



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITUI
HIGH COURT ELECTION APPEAL NO. 1 OF 2018

MUSEE MATI.....APPLICANT

VERSUS

BARIDI FELIX MBEVO.....RESPONDENT

R U L I N G

1. **MUSEE MATI**, the applicant herein, has vide a **Notice of Motion** dated **5th October, 2021** moved this court for the following reliefs namely: -

- i. Spent**
- ii. Spent**
- iii. Spent**

iv. That this Hon. Court be pleased to order preservative stay of execution and enforcement of the warrants of sale and attachment dated 15.09.2021 and the proclamation of attachment dated 4.10.2021 respectively pending the hearing and final determination of the application dated 20th September 2021 which is coming for hearing on 27th January, 2022.

v. That this Hon. Court be pleased to issue or make such other orders as the ends of justice may demand.

2. This application is grounded on the following grounds namely:

- i. That at the time of filing an application dated 20th September 2021, the applicant had not noticed that execution had commenced.**
- ii. That the auctioneers have levied execution against the applicant's household goods on 4th October 2021.**
- iii. That it has become now necessary to request a stay of execution.**
- iv. That unless stay of execution is granted both the applications will be rendered nugatory and the applicants right to be heard will be obliterated and obscured.**
- v. That it is in the interest of justice to give the application dated 20th September 2021 a fair chance before execution can be carried out.**

3. In his supporting affidavit sworn on 5th October 2021, the applicant avers that he has a judgement against the Respondent in the Court of Appeal Nairobi vide Nairobi Court of Appeal Petition No. 28 of 2018 where he expects an amount in excess of the amount in the decree herein and the subject of the execution being levied on him.

4. He avers that he has a pending application for stay of execution dated 20th September 2021.

5. The applicant submits that after the determination of costs payable to him in the Court of Appeal, it is reasonable to expect that he would have a negotiated agreement where a set off would be done and whoever is owed more would be given time to settle the difference amicably.

6. He faults the Respondent for ambushing him with proclamation of his household goods.

7. He urges this court to exercise its discretion in his favour by postponing execution for a given period arguing that it makes more sense to do that until after the Court of Appeal determine costs payable to him. He submits that though he does not have decree at the moment for a set off he knows this decree will come.

8. The applicant further submits that parties in this matter have patiently waited since 2018 and that the Court of Appeal rendered itself on 24th May 2019.

9. He avers that the Respondent has not responded to his application dated 20th September 2021 and faults the Respondent's Counsel for replying to the application when he is not a party to the case. He argues that, it is only parties to a dispute that feel the weight of execution.

10. The Applicant has listed the following authorities to buttress his submissions.

i. Kenya Commercial Bank versus Commissioner of Police and 2 Others [2012] eKLR.

ii. Hanif Kassamali Hirji versus PMB Nominees Ltd [2014] eKLR.

iii. Danson Muriithi Ayub versus Evanson Mithamo Muroko [2015] eKLR.

iv. Gilbert Chege Njoroge versus Charles Kamau Mungai & Anor. [2021] eKLR.

11. The Respondent has opposed this application through a replying affidavit sworn on 12th October 2021 by his learned Counsel, Shadrack Mwendwa Mwinzi. The Respondent contends that this application is strange in law arguing that costs payable to the applicant in the court of appeal is indeterminate and the question of cross decree does not arise. He claims that he acts for the Respondent and he has not been served with any taxation proceedings in the Court of Appeal.

12. The Respondent avers that the Applicant paid only Kshs. 100,000 which has been acknowledged but has failed to pay the balance this necessitating execution.

13. The Respondent contends that this application has been made in bad faith because the applicant withdrew the money deposited as security of cost which made it difficult for the Respondent to recover costs forcing him to execute.

14. He further submits that, while costs payable to the Respondent have been determined the costs to the applicant in the court of appeal is indeterminate and that based on that there is no sufficient cause to stay the execution. He contends that the applicant is only interested in delaying or obstructing the satisfaction of the decree. He points out that this application seeks stay pending determination of a previously filed application which to him is a tactic just delay satisfaction of the decree.

15. He contends that this application is an abuse of court process because the applicant has used unknown procedure in seeking stay. He relies on the decision of **Samuel Kiambi versus M'noti M'mwirichia [2016] eKLR. He also relies on the decision in Navendra Chaganlal Solanki versus Neepea Auto Spares Ltd and Others [2015] eKLR.**

16. This court has considered this application and the response made. The applicant is asking for some preservatory orders but basically what he is seeking is simply a stay of execution of a decree based on Certificate of Costs passed against him. He has invoked the general inherent powers of this court under **Section 3, 3A and 63 (e) of the Civil Procedure Act.** He has also invoked the discretionary powers of this court under **Order 21 Rule 12 (1) of the Civil Procedure Rule** which provide: -

“Where in so far as a decree is for payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be paid by instalments, with or without interests notwithstanding anything contained in the contract under which the money is payable.”

The applicant is not seeking to liquidate the amount decreed through payments by instalments. He seeks for postponement pending determination of an application dated 20.09.2021 which application is also seeking stay of execution pending determination of taxation of costs in the Court of Appeal Election Petition No. 28 of 2018.

17. The Respondent's grievance against the applicant's option to file this application on top of the other application dated 20th September 2021 is legitimate because a cursory look of the two application shows that both applications substantively are seeking similar orders of stay of execution pending determination of taxation of bill of costs in the Court of Appeal. Prayer (2) of the former application in particular seeks for the following relief/order;

“That this honourable court be pleased to grant postponement or stay of execution of the decree and certificate of stated costs dated 20th August 2021 to await taxation of the applicants' bill of costs dated 28th February 2021 against the Respondent herein, at Court of Appeal Election Petition Appeal No. 28 of 2018, Musee Matu versus Baride Felix Mbevo & 2 Others with a view to apply set off.”

18. In this instance, the applicant in his substantive prayer (4) seeks the following relief/order.

“That this Hon. Court, finally, be pleased to order preservatory stay of execution and enforcement of the warrant of sale and attachment dated 15.09.2021 and the Proclamation of attachment dated 4th October 2021 respectively pending the hearing and final determination of the application dated 20th September 2021 which is pending for hearing on 27th January 2022.”

19. The Applicant is therefore evidently seeking for similar prayers which is stay of execution of course he has cleverly introduced the word “*preservatory*” in this instance, perhaps to cover the mischief but it is clear that the applicant is simply being vexatious here. I say this because, why didn’t he simply prosecute his previous application dated 20th September 2021? Or even if he claims that he was unaware that execution could be carried out why couldn’t he simply file a certificate of urgency and state that, owing to the exigencies arising, there was need to determine whether a temporary stay was merited?

20. The applicant is duly represented by a Counsel who certainly knows that there was decree or certificate of costs passed and once the same is passed, the decree holder is at liberty to execute because there was not stay of execution. I am not persuaded by the claims that the Respondent ambushed him with execution. There was no ambush at all because the Respondent was simply engaged in a lawful process of execution.

21. The applicant under the provisions of **Order 21 Rule 12(1)** is required to demonstrate a good cause for this court to exercise its discretion to postpone payments of taxed costs. The question posed is has he shown a “*good cause*”? To answer this question objectively, this court has considered the applicant’s argument. He says that he was awarded costs in the court of Appeal vide Election Petition Appeal No. 28 of 2018. However, it is evident that the costs have not been assessed. The invoking of **Order 22 Rule 14 & 15 of the Civil Procedure Rule** which relates to cross-decrees by the applicant at this stage is therefore premature and speculative. There is no decree passed in his favour as yet. So he cannot talk of a cross-decree at this stage. The costs in the Court of Appeal is yet to be assessed and it is therefore, purely speculative for the applicant to claim that the costs in the Court of Appeal will be more than the decree herein.

22. Taxation of costs depends on provisions of Advocate Remuneration Order which stipulates sums payable on instructions fees, attendances and other itemised bills. It does not necessarily mean that the higher a litigant goes in court’s hierarchy, the higher the costs. But even if the costs in the Court of Appeal were to be higher, there is nothing stopping the applicant from demand for payments in satisfaction of the decree that will be passed in his favour. He certainly cannot ask for postponement of payments of costs on the basis that he has another pending application for stay of execution. That is in my view, being vexatious.

23. The prayer being sought here if granted will obviously have ramifications on the application dated 20th September 2021. The applicant is asking this court to give that application a chance to be canvassed but no one has denied him a chance to ventilate his application. What he is doing in this instance is a kin abuse of the process and causing unnecessary delay to determination of the same very application. That in my view, is undesirable and in fact violates the objectives stipulated under **Sections 1A and 1B of the Civil Procedure Act** which is the very provision that the applicant ironically invoked in this application. This court has a duty to foster and facilitate efficient and expeditious disposal of matters brought before it. It is even significant to note that this is an election related dispute which in itself has strict Constitutional timelines within which to be canvassed and determined. The election dispute was resolved well on time and even if it is true that the matter escalated all the way to the Supreme Court, there is no excuse to cause further unnecessary delays in settlement of costs and put the matter to rest.

24. The Applicant has also invoked the inherent powers of this court under **Section 3A and Section 63 (e) of the Civil Procedure Act** but the exercise of those inherent powers are meant to address ends of justice and address matters not specifically covered by the **Civil Procedure Act or Civil Procedure Rules**. The underlying factor is to prevent abuse of court process. My findings above in respect to the abuse of court process certainly rules out the applicant from successful invoking the said inherent powers of this court.

25. I have considered the authorities cited by the applicant and the decisions cited cannot aid his cause.

26. In the case of **KCB versus Commissioner of Police & 2 Others (Supra)**. The court was dealing on application under **Order 22 Rule 14** where the court was dealing with two cross decrees. In this instance, there is only one decree passed in favour of the Respondent. The decree in respect to the Applicant’s costs in the court of appeal has not been passed because costs have not been taxed. The cited decision is therefore, not relevant here. The decision in **Hanif Kasamali Hirji [Supra]** is also viewed in the same light because the court was dealing with existence of a set-off which was a determinate factor. But here the costs due to the applicant are indeterminate.

27. The decision in **Danson Muriithi Ayub versus Evanson Mithamo Muroko [2015] eKLR** is even familiar particularly to this court having dealt on the matter. The ratio *decidendi* of that decision is similar to the above cited decisions. It simply does not apply here. This court was dealing with 2 cross decrees passed in 2 separate suits in respect to the same parties. **Order 22 Rule 4** was perfectly applicable unlike the situation here. The decision in **Gilbert Chege Njoroje [Supra]** also relates to the applicability of **Order 22 Rule 4 of the Civil Procedure Rules**.

28. This court finds that it is premature to apply the provisions of **Order 22 Rule 14** in respect to the present situation because as I have said above, the applicant simply does not have a decree in his favour. Of course he has every reason to be optimistic and hopeful that eventually he will reach there but even a child beginning Grade One is optimistic that in the near future he/she will sit Grade 6 exams and qualify to go to Junior Secondary School. That hope and optimism does not mean that the child at the level of grade one can claim that he/she has a Certificate certifying that he/she has done Grade 6. For that child in Grade 1, Grade 6 is hope and optimism which will only crystalize upon education process and progress. That hope is similar to the situation obtaining here. The applicant’s hope to eventually get a decree in his favour is predicated upon the process of taxation of bill of costs and issuance of Certificate of Cost and eventually a decree. For now, this court finds that litigations must come to an end at least in this forum. The parties can pursue their costs in Court of Appeal at their convenience.

From the foregoing, this court finds no merit in the application dated 5th October 2021. The same is dismissed with costs to the Respondents.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 12TH DAY OF NOVEMBER, 2021

HON. JUSTICE R. K. LIMO

JUDGE