



MBA v MAK (Civil Appeal E041 of 2025) [2025] KEHC 6795 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E041 OF 2025**

G MUTAI, J

MAY 9, 2025

BETWEEN

MBA APPELLANT

AND

MAK RESPONDENT

RULING

1. The Hon Abdiaziz Maalim Mohamed, PK delivered a ruling on 13th February 2025, vide which he declined to allow the application dated 24th September 2024.
2. Being aggrieved with the said decision the appellant filed a memorandum of appeal dated 14th February 2025, vide which he sought the have the ruling dated 13th February 2025 quashed and or set aside and that this court be pleased to find that the dowry paid by the appellant settles the judgment of the trial court and for him to be awarded the costs of the appeal.
3. The appellant also filed a notice of motion application dated 14th February 2025, under a certificate of urgency, vide which he sought to have the ruling delivered on 13th February 2025, together with all the consequential orders, stayed pending the hearing inter partes of the application and the hearing, on merits, of the appeal.
4. The application was grounded on the averments that the application for review dated 24th September 2024, was dismissed on 13th February 2025. It is urged that there were negotiations between family members in which it was agreed that the dowry paid by the appellant to the respondent would be used to settle the decretal amount, which the respondent had unfortunately resiled.
5. The appellant averred that the court below did not properly consider his defence. He stated that the court didn't give due weight to his application. He lamented that he was undergoing financial constraints and could not pay the decretal amount as ordered by the Court. He urged that it was fair and just that the application be allowed as he stood to suffer irreparable loss.



6. The respondent opposed the application. Ms MAK filed a replying affidavit sworn on 27th February 2025, in which she averred that the application before the court had no merit and was brought in bad faith to frustrate the respondent unnecessarily and to prevent her from getting her rightful dues from the appellant. She urged that the application be dismissed with costs and that the current status quo be maintained until the appellant fully paid the decretal sum.
7. The respondent deposed that the appellant married her deceitfully as the third wife after deceiving her that she would be the second wife and abandoned her shortly thereafter, forcing her to seek legal relief in the Kadhi's court. Upon hearing the parties, the court dissolved the marriage between them with effect from 13th June 2024, compelled him to pay eddat maintenance for 3 months at Kes 30,000/- per month and for the appellant to provide her with past maintenance for 9 months at Kes 30,000/- per month.
8. The respondent averred that her dowry of Kes 300,000/- could not be set off against her claim, as he was the one who went away immediately after the marriage was consummated, and she attended to his needs as a Muslim wife. She averred that to do so would be un-Islamic.
9. The respondent urged that the appeal was without merit and should be dismissed. In the alternative, she urged that if the application was allowed, it ought to be on condition that the entire decretal amount be deposited in court so that if the appeal were unsuccessful, she would be able to recover the decretal sum without difficulty.
10. The application was canvassed through oral submissions in court on 17th March 2025.
11. In his brief oral submissions, the appellant urged that the application be allowed as the parties were negotiating. He stated that he abandoned the respondent after he found that she wasn't a virgin. He prayed that negotiations and mediation be given a chance. Mr Aboud stated that he would not be able to meet the amount ordered by the court. He accused the court of having engaged in machinations to frustrate him. The appellant urged that since the respondent wasn't a virgin at the time he married her, he was entitled to a refund of the "mahar".
12. The respondent, on her part, accused the appellant of being a great liar and of not having been truthful during their courtship. She accused him of failing to disclose that he had two wives and five children. She denied that there had been a discussion between their families. She also denied that she wasn't a virgin at the time they got married. Ms MAK stated that the appellant shouldn't have taken a loan to marry her and should only have got married if he could care for his wife/wives. She thus urged that I dismiss the application.
13. I have considered the application before me, the response thereto, as well as the oral submissions of the parties. I note that this is an application for a stay of execution of the orders said to have been made on 13th February 2025.
14. Applications for stay of execution of decrees and orders are made under Order 42 Rule 6 (1) of the *Civil Procedure Rules*. The said Rule provides that:-
 - “(2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

15. My understanding of the foregoing provision is that an appellant with a case that can possibly succeed on appeal may apply for a stay of execution, subject to fulfilling the following conditions: -
- a. Showing that he would suffer substantial loss if the application is not allowed;
 - b. Demonstrating that the application was filed without delay; and
 - c. Providing, or showing a willingness to provide, Security for the due performance of any order that may ultimately be binding upon him.

16. I note that the decision sought to be appealed against was in respect of the review application. Other than dismissing the application, the court below appears to have done nothing else. Therefore, it does not seem to me that there is a positive order capable of being stayed.

17. I am guided by the decisions of the Court of Appeal in the following 2 matters.

18. In *Western College of Arts and Applied Sciences v Oranga & Others* [1976-80] 1 KLR 63, the Court of Appeal for East Africa stated that:-

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for a stay, it is so ordered.”

19. Similarly the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR the Court of Appeal expressed itself thus:-

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated: ‘..... an order for stay of execution must be intended to serve a purpose’”

20. There is simply no positive order in the decision of the court below that is capable of being stayed.

21. Even if I was wrong, the appellant hasn’t shown that he would suffer substantial loss if the execution of the judgment proceeded.

22. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR in the following terms:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has



been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

23. I do not think that the execution of the decree or order of the court below will create conditions that will make the appeal, if successful, an academic exercise. I am therefore not convinced that it will be fair in the circumstances of this case to deny the respondent the fruits of a judgment in its favour.
24. I note that the requirements for the grant of stay under Order 42 Rule 6 are conjunctive. Thus, although the application was filed promptly, the fact that no substantial loss has been shown renders the prompt action neuter and effete and of no effect.
25. The appellant could have offered to deposit the decretal sum in court. He did no such thing. The third condition was therefore not fulfilled.
26. It is evident from the foregoing that the application has no merit and is denied. The same is dismissed. As this is a family matter, each party shall bear his or her own costs.
27. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms MAK;

Mr MBA; and

Arthur - Court Assistant.

