appellant cannot claim to have been denied an opportunity to defend their case because the Trial Court allowed the Respondent to file their defence; that the defence was filed but it did not raise triable issues forcing the Respondent to file an application to strike out the defence. The Respondent further avers that the Trial Court delivered a ruling noting that the defendant had actually conceded to the claim but in the interest of justice allowed the matter to proceed to full hearing on merit on condition that the Appellant deposits Kshs. 1, 120, 000/- in addition to interest thereon and costs of the suit.



4. The Respondent further rejoins that the substratum of the appeal has become moot as it has been overtaken by events, and therefore should be dismissed with costs. This, according to the Respondent, is because the Appellant did not file an application in the high court for stay of proceedings in the lower court and as such the matter has proceeded to the extraction of a decree and the issuance of a certificate of costs.
5. Both parties filed their submissions.

Analysis And Determination

i. Whether the Appeal has been overtaken by events

6. There is a preliminary question that this court has to contend with first before venturing into the other issues, if necessary. The Respondent has raised an issue that I consider preliminary as it can dispose of the matter entirely: whether the present appeal has been caught up with the mootness doctrine.
7. The background of this case is that on the 29th March, 2022 the Trial Court entered an interlocutory judgment in Kisumu Civil Suit 444 of 2021 considering that the suit was liquidated. The Appellant thereafter sought the leave of the court to enter appearance and to file a defence. Later the interlocutory judgment was set aside and the appellant was granted leave to file a defence in a ruling dated 4th August, 2022.
8. In his defence dated 5th August, 2022 the Appellant admitted owing the amount claimed by the Respondent prompting the Respondent to file an application dated 19th September, 2022 seeing to strike out the defence under Order 2 Rule 15 of the Civil Procedure Code. In a ruling dated 1st December, 2022, the court noted that the Appellant had actually conceded the claim, but in the interests of justice allowed the case to proceed to hearing on merit on condition that the appellant deposits Kshs. 1, 120, 000/- in court within 30 days, failure to which a summary judgment was to be entered against the Appellant, and the Respondent could proceed to execution.
9. Aggrieved by the decision the Appellant filed another Application dated 21st December, 2022 before the Trial Court seeking a stay of execution of the ruling dated 1st December, 2022. The Trial Court dismissed the application with costs to the Respondents and advised the Appellant to move to the high court to seek for the same orders if they so desired.
10. The Appellant neither deposited the funds nor made a formal application in this court for a stay of the proceedings in the lower court. The Respondent went ahead and extracted a decree that is attached and produced at page 196 of the record of appeal marking the conclusion of the matter in the lower court and thereby making the Trial Court functus officio.
11. That set of facts is uncontested. The question, I think, for this court as an umpire to determine is what that portends.
12. I am of the view that a ruling, like the one appealed from, is interlocutory in nature. As such, an interlocutory appeal makes sense insofar as the primary suit is active.
13. In *Natural World Mombasa Safaris LTD vs Karuri* (Civil Appeal E045 of 2022) KEHC 9979 (Ruling), the Learned Court, confronted by a similar interlocutory appeal, rendered itself as follows:

“There being a judgment by a court of competent jurisdiction, I am of the considered view that the Appellant cannot adequately and sufficiently mount a good case on the present appeal, save to perhaps file another appeal, against the judgment of the Trial Court. To do



otherwise, and proceed to have the appeal heard would, in my view, be an academic exercise and made to waste precious judicial time. The grounds of appeal post-judgment will no doubt be very different from those stated in the present appeal, but could also include the same.

Having stated as above, I hold the view that the appeal hereby has been overtaken by events and caught up with the mootness doctrine as it ceases to present a justifiable dispute by the events (judgment), and therefore any resultant decision would be of no practical value or use.”

14. For the orderly disposal of disputes, it is required that a party who prefers an appeal against a ruling or a judgment, makes a formal application to stay execution and/or the impugned proceedings so as to avoid the possibility of wasting precious judicial time in parallel processes. The Appellant herein did not, even when the Trial Court explicitly counseled him to do so. Now that the substratum of the interlocutory appeal has abated, the jurisdiction of this court can only be invoked by way of a substantive appeal.
15. In the upshot, I find that the appeal herein is overtaken by events and is moot.
16. Having found that the interlocutory appeal has been overtaken by events and caught up with the doctrine of mootness, there is no need to analyze and determine with the rest of the issues as raised, as that finding in itself disposes of this appeal.
17. Accordingly, I dismiss this appeal with costs to the Respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE

JUDGE

