



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maiyo v Too (Civil Appeal E179 of 2024)  
[2024] KEHC 14286 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E179 OF 2024  
SM MOHOCHI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**DIANA MAIYO ..... APPELLANT**

**AND**

**DAVID KIPCHIRCHIR TOO ..... RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 14<sup>th</sup> August, 2024 brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Rules. The Applicant seeks:
  - a. Spent
  - b. This Honourable Tribunal to issue stay of execution of the orders given on 13<sup>th</sup> August, 2024.
  - c. That this Honourable Tribunal be pleased to review and/or set aside the orders of the Hon, V. O Adet given on 13<sup>th</sup> August, 2024.
  - d. That the Court be pleased to makes all such other or further orders and directions as it may deem fit.
  - e. That cost of this Application be provided for.
2. The grounds in support of the Application are set out in the Application and the Supporting Affidavit sworn by Daina Maiyo.

**Applicant's Case**

3. It was the Applicant's case that she moved Court on 5<sup>th</sup> June, 2024 seeking Protection Orders against the Respondents for threats on her life. That when the matter came for Ruling oi 13<sup>th</sup> August, 2024



the Court Suo Moto ordered the parties to attend mediation without issuing protection orders. That she has no intention of engaging in mediation and the same cannot be imposed against parties.

4. It was her case further that she made a case hoping for protection against the Respondent and whilst the Application was ongoing, the Respondent continued harassing and threatening her. That she also made a case of the Respondent being an armed police man who had managed to make criminal proceedings not take off despite her making several complaints and pointed out the escalated careless killings in the country.
5. She argued that she risks losing her life and the appeal being rendered nugatory unless the orders in the said Ruling are stayed pending appeal.

### **Respondent's Case.**

6. In opposition to the Application, the Respondent swore the Replying Affidavit dated 16<sup>th</sup> September, 2024. He averred that the Application is devoid of merit, premature vexatious and abuse of the Court process. That the Application is fatally defective for being brought under the wrong provisions of the law.
7. He added that there was no Ruling and order made on the 13<sup>th</sup> August, 2024 by Hon Adet capable of being stayed, reviewed and set aside and or appealed. That the Court reserved its Ruling and referred the matter to Court Annexed Mediations. That by the Court screening the matter for mediation, he was excising his judicial authority guided by the principle of alternative forms of dispute resolution anchored under Article 159 of *the Constitution* of Kenya.
8. That the Appeal together with the application are ripe for dismissal as no leave of the Court was sought before appeal contrary to the provisions of the Civil Procedure Rules and that the Applicant was guilty of forum shopping as an application for review can only be made in the Court that made the Orders.
9. It was his case that there are no reasons as to justify the order of stay of execution as to the loss that would be occasioned to her and further the Applicant has not demonstrated willingness to place a security for the grant of the orders sought therefore failing in substance and procedure. He stated that the allegations made in the affidavit are mere lies without proof of documents.

### **Applicant's Submissions**

10. The Applicant Submitted on one issue on whether the Application is merited. She argued that a Court may adopt Alternative Dispute Resolution and relied on Kenya Pipeline Company Limited v Kenolkobil Limited [2013] eKLR where the Court was of the opinion that *the constitution* under Article 159 uses the word "promote" and not "shall refer to" alternative dispute resolution.
11. She submitted that there should be a balance to the cases submitted to alternative dispute resolution. Reliance was placed in Albert Mwaniki Kwenja & 2 Others v Jernado Njoka Kwenja [2020] eKLR to submit that parties ought to be willing to mediate where consent is important and there should be no imposition.
12. Reliance was further placed in Republic v Abdulahi Noor Mohaed (Alias Arab) eKLR where the Court dismissed an application to settle a matter given the nature of the case.
13. It was her submission that *the Constitution* protects the right to life and there is a threat to her life. That alternative dispute resolutions should be applied so there is consonance with *the constitution*.



## Respondent's Submissions

14. The Respondent submitted that the Application is fatally defective since it has been brought under the wrong provisions of the law whereas Order 43 of the Civil Procedure Rules provides for appeals from orders.
15. It was also submitted that no Ruling was delivered on 13<sup>th</sup> August, 2024 and no subsequent order was issued capable of being stayed or appealed against. That the Applicant did not also annex a Ruling or Order.
16. It was further the Applicant's submissions that leave of Court was also not sought before Appeal contrary to Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules. It was the Respondent's argument that the appeal does not lie as a right and leave ought to have been sought first.
17. It was also submitted that Order 45 of the Civil Procedure Rules provide that the Application for review ought to have been filed before the Court that issued the orders.
18. Finally, that the Applicant has not met the threshold for grant of orders for stay of execution as there is noncompliance with Order 42 Rule 6 of the Civil Procedure Rules. According to the Respondent substantial loss has not been established and no security has been provided for due performance.

## Analysis and Determination

19. I have considered the Application and find that the issues for determination is:
  - a. whether the Application is fatally defective for being brought under the wrong provisions of the law
  - b. Whether the Application has merit
  - c. Who bears the costs of the Application?
20. The Respondent has urged that the Application has been brought under the wrong provisions of the law therefore rendering it defective incurably. According to the Respondent the correct provision of law would have been Order 43 of the Civil Procedure Rules.
21. Looking at Order 43, it is Procedural Order for Section 75 of the *Civil Procedure Act*. The Order sets out the orders from which appeals would lie. The instant application is predominantly pegged on Order 42 Rule 6 of the Civil Procedure Rules which essentially provides for stay of execution pending appeal. I believe the Applicant cited the correct provision.
22. Even if that was not the case there is a plethora of authorities that have held that in the spirit of Article 159 (2) of *the Constitution* and Section 1As and 1B of the *Civil Procedure Act*, failure to cite the correct provisions of law is not fatal and would not warrant a dismissal. See *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs)* [2019] eKLR. See also *Faustina Njeru Njoka v Kimunye Tea Factory Limited* [2022] eKLR.

## Merits of the Application

23. Prayer No (b) as framed seeks that "This Honourable Tribunal to issue stay of execution of the orders given on 13<sup>th</sup> August, 2024 "
24. The prayer does not expressly seek stay of execution pending Appeal. Nonetheless, as stated, the application is hinged on Order 42 Rule 6 of the Civil Procedure Rules which essentially provides for



stay of execution pending appeal. If the Court was to proceed with the determination, it would proceed with a presumption that the Applicant is seeking Stay of Execution pending Appeal.

25. Assuming stay pending appeal was the gist of Prayer No. (b) Order 42 Rule 6 further lays down the conditions to be met by an Applicant in order to be entitled to an order for stay pending appeal. that (a) that she will suffer substantial loss unless the order is granted, (b) the Application has been made without unreasonable delay, and (c) such security for the due performance of such decree or order.
26. The issues deposed and submitted by the Respondent is that there was no order made on 13<sup>th</sup> August, 2024 capable of being stayed, reviewed, set aside and or appealed against. I note that the Applicant has attached pleadings from the Trial Court but the Ruling or order sought to be stayed has not been annexed for perusal.
27. Failure to attach the order poses several challenges since Court is not able to securitize the reasons the trial Court preferred to refer the matter to Court annexed mediation in order to issue the payers sought. I cannot begin to assess the substantial loss the Applicant is likely to suffer if the Applicant has not demonstrated the loss she will suffer if the matter proceeds to mediation.
28. If the Court was to make a finding on the merits or demerits of the Application it would be proceeding blindly and since Prayer No (b) seeks discretionary orders, the Court cannot exercise its discretion in a vacuum. The Applicant is literally asking the Court to make a decision on nothing.
29. Prayer No (c) seeks “this Honourable Tribunal be pleased to review and/or set aside the orders of the Hon, V. O Adet given on 13<sup>th</sup> August, 2024. The Law on review is contained in Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules.
30. The grounds for review are well established. The Applicant has not in any way listed why she needs the order or ruling reviewed. Was there an error on the face of it or discovery of new evidence? the Applicant has also failed to address this prayer in the affidavit and her submissions.
31. She sought the prayer then did not support it with grounds or arguments. It would be difficult for the Court to begin to analyse the threshold of granting of this order without anything to go by. This prayer cannot further be sustained since the order being reviewed is not attached for the Court to scrutinize it.
32. From a cursory look of the annexed pleadings from the Lower Court it is not clear what the Applicant clearly seeks in this Application. The Applicant has argued extensively that she is not interested in the mediation and wants her life to be protected.
33. If the Applicant felt she needed protection against the Respondent by this Court or that she was aggrieved by the decision of the Court not to grant the protection she ought to have moved this Court appropriately and framed the prayers to the effect. It is not in order to argue on one thing and seek something different.
34. The prayers as framed are vague and incapable of being granted based on the grounds in support. The Applicant’s application is destined to fail.
35. The upshot of the above is that the Applicant’s Application lacks merit and is dismissed with costs to the Respondent.

It is ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

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**MOHOCHI S.M**



**JUDGE**

