



Araka aka Hellen Osore v Dazzan Investments Limited (Civil Appeal E108 of 2021) [2023] KEHC 27076 (KLR) (Civ) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E108 OF 2021

CW MEOLI, J

DECEMBER 20, 2023

BETWEEN

HELLEN MALOU ARAKA AKA HELLEN OSORE APPLICANT

AND

DAZZAN INVESTMENTS LIMITED RESPONDENT

RULING

1. The motion dated 23.02.2023 by Hellen Malou Araka aka Hellen Osore (hereafter the Applicant) seeks inter alia that there be an order to stay execution of the warrants of arrest issued on 13.02.2023 in Nairobi Milimani CMCC 8757 of 2017 (hereafter lower court suit) pending hearing and determination of the appeal; that the court be pleased to allow the Applicant to liquidate the decretal sum by reasonable monthly installments pending the hearing and determination of the appeal; and that the court be pleased to grant any further orders as it may deem just and expedient.
2. The motion is expressed to be brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 42 Rule 6 and Order 51 of the *Civil Procedure Rules* (CPR), *inter alia*, on grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant.
3. To the effect that on 13.02.2023 when the Notice To Show Cause (NTSC) in execution of the judgment in favour of Dazzan Investments Limited (the Respondent) came up for hearing, the lower court directed the Applicant to settle the decretal sum of Kshs. 2,902,778.98/- within 14 days, or in default be committed to civil jail. That the court failed to appreciate her affidavit material in which she proposed settlement by installments having no alternate source of income apart from her salary. She asserts that committal of civil jail is prejudicial to her as the sole breadwinner of her family. That it would result in irreparable loss and damage compounded by possible loss of her current employment. In conclusion, she urges the court to stay the orders issued in the lower court suit on 13.02.2023 to accord her an opportunity to liquidate the decretal sum in installments.



4. The Respondent opposes the motion through a replying affidavit sworn by Charity Lumbasi Wainaina, who describes herself as a director of the Respondent. Setting out the history of the matter, she proceeds to attack the Applicant's affidavit material and avows that the Applicant is not being candid, as she owns properties, a real estate company and has the ability to settle the decretal sum. That the Applicant has consistently acted in bad faith for ten years by issuing false promises to repay the debt due to the Respondent's debt and appears intent to compel the Respondent to accept an unreasonable payment proposal.
5. That the Applicant has not demonstrated substantial loss while the appeal does not raise any triable issues and is intended to hinder the just determination of proceedings. She concludes by deposing that the Respondent was legally within its right to seek the Applicants' committal to civil jail for failing to settle the decretal sum.
6. The motion was canvassed by way of written submissions. Counsel for the Applicant relied on the provisions of Section 38 of the CPA to posit that execution by way of detention is a drastic measure and the court ought to exercise its discretion carefully. That the decretal sum of Kshs. 2,902,778.98/- is too large for payment within 14 days as ordered by the trial court. Reiterating the Applicant's affidavit material, counsel argued that out of goodwill the Applicant has offered a reasonable proposal on settlement, and that the motion has been made in bad faith. Citing the case of Solomon Muriithi Gitandu & Another v Jared Maingi Mburu [2017] eKLR, counsel reiterated the various methods of execution stating that the Respondent did not attempt any other alternative methods before seeking the arrest and detention of the Applicant. That the lower court in ordering the committal of the Applicant to civil jail ignored the legal safeguards relating to the issue and this court ought to grant the stay order to allow the Applicant prosecute her appeal.
7. As regards liquidation of the decretal sum, counsel asserted that the Applicant was willing to pay a lumpsum of Kshs. 300,000/- by way of banker's cheque thereafter installments of Kshs. 100,000/- per month and Kshs. 200,000/- per month as of January 2024. That the said proposal is reasonable given that the Applicant's only source of income is her salary citing the harsh economic times. Counsel argued that dismissal of the motion will result in the Applicant being unable to generate income towards settlement of the decretal sum. That allowing the Applicant to liquidate the amount in instalments, would be beneficial to Respondent as opposed to committal to civil jail. It was submitted further that the appeal herein has a high chance of success and the Applicant ought to be allowed to prosecute it to conclusion. Counsel thus urged the court to allow the motion as prayed.
8. On behalf of the Respondent, counsel addressed the singular issue whether the Applicant's motion has satisfied the criteria for grant of stay of execution. While placing reliance on the provision of Order 42 Rule 6(2) of the CPR and read with Section 1A & 1B of the CPA counsel argued that in considering the instant motion, the court is enjoined to give effect to the overriding objective in the exercise of its powers. She contended that the Applicant has not demonstrated sufficient cause to warrant a stay of execution of the orders of the trial court on grounds that there is no appeal as against the decree sought to be executed; that the Applicant has consistently defaulted on proposals made in the past; that the Applicant is a person of means and capable of settling the decree; that the Applicant has consistently acted in bad faith towards the Respondent; that the Applicant has never formally moved the court to settle the decretal sum in installments; and that the Applicant does not have an arguable appeal.
9. Counsel thus relied on the decisions in Rajabali Alidina v Remtulua Alidina & Another [1961] EA 565 and Grand Creek LLC & Another v Nathan Chesangmoson [2015] eKLR to submit that the Applicant has not met the test to warrant this court order settlement of the decretal sum by way of instalments.



10. On the question of substantial loss, while citing the decision in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and *RWW v EKW* [2019] eKLR, it was reiterated that the Applicant has not appealed against the decree of the lower court meanwhile has not demonstrated how execution will irreparably affect her. That she has further not established that she will suffer substantial loss by meeting her obligation and or settling the decretal sum neither offered security for due performance of the decree. In summation counsel urged the court to dismiss the motion and exercise its discretion judicially by allowing the Respondent to enjoy the fruits of its judgment as it has since been prejudiced by the Respondent for far too long.
11. The court has considered the material canvassed in respect of the motion. At the outset this court notes that the respective affidavit material and submissions of the parties appear to canvass issues that belong to the appeal itself. It is pertinent to state that at this interlocutory stage, the court is not concerned with the merits of the appeal.
12. The Respondent's counsel has correctly pointed out that the Applicant's appeal is not against the decree in the lower court giving rise to the execution proceedings. The court having perused the memorandum of appeal and the parties' respective material has confirmed that this appeal relates to an order of the lower court, made in execution proceedings brought pursuant to the provisions of section 38(d) of the *Civil Procedure Act* and Order 22 Rules 31 to 34 as read with Rule 7 (j)(iii) of the *Civil Procedure Rules*.
13. Section 75 of the *Civil Procedure Act*, while providing for orders from which appeals lie as of right, expressly excludes therefrom orders made in execution of a decree for the arrest or detention of a judgment debtor. Similarly, under Order 43 Rule 1 (k) of the *Civil Procedure Rules*, appeals only lie as of right from orders contemplated under Order 22 Rules 25, 57, 61(3) and 75 of the *Civil Procedure Rules*, hence excluding orders made under Rules 31 to 34 of Order 22 of the *Civil Procedure Rules*. This means that the Applicant could only approach this court on appeal, with leave, obtained from the lower court pursuant to section 75 (1) of the *Civil Procedure Act* and Order 43 Rule 1(2) and (3) of the *Civil Procedure Rules*. No copy of an order granting such leave to file this appeal has been exhibited before this court by the Applicant or impleaded in the memorandum of appeal.
14. In the circumstances, the appeal is incompetently before this court and the Applicant has wrongly invoked the appellate jurisdiction of this court. The erroneous invocation of this court's appellate jurisdiction is not a mere technicality that is curable by application of the provisions of Article 159(2) (d) of the Constitution and Section 3A of the *Civil Procedure Act*. In *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR, the Court of Appeal while considering a notice of appeal that was invalid for want of leave stated inter alia that:

“Without leave of the High Court, the Appellant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave, which has not been sought and obtained is dead in the water.”
15. The appeal filed by the Applicant is incompetent and incapable of giving anchor to her motion. The motion dated 23rd February 2023 being equally incompetent is hereby struck out with costs to the Respondent. The Applicant is directed to regularize her memorandum of appeal within 30 days of today's date failing which it will stand automatically struck out with costs to the Respondent.



**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF
DECEMBER 2023.**

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Oonge

For the Respondent: N/A

C/A: Emily

