



**HB & another v SAS & another (Family Appeal E057 of 2025)  
[2025] KEHC 18013 (KLR) (1 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E057 OF 2025**

**G MUTAI, J**

**DECEMBER 1, 2025**

**BETWEEN**

**HB ..... 1<sup>ST</sup> APPELLANT**

**AAE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAS ..... 1<sup>ST</sup> RESPONDENT**

**AA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before me is dated 15<sup>th</sup> October 2025. It seeks a stay of execution of the ruling and the order of the Kadhi’s Court Mombasa dated 9th October 2025 in Kadhi Court Divorce Cause No E301 of 2024; SAS v AA pending hearing and determination of the appeal, and for the costs of the application to be provided.
2. The application was supported by the affidavit of HBM, the County Payroll Manager of Garissa County, who deposed that they were unable to comply with the Court order as the net salary of the 2<sup>nd</sup> Respondent was insufficient to pay Kes.60,000/- that the court below had ordered. He attached to his affidavit a pay slip of the 2<sup>nd</sup> Respondent, which shows that his net salary is Kes18,056/20. The gross pay is Kes.125,670/-, with the total deductions being Kes.107,583/80.
3. The Court notes that the deponent did not attach the execution page of the affidavit. Mr B stated that he appeared in Court on 8<sup>th</sup> October 2025 to explain their difficulty in complying with the orders of the Court, but that the Court below nevertheless ordered that the Chief Officer of Health, Garissa County, and the payroll manager be arrested for non-compliance, be brought to Court on 21<sup>st</sup> November 2025, and committed to civil jail for 30 days.



4. The 2<sup>nd</sup> respondent does not oppose the application. The 1<sup>st</sup> respondent opposes the application and filed a Notice of Preliminary objection dated 17<sup>th</sup> November 2025, in which she averred that the preliminary objection was incompetent because the contempt was not purged first. For that reason, the appellants/applicants lacked audience. She further averred that no leave to institute the application was first obtained before the subordinate Court, and the affidavit was incurably defective as the execution page of the affidavit was not attached.
5. Mr. AA filed a replying affidavit sworn on 17<sup>th</sup> November 2025 in which he deposed that his net salary was Kes.18,086/20, which amount could not sustain the deduction. He contended that the deduction offended section 44(1) of the Civil Procedure Act, which limits deductions to 1/3 of the take-home pay. He deposed that he had other obligations, including rent, school fees, and medical expenses, which render compliance with the Court order impossible.
6. The appellants/applicants filed the complete affidavit on 17<sup>th</sup> November 2025. The same shows that HBM executed the supporting affidavit on 15<sup>th</sup> October 2025 before a Commissioner of Oaths in Nairobi.
7. The applicants were heard on 19<sup>th</sup> November 2025. I have considered the parties' submissions, the documents filed, and the applicable law.
8. Since this is an application for stay pending appeal, the Court must consider whether the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules have been met. These are: -
  - i. Whether the applicants will suffer substantial loss unless the order sought is granted;
  - ii. Whether the application was filed without undue delay; and
  - iii. If the security for the due performance of the decree has been given.
9. Stay of execution is intended to preserve the subject matter pending the hearing and determination of the appeal. In *RWW v EKW* [2019]KEHC 6523 (KLR), it was held that:-
  - “ 8. The purpose of an application for stay of execution pending 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 that 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 called upon to ensure that no party suffers prejudice that cannot be compensated by an award or costs.”
10. The 1<sup>st</sup> respondent objects to the application based on the fact that the supporting affidavit was incomplete and that no leave was sought before the filing of the said application. Although the original filing lacked the execution page, the complete document has since been supplied. I am of the view that the failure to file the full document was an error on the part of counsel, which should be excused by the Court. I say so for the following reasons.
11. Firstly, where a matter before the court is not hopeless and beyond redemption, the Court should, in the interest of justice, make a decision that favours sustaining the suit, rather than dismissing it on technicalities, so that a decision on the merits can be made. I am guided by the decision of the Court



in the case of Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] KEHC 8695 (KLR), where it was held that: -

“(17) I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in *the Constitution* especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit...”

12. Secondly, mistakes do happen in the course of an advocate's work. Madan, JA, as he then was, stated this fact eloquently in the case of Belinda Murai & 9 others v Amos Wainaina [1979] KECA 25 (KLR), where he said that: -

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice”

13. There is a clear and present risk that the applicants will suffer loss of liberty as they could be imprisoned for 30 days as a consequence of the ruling of the court below, on account of an order they say is incapable of being enforced. That contention appears to be reasonable. Perusal of the 2<sup>nd</sup> respondent's pay slip shows that he earns a net pay of Kes.18,086/20, far less than Kes.60,000/-, which the appellants/applicants were required to deduct. It has been stated that the deduction runs afoul of the law.

14. Section 44 of the *Civil Procedure Act* states that “two-thirds of the salary of a public officer or other person in employment” is not liable to attachment. In this case, the attachment exceeds that threshold and, in fact, calls on the employer to chip in and pay the debt on behalf of the employee. That, on a prima facie basis, is perverse. In my view, the first test has been met.

15. There is no doubt that the application was filed without undue delay. The applicants have expressed a willingness to comply with the Court's orders. In the circumstances, I am persuaded that the remaining two tests have been met.

16. In my view, the application dated 15<sup>th</sup> October 2025 has merit. The same is allowed as prayed. I make no orders as to costs. In the interest of justice, I direct that the appeal be heard on a priority basis.

17. It is so ordered.



**DATED AND SIGNED IN MOMBASA, THIS 1<sup>ST</sup> DAY OF DECEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Dayib, for the Appellant/Applicant;

Mr Asige, for the 1<sup>st</sup> Respondent;

Mr Bundi, for the 2<sup>nd</sup> Respondent;

Arthur – Court Assistant.

