



REPUBLIC OF KENYA



KENYA LAW
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**Macharia v Maina & Maina Advocates (Civil Appeal (Application)
E086 of 2021) [2023] KECA 1472 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1472 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E086 OF 2021
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
DECEMBER 8, 2023**

BETWEEN

EDWARD MWANGI MACHARIA APPELLANT

AND

MAINA & MAINA ADVOCATES RESPONDENT

*(Being an application for stay of execution and of further proceedings
against the Ruling and Orders of the High Court of Kenya at Nairobi (J. K.
Sergon, J.) delivered on 6th November 2020 in Civil Appeal No. 186 of 2016)*

RULING

1. The applicant, Edward Mwangi Macharia, instructed the respondent, Ms. Maina and Maina, in July 2018 to represent him in Nairobi HCC Miscellaneous Application No 46 of 2006 in place of Ms Waiganjo and Company.
2. The proceedings in the applicant's judicial review Miscellaneous Application aforesaid were determined whereupon the respondent filed their Bill of Costs dated July 4, 2013, which was taxed and allowed in the sum of Kes 232,690=.
3. Dissatisfied with the decision of the Taxing Officer, the applicant filed an appeal in HCCA No. 186 of 2016, which was struck out on 8th December 2017 vide the Ruling of J. K. Sergon, J. following a preliminary objection raised by the respondent.
4. Dissatisfied further by the ruling of J. K. Sergon, J., the applicant moved to this Court on appeal. He simultaneously filed a Chamber Summons dated March 18, 2019 in the High Court seeking stay of execution and of further proceedings pending determination of his appeal to this Court. His Chamber Summons was dismissed by J. K. Sergon, J. in a ruling dated November 6, 2020.



5. Subsequently, the applicant filed the notice of motion dated February 26, 2021 seeking stay of execution of the ruling of Serگون, J. and of further proceedings in the High Court pending hearing and determination of his appeal herein.
6. The applicant’s Motion is made under rule 5(2) (b) of the [Court of Appeal Rules](#) supported by the applicant’s affidavit sworn on February 26, 2021. It is anchored on 12 grounds set out on the face of the Motion, which we need not replicate here.
7. In addition, the applicant filed written submissions and list of authorities dated July 1, 2021. He cites, *inter alia*, this Court’s decision in [Regnoil Kenya Limited v Winfred Njeri Karanja](#) [2019] eKLR and submits that no prejudice would be suffered by the respondent if the orders sought in his Motion are granted.
8. In opposition to the applicant’s Motion, the respondent filed written submissions dated April 9, 2021, but did not file any affidavit in reply. They cite, *inter alia*, the case of [Kenya Shell Limited v Benjamin Karuga Kibiru and another](#) [1986] eKLR, arguing that an order for stay of execution should not be granted where the applicant has not demonstrated that a substantial loss will result. Be that as it may, the ruling and orders sought to be stayed constitute negative orders incapable of being stayed. The Court of Appeal in [Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union \(Kenya\)](#) [2015] eKLR held that:

“Following that approach of looking at the nature of the orders even before delving into the said principles in a rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & anor* [2005] 1 EA 53 where it was stated:

“... The order which dismissed the suit was a negative order which is not capable of execution...”

9. Likewise, the Court of Appeal in [George Ole Sangui & 12 others v Kedong Ranch Limited](#) [2015] eKLR held that:

“20. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

With regard to the prayer for stay of proceedings in the High Court pending appeal, stay of proceedings is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of



each case. The circumstances of the case before us does not merit the order sought. As stated by this court in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR -

“The court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts..”

10. Finally, we cite with approval the decision of the High Court of Kenya at Meru the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR where Gikonyo, J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”

11. Having considered the applicant’s motion, the affidavit in support thereof, the grounds on which it is anchored, the applicant’s written submissions, those of the respondent, and the cited authorities, we reach the inescapable conclusion that the applicant’s motion fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

