



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC APPEAL NO. 7 OF 2017**

**(Formerly Machakos ELC Appeal No. 118 of 2015)**

**MWAURA KARUGA.....APPELLANT**

**VERSUS**

**APOLLO J. KARUGA.....1<sup>ST</sup> RESPONDENT**

**JESSE MUTHIGA ALBERT.....2<sup>ND</sup> RESPONDENT**

**RULING**

What is before Court for determination is the 2<sup>nd</sup> Respondent's application dated the 29<sup>th</sup> June, 2020 where he seeks the follows Orders:

1. Spent
2. That this Honourable Court be pleased to grant leave to the 2<sup>nd</sup> Respondent/ Applicant to liquidate the decretal amount hereof by way of monthly instalments of the sum of Kshs. 50,000 commencing 10<sup>th</sup> July, 2020 and thereafter on or before the 10<sup>th</sup> day of each succeeding month till settlement in full.
3. That the 2<sup>nd</sup> Respondent/ Applicant be allowed to deposit such instalment in court on account of the Appellant/ Respondent.
4. That pending the inter partes hearing of this Application, this Honourable Court be pleased to stay execution of the judgement and resultant Decree hereof.
5. That this Honourable Court do freeze further interest on the principal amount entered in Judgement from 28<sup>th</sup> May, 2020 when this Court rendered its Judgement in the matter hereof.
6. That the costs of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of JESSE MUTHIGA ALBERT where he explains the contents of the Judgement in the Lower Court and avers that his attempts to settle the sum of Kshs. 200,000/= as directed by the said Court were in vain as the Appellant filed the instant Appeal. He contends that this Court reaffirmed the Judgement in the Lower Court and awarded interest on the principal sum of Kshs. 200,000. Further, that the Appellant is still aggrieved by this Court's Judgement and filed a Notice of Appeal to that effect. He claims in light of this Court's Judgement, the principal amount plus interest has accumulated to a figure in excess of the sum of Kshs. 400,000, exclusive of costs. He claims that under his current financial situation, he is completely unable to settle the decretal amount in lumpsum but has minimal savings with Equity Bank Ltd and also derives income from rental collection. He intends to commence repaying the entire amount owing to the Appellant from 10<sup>th</sup> July, 2020 by way of Kshs. 50,000 per month and would undertake to do so on or before the 10<sup>th</sup> Day of each successive month. He has sought to engage the Appellant on this position but he is unwilling.

The Appellant/ Respondent opposed the Application by filing Grounds of Opposition dated 22<sup>nd</sup> July, 2020 where he states thus:

1. That the Appellant has already filed an Appeal against the decision of this Court and a Notice of Appeal has been served upon the 2<sup>nd</sup> Respondent's Advocates.
2. That the Plaintiff's application is misconceived, mischievous, in bad faith, is frivolous and vexatious.

3. That the Decree has not been extracted and it is therefore inconceivable that any form of execution can be undertaken at all.
4. That to stop any interest from accruing on the principal sum the 2<sup>nd</sup> Respondent must deposit the entire decretal sum into Court or in an interest earning account pending the hearing and determination of the Appeal.
5. That the 2<sup>nd</sup> Respondent has had the principal sum of Kshs. 200,000/= since the year 2002 and it is dishonest to blame COVID – 19 in the year 2020 when all along the Respondent has not made any offer to deposit the amount to avoid interest.
6. That the application herein being an abuse of the Court process is for dismissal with costs.

Both the 2<sup>nd</sup> Respondent and Appellant's Counsels canvassed the Application orally.

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 29<sup>th</sup> June, 2020 including the supporting affidavit, Grounds of Opposition and parties' submissions, the only issue for determination is whether the 2<sup>nd</sup> Respondent is entitled to the Orders sought therein.

I note this court dealt with this matter on Appeal from a judgement of the lower Court. Further, the Orders sought in the instant application relate to execution of a Decree emanating from the Lower Court.

Section 28 of the Civil Procedure Act provides that: ' **The provisions of this Act relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. 29. Definition of "court which passed a decree" The expression "court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, except where the context otherwise requires, include— (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance; and (b) where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit'**

These provisions are very clear that where the Decree which is sought to be executed has been passed in exercise of the appellate jurisdiction, application for execution has to be done in the court of first instance. I note the Decree for payment of Kshs. 200,000/= was issued in the lower court. The Appellant appealed herein and the court proceeded to uphold the judgement of the lower court and made an order in respect to payment of interest on the principal amount. In the circumstance, I find the application for payment of the decretal sum in instalments and freezing of interest rates on the same premature and direct that the same should be filed in the lower court that had determined the dispute in the first instance.

As for the prayer for stay of execution, I note this was sought pending the outcome of this application and since I have declined to grant the orders as sought, I will not make a determination on the same and direct that this be sought in the Lower Court.

It is against the foregoing that I find the instant application unmerited and will strike it out

Costs will be in the cause

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY ON 29TH JULY, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**