



REPUBLIC OF KENYA



KENYA LAW
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**Masua v Mbuvi & another (Civil Appeal 31 of 2018)
[2024] KEHC 12448 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 31 OF 2018
RK LIMO, J
OCTOBER 17, 2024**

BETWEEN

KYANIA MASUA APPELLANT

AND

JOSEPHINE KADZO MBUVI 1ST RESPONDENT

CRATER VIEW AUCTIONEERS 2ND RESPONDENT

RULING

1. Before this court at two related applications by the appellant dated 2.9.2024 and 13.9.2024. The reason why they are related is that the applicant in both applications is mainly seeking for stay of execution pending appeal. The only distinction between the two applications is that in the latter application, the applicant also seeks a stay of sale of attached Motor vehicle Registration No. KDC 993W.
2. In the first application dated 2.9.24 the applicant seeks the following orders namely;
 - i. Spent
 - ii. That this Honourable court be pleased to order stay of execution of the judgment dated 17.1.2020 and or decree issued on 14.2.2020 where the court deemed that the applicant to pay kshs.621,390/- as the decretal sum.
 - iii. This court be pleased to set aside the warrants of attachments issued by this court dated 20.8.2024 and the proclamation made by the 2nd Respondent Crater view Auctioneers.
 - iv. That the applicant /judgment debtor be ordered to deposit the decretal sum in a joint interest earning account.



- v. That upon compliance with prayer (iv), there be a stay of execution pending determination of Court of Appeal Nairobi Civil Appeal No. 56 of 2020 *Kyania Masha v Josphine Kadzo Mbvi*.
3. The grounds of the above prayers are listed as follows;
- a. That this court heard Kitui Civil Appeal No. 31 of 2018 which originated from Mutomo PM's Court Civil Case No. 62 of 2017.
 - b. That the court determined appeal on 17.1.2020 and awarded the respondent decretal sum of Kshs. 621,390/=.
 - c. That the applicant after the judgment fell out with his advocate and appointed a new advocate to file an appeal in the Court of Appeal.
 - d. That the new counsel was unaware that there was no application for stay of execution.
 - e. That the applicant proceeded to file an appeal in the Court of Appeal vide Civil Appeal No. 56 of 2020 and that the appeal is active before the court of Appeal.
 - f. That the appellant on 29.9.24 received a proclamation notice issued by Crater View Auctioneers and Warrants of attachment from court.
 - g. That if the judgment creditors proceed to attach and sell the property by public auction his appeal will be rendered nugatory and has asked this court to protect his interests and that of the respondent.
 - h. That he has approached this court with clean hands and that unless stay is granted he will be highly prejudiced.
 - i. The applicant has supported the above grounds with an affidavit sworn on a date not clearly indicated but he has majorly reiterated the above grounds.
4. In the Notice of Motion dated 13.9.24 (though date shows 13.9.23- probably a typing error), the applicant seeks the following prayers which are quite similar to the other prayers in the former application. In the latter application he seeks the following orders namely;
- i. Spent
 - ii. That this court do order a temporary order of stay of execution of the judgment dated 17.1.2020 pending directions on 26.9.24
 - iii. That a temporary injunction do issue restraining the Respondents from selling by way of public auction attached motor vehicle Reg. No. KDC 993W.
 - iv. That status quo do remain pending determination of the motion dated 2.9.2024
 - v. That the warrants of attachments issued on 20.8.2024 and proclamation by crater view Auctioneers be stayed.
 - vi. That the applicant be ordered to deposit the decretal sum in a joint interest earning account in the joint names of Counsels on record.
5. The applicant has cited similar grounds to the former application but interestingly in this application he now claims the decretal sum is Kshs. 400,000/=.



6. He further introduces another ground stating that judgment was delivered during Covid period and that a challenge in filing the application for stay of execution.
7. He further adds that unless stay of sale is granted, the auctioneers will proceed to sell the proclaimed vehicle.
8. He has supported this application through an affidavit sworn on 13.9.24. he has majorly reiterated above grounds adding that an order of deposit of decretal sum would protect the interests of both parties. He submits through counsel that the interests that would accrue from the deposited amount will safeguard the interest of the respondent if the appeal fails.
9. He submits that the respondent remained silent since 2020 when judgment was delivered and never sought to execute until when the court of Appeal fixed the appeal for pre-trial directions. He wonders why he remained inactive for 4 years yet he cannot wait for 6 months for the appeal to be determined.
10. In a twist he contends that equity does not aid the indolent and faults the respondent for hastily moving to execute when he realized there was an appeal pending in the Court of Appeal. I say a twist because, if there is a party who is invoking the doctrine of equity, it is the applicant as will be shown shortly.
11. He submits that unless stay is granted, the appeal in the court of Appeal will be rendered nugatory. He relies on the Case of [*Elena D Korir v Kenyatta University*](#) [2014] eKLR.
12. He further contends that though there was a delay in presenting these 2 applications, he has given adequate explanation. He blames Covid for the delay and the fact of change of advocates. He urges this court not to punish him for the actions or inaction of his former counsel.
13. The Respondent has opposed this application through a replying affidavit and written submissions made through counsel.
14. The 1st Respondent terms both the applications unsound, inept, misconceived and bad in law. She contends that the same is meant to deprive her the fruits of judgment.
15. She points out that under Order 42 rule 6 of the [*Civil Procedure Rules*](#), no order of stay can be issued unless it is demonstrated a substantial loss will be occasioned and that the application has been made without unreasonable delay.
16. She submits that the applicant has failed to demonstrate that he would suffer substantial loss.
17. She further submits that the delay in filing the 2 applications is unreasonable. He avers that she has not enjoyed the fruits of judgment for the last 8 years and will be prejudiced if a stay is granted.
18. She faults the applicant for not advancing any ground to demonstrate that the appeal filed is arguable and that in the absence of the same it is difficult for this court to know if the appeal will be rendered nugatory if execution proceeds.
19. She says that the deposit offered will leave her at a disadvantage if the appellant fails to proceed with his appeal. She contends that she will suffer prejudice due to delay.
20. This court has considered both the applications and the responses made thereto. This court has tried to do a summary of both applications and the responses for the interest of Judicial time.
21. The two applications are aimed at obtaining a stay of execution of the decree passed by this court and a stay of sale of the proclaimed Motor Vehicle Registration KDC 993W.



22. The 2 applications are premised on an appeal pending in the Court of Appeal against a decision or judgment of this court delivered on 17th January 2020.
23. An appeal does not operate as an automatic stay of execution. An applicant must show good or sufficient cause to be granted an order of stay of execution/sale.
24. A grant of stay is a discretionary matter but a party seeking stay must satisfy the conditions set under Order 42 Rule 6 (2) which state as follows;
 - “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”.
25. The above shows that besides the condition of demonstrating sufficient cause for stay, an applicant must also satisfy the 3 conditions shown above.
26. This court has looked at the grounds and representations made by the applicant and I am satisfied that he has shown sufficient cause because he has demonstrated that he has a pending appeal. This court is not well placed to determine whether the grounds raised in the appeal reveal arguable appeal or not. I will therefore not accept the invite by the respondent that I determine whether the appeal filed stands good chances of success. That is an issue outside the per view and jurisdiction of this court.
27. On the question of substantial loss, this court is not fully persuaded that the applicant has laid sufficient material or facts to demonstrate that he is likely to suffer substantial loss or that his appeal will be rendered nugatory unless stay is granted.
28. The most significant issue or condition which the applicant has failed to surmount in his two applications is timelines. The judgment which he is appealing from was delivered on 17.1.2020. The 2 applications were both lodged in the month of September 2024. The delay of 4 years whichever way one looks at it is unreasonable. The reason for delay given in the application dated 2.9.2024 was change of advocates and an oversight.
29. In the subsequent application dated 13.9.24 the applicant blames Covid as the main reason and also blames the respondent for not executing or sort of waking him up and that is why he invokes the doctrine of equity. However, it is the applicant who was required by law to move this court without unreasonable delay which is an equitable remedy or a discretionary matter. The applicant did not do so and has come to this court for equity but as he correct points out equity does not aid the indolent.
30. I find that the applicant is guilty of indolence because in one application he blames the change of advocate and on another he blames Covid which subsided 3 years ago. It is true that for a while particularly the two succeeding years after Covid i.e year 2021 and 2022 most indolent parties in court cited Covid as the main reason for their indolence, but for a party to come to court in September 2024 4 years after covid period and still blame Covid is taking the excuse to another level altogether. This court is not persuaded to buy that reason or the other reason of change of advocates. Those grounds are too lame to explain what is clearly unreasonable delay.
31. In the premises, this court finds no merit in both applications dated 2.9.24 and 13.9.24 same are dismissed with costs to the 1st respondent.



DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF OCTOBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

