



REPUBLIC OF KENYA



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**Masika v Makokha (Civil Appeal E039 of 2024)
[2024] KEHC 10340 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 10340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E039 OF 2024**

F WANGARI, J

MAY 30, 2024

BETWEEN

GEORGE SIKUKU MASIKA APPLICANT

AND

ELIUD OYENGA MAKOKHA RESPONDENT

RULING

1. This ruling relates to an application dated 28th February, 2024 which sought for the following orders: -
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this Appeal this Honorable Court be pleased to stay judgment, ruling, execution and any further proceedings in Mombasa Civil Suit No. MCCC 1163 of 2021;
 - d. That costs of this application be in the cause.
2. The grounds in support of the application were that the appellant has lodged an appeal against the Ruling of Hon. Lewis Gatheru where the court dismissed a notice of motion seeking for leave to liquidate the decretal sum in monthly instalments and the respondent now threatens to execute against the appellant.
3. That the appeal will be rendered nugatory if the application is not granted. That the appellant is willing to liquidate the decretal sum in monthly instalments of Kshs.150,000/- per month.
4. The application was strenuously opposed through a replying affidavit dated 13th March, 2024 sworn by the Respondent. He averred that the application and the orders sought cannot issue in law as they



are superfluous, an abuse of the legal process and completely unnecessary. That the application also lacks merit and is made in bad faith.

5. That the appellant had only paid three instalments since making the impugned application and that he has failed to show the court that he has financial restraints as alleged. That the appellant has also not shown how the intended appeal is likely to be rendered nugatory.
6. The respondent further avers that the Respondent is financially stable and capable of refunding any sums should the appeal be successful. That the appellant shall not suffer irreparable loss as the decretal amount is known and that the appellant has not tendered any security to the court as required by law.
7. The Respondent urged the court to dismiss the application as it is only meant to deny the respondent the enjoyment of the fruits of his judgment.
8. The Applicant filed a further affidavit wherein he states that his failure to liquidate the decretal sum is not deliberate but that he has been incapacitated by misfortune in his business which had led to accrual of debts owed to numerous creditors. He had attached copies of letters in respect of different creditors that he allegedly owes.
9. The application was canvassed by way of written submissions wherein both parties complied by filing detailed submissions and cited various authorities in support of their rival positions.

Analysis and Determination

10. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -
 - a. Whether the Applicant has made out a case for the grant of the orders sought;
 - b. If the order in (a) is in the affirmative, whether this court will stay the proceedings in Mombasa CMCC No. E1163 of 2021;
 - c. Who bears the costs of the application?
11. The principles for granting of stay of execution pending hearing of an application or appeal are the same. It is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides as follows: -
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

12. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...The purpose of an application for stay of execution pending an 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 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 also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

- 13. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Applicant submits that he does not deny that he owes the Respondent but that the payment of the entire decretal amount at once will economically diminish his ability to settle the decree in question as he will not be able to carry out his business that is also his sole source of income.
- 14. The Respondent submits that the applicant will not suffer any substantial loss as the decretal sum is a money decree and quantifiable.
- 15. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court while addressing this limb had the following to say; - “...No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss... This is so because execution is a lawful process...” Therefore, the fact that the Respondents might have set in motion the process of execution does not of itself amount to substantial loss. As was held in the above case, the Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.
- 16. In the same decision above, the Court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.



17. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

18. It is my considered view that were this court to grant one party stay as against the other, it would have placed them at a more prejudicial position than they are currently. The suit in the Magistrate’s Court was instituted way back in 2021. The cause of action is said to have arisen in 2017 after a botched transaction. The Appellant does not deny that he owes the Respondent the decretal sum but states that his fortunes have changed and he is amenable to paying in instalments.

19. From the Instalments said to have been paid, he had cleverly paid two instalments and later in November 2023 and December 2023 and then paid a third instalment 10 days before filing the instant application. The Applicant seems to be buying time and in the process delaying the Respondent from enjoying the fruits of his judgment. Litigation must come to an end.

20. He who comes to equity must do so with clean hands. The Appellant had and has the means to pay the decretal amount as he has not shown to the court how his fortunes have changed save for the numerous letters annexed and which cannot be said to bear an evidential value at this point.

21. On the issue of delay, I note that both parties agree that the application was filed timeously and I need not say more on this limb.

22. As to the issue of costs, the same follows the event. That is what section 27 of the *Civil Procedure Act* provides. The respondent shall have the costs of this application.

23. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The application dated 28th February, 2024 lacks merit and is hereby dismissed in its entirety.
- b. Costs of this application are awarded to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF MAY, 2024.

.....
F. WANGARI

JUDGE

In the presence of;

M/S Theuri Advocate h/b for Wanyonyi Advocate for the Appellant

M/S Osino Advocate for the Respondent

Barile – Court Assistant

