



REPUBLIC OF KENYA



**Makau v Makhasala (Civil Appeal E011 of 2023)  
[2023] KEHC 23009 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23009 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E011 OF 2023**

**TM MATHEKA, J**

**OCTOBER 2, 2023**

**BETWEEN**

**RAPHAEL MUSILA MAKAU ..... APPELLANT**

**AND**

**EMMAH NANYAMA MAKHASALA ..... RESPONDENT**

**RULING**

1. The notice of motion filed before me on 20/2/2023 is brought under order 42 rule 6, order 50 rule 6, order 51 rule 1&3 of *Civil Procedure Rule*, sections 3A, 79G, 95 of the *Civil Procedure Act*.
2. It seeks inter alia - that the court be pleased to issue a stay of execution of the Judgement /Decree of Hon. M.K Mutegi PM 's decision on 31/1/2023 in Tawa CMCC 31/2022 pending the hearing and determination of the appeal.
3. The applicant was aggrieved by the learned trial magistrate court's direction to award the 1<sup>st</sup> respondent (sic) 100% liability , general damage of Kshs. 150,000 plus cost and interest. In the application there is reference to 1st respondent but I have only seen a respondent.
4. The appeal is against both liability and quantum. The applicant has annexed a memorandum of appeal which speaks of general damage of Kshs. 250,000.
5. The judgment against which the application is brought has not been annexed.
6. The applicant filed another certificate of urgency dated 24/4/2023 expressing fear that the respondent was out to execute the decree.
7. The application is supported by the affidavit of Raphael Musila Makau.
8. In opposition, Benard M. Kitindio has sworn affidavit. He notes that the application does not satisfy the condition set out by the law. He contends that the general damage award were way below the



conventional award for the kind of injuries the respondent sustained – and should the court find it in order to allow the application - to order the applicant to pay ½ the decretal sum to the respondent and deposit the other in joint interest earning account.

9. Both sides filed submissions which I have considered. For the applicant is argued that applicant has an arguable appeal - on the ground that the award exceeds convention at awards, that the appeal raises serious points of law and *fact. See Bake 'N' Bite (Nairobi) Limited vs Daniel Mutisya Mwalunzi* [2015] eKLR that the applicant is not required to prove an arguable appeal as per order 42 rule 6 – that granting the orders under order 42 rule 6 is an exercise in discretion See *Ester Wamaita Nlilia & 2 others Vs Safaricom Ltd* [2014] eKLR on the Principles governing the exercise of court's discretion and that the main concern for the court to do justice for the parties, avoid hardship etc.
10. That the applicant has established sufficient cause as set out in *Tarbo Transporters Ltd vs Absalom Dova Lumbasi* [2012]eKLR that applicant will suffer substantial loss, application has been made without delay, security as ordered by the court for the due performance of the decree.
11. That applicant has offered Bank Guarantees as security, application was filed without delay, appellant is ready to furnish security.
12. The respondent submits that the orders sought are not warranted that respondent was a fare paying passenger in motor vehicle Reg. No. KCY 732 when the road traffic accident happened along Machakos -Kitui Road .
13. That substantial loss has not been established - see *Antoine Ndiaye V African Virtual University* [2015] eKLR citing Tropical Commodity Suppliers Ltd defining substantial loss - as .... any loss , great or small that is of real worth on value as distinguished from a loss without value ... See also Bungoma HC Misc App 42/11 *James Wangalwa & Another V Agness Nialiaka Cheseto* - it must be demonstrated that the execution will lead to an irreparable status of affairs which would negate the very core of the appeal see *Kenya Shell Ltd Vs Benjamin Karinga Kigiblu Ruth Wairimu Karunga* (1982 - 1988) KLR - where it was held that substantial loss is the corner stone of the jurisdiction for granting stay.
14. On deposit of security - reference is made to Anne Njoki Vs Musafee Essajee & Another (citation not given.)  
That the successful litigant should not be disadvantaged should the appeal fail - It is strongly argued that the application is not warranted and ought to be dismissed with costs.
15. The only issue from determination is whether the prayer sought is tenable.
16. The applicant has the right to an appeal - hence that right cannot be negated.
17. The applicant has been brought in good time. The proposed security of a bank guarantee is in my view not sufficient. It is not specific to this case – and the document annexed is incomplete - the applicant has not demonstrated what substantive loss he will suffer - other than that the respondent may not be in a position to refund the entire decretal sum if it is paid - this court has to balance the right of appeal and that of the respondent to enjoying the fruits of her judgment.
18. It is in the exercise of that balance - that I allow the application in the following terms,
  - a. There be stay of execution on condition that the applicant pays the respondent ½ the decretal sum, and deposits the other half in a joint interest earning account in the names of the advocates within 30 days hereof.
  - b. In default - the application will stand dismissed. The respondent is at liberty to execute.



c. The appeal be filed and served within 30 days hereof

d. Costs to abide to abide the appeal

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2<sup>ND</sup> OCTOBER 2023**

.....

**MUMBUA T MATHEKA**

**JUDGE**

CA Nelima

Kimondo Gachoka & Co. Advocate for applicant

Kitindio Musembi & Co. for respondent

Ms. Muia for the respondent

