



REPUBLIC OF KENYA



**KENYA LAW**  
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**Makhanu & another v Anyango (Civil Appeal E030 of 2021)  
[2023] KEHC 18576 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18576 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E030 OF 2021**

**KW KIARIE, J  
JUNE 14, 2023**

**BETWEEN**

**AUGUSTINE WESONGA MAKHANU ..... 1<sup>ST</sup> APPELLANT**

**CLIMAX COACHES LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PHOEBE ANYANGO ..... RESPONDENT**

*(Arising from the judgment of the honorable DW Mburu,  
SPM delivered on 7/5/2021 in Nairobi CMCC 2311 of 2019.)*

**RULING**

1. The appellants/applicants application was brought by way of notice of motion dated January 23, 2023. The application is brought under sections 1, 1A, 3A & 63 (e) of the [Civil Procedure Act](#), order 22 rule 22, order 50 rule 5 & 6 and order 51 rule 1 of the [Civil Procedure Rules](#) and rules 55(4) &(5) of the [Auctioneers Rules](#). They are seeking the following orders:
  - a) That this application be certified urgent and service thereof be dispensed with and the application herein be heard ex-parte and in the first instance.
  - b) That the court grants stay of execution of the judgment of the honorable Moseti, SRM delivered on 10/3/2021 in Mbita CMCC 19 of 2019 pending the hearing and determination of this application.
  - c) That the court grants stay of execution of the judgment of this court, delivered on January 23, 2023 dismissing the appeal pending the hearing and determination of this application.
  - d) That this honorable court does deem the replying affidavit and submissions dated December 21, 2022 as duly filed.



- e) That this honorable court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.
  - f) That the cost of this application be in the cause.
2. The applications were premised on the following grounds:
- a) That the appellants instituted this appeal vide a Memorandum of Appeal dated 7/6/2021 against the judgment of the honorable DW Mburu, SPM delivered on 7/5/2021 in Nairobi CMCC 2311 of 2019.
  - b) That the applicants did their replying affidavit and submissions and had an issue with a shortage of clerks thus the same were not processed and filed in time.
  - c) That on 23/1/2023, the appeal was dismissed through the allowing of the application dated October 24, 2022 by the respondents.
  - d) That there is no stay of execution currently and the application herein is exposed as the respondent might execute based on the said ruling.
  - e) That unless the honorable court issues stay of execution orders, the respondent shall proceed and execute therefore rendering this application nugatory and the applicants will have been condemned unheard.
  - f) That unless this application is certified urgent and heard immediately, this application would be rendered nugatory as the applicants herein are exposed and the respondent might execute the said ruling.
  - g) That unless the honorable court grants stay of execution, the respondent shall proceed and execute the ruling therefore rendering this application and the intended appeal nugatory and the applicants will have been condemned unheard.
  - h) That unless this application is certified urgent and heard immediately, this application would be rendered nugatory as there exists no stay of execution.
  - i) That the applicant is ready and willing to abide by any other or further orders as may be issued by this honorable court.
  - j) That this application has been made without unreasonable/inordinate delay.
  - k) That in any event this application has been filed in timely fashion.
  - l) That the application has been made in good faith.
  - m) That this application ought to be granted in the interest of equity and justice.
3. The respondent opposed the application on the following grounds:
- a) That the application is an abuse of the due process of the court.
  - b) That the appellants went to sleep after filing of the record of appeal.
4. The applicants filed their record of appeal on October 13, 2021. The court admitted the appeal On March 9, 2022 and ordered the applicant to serve the record of appeal on the respondent. The parties were expected to appear before the court for directions on March 23, 2022. No party appeared an indication that the appellant had not served the respondent. This provoked the current application. It is clear that the appellants went to sleep.



5. An appeal does not automatically act as a stay of execution. In the case of *RWW v EKW* [2019] eKLR, the court while addressing its mind to the purpose of a stay of execution order pending appeal, stated:

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

6. The applicants' had gone to a slumber. In the interest of justice I will, however, allow the application on the following conditions:

- a) The applicants to deposit the decretal amount together with the agreed cost in an interest earning Bank account in the names of both counsel on record for the parties within 30 days.
- b) The applicant to set the appeal for hearing within 15 days of this ruling.
- c) Failure to comply with any of the conditions, then the respondent will be at liberty to commence execution.

7. The appellant will pay costs of this application.

**DELIVERED AND SIGNED AT HOMA BAY THIS 14<sup>TH</sup> DAY OF JUNE, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

