



REPUBLIC OF KENYA



**KENYA LAW**  
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**Makanga v Atoni (Civil Appeal E046 of 2022)  
[2024] KEHC 756 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E046 OF 2022**

**DK KEMEL, J  
JANUARY 31, 2024**

**BETWEEN**

**JONAH WAKA MAKANGA ..... APPLICANT**

**AND**

**MUSONGE WANYONYI ATONI ..... RESPONDENT**

**RULING**

1. The Appellant /Applicant filed the present application dated 7/9/2-23 seeking the following reliefs:-
  1. Spent
  2. Spent
  3. That an order of stay of execution of decree and warrants of attachment against the Appellants movable property pending the hearing of the application and the Appeal
  4. Spent
  5. That this court do lift and or set aside the warrants of attachment and proclamation notices against the appellants movable property.
  6. That the costs of the application be provided for
2. The Application is supported by grounds set out on its face and by an affidavit of the appellant sworn on even date. The Appellant's case is *inter alia* that the Applicant is aggrieved by the judgement of the trial court in Bungoma CMCC No. 176 of 2023 dated 17/9/2021; that the Respondent has commenced execution of the decree and that the Appellants stands to suffer loss and prejudice if stay is not granted; that the Appellant is apprehensive that if the decretals sum is paid the Respondent will not be in a position to refund the same in the event of success of Appeal.



3. The Application is opposed by the Respondent who filed a replying affidavit dated 22.9.2023 by his learned counsel Omagwa Angima who averred *inter alia*; that the application is res judicata and duplicity of a previous application dated 6/12/2021. 05/5/2023 and 6/12/2021 in Bungoma HC Misc Appl No. E082/2021; That this court is already functus Officio; that the Appellant was granted conditional stay pending an intended appeal, that the Appellant has not preferred appeal or review on the various rulings delivered in those applications; that the Appellant is out to frustrate and defeat the cause of justice;
4. I have considered the rival affidavits and submissions presented.  
It is not in dispute that the Appellant has filed several applications before the lower court dated 6.12.2021 and 5.5.2023 seeking for orders of stay of execution and in which the first one was granted conditional stay while the second one was dismissed. It is not in dispute that this court vide a HC misc. application No. E082 of 2021 granted the Appellant leave to lodge appeal but dismissed his request for order of stay of execution of the lower court decree. It is also not in dispute that the appellant has not lodged an appeal review against this court's refusal to grant him orders of stay vide HC Misc E082 of 2021. It is also not in dispute that the Appellant later approached the lower court for orders of stay of execution despite having lodged this appeal and which application dated 5.5.2023 was dismissed. That being the position, I find the only issue for determination is whether the application has merit.
5. As noted vide paragraph 4 above, the Appellant has in the past approached this court vide HC Misc E082 of 2021 and in the lower court for orders of stay of execution which were dismissed. Hence, the present application is *res judicata* and that this court is already functus officio. It seems the Appellant is paying lottery with courts even after losing his quest for orders of stay of execution. The conduct of the Appellant in approaching this court and then going back to the lower court and then back to this court seeking similar relief is at best an abuse of the court process. Hence I do not see the need to subject the application though the provision of order 42 Rule 6 (2) of the [Civil Procedure Rules](#) since the matter is res judicata.
6. In view of the foregoing observations, it is my finding that the Appellant's application dated 7.9.2023 lacks merit. The same is dismissed with costs to the Respondent.

**DATED AND DELIVERED AT BUNGOMA THIS 31<sup>st</sup> day DAY OF JANUARY 2024**

**D KEMEI**

**JUDGE**

In the presence :-

Shikhu for Appellant/Applicant

Okaka for Respondent

Kizito Court Assistant

