



REPUBLIC OF KENYA



**Irungu & another v Matheka (Civil Appeal E677 of 2022)  
[2024] KEHC 12317 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12317 (KLR)

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

**CIVIL**

**CIVIL APPEAL E677 OF 2022**

**MA OTIENO, J**

**SEPTEMBER 26, 2024**

**BETWEEN**

**DUNCAN GATUIKU IRUNGU ..... 1<sup>ST</sup> APPELLANT**

**JOSHUA MUSYOKI NZAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHARLES KYALO MATHEKA ..... RESPONDENT**

*(Being an appeal against the Ruling of Hon. B.J. Ofisi (Mrs) RM  
delivered on 30<sup>th</sup> April 2021 in MILIMANI CMCC 8435 OF 2018)*

**JUDGMENT**

1. This is an Appeal from the Ruling of the magistrate's court delivered on 30<sup>th</sup> April 2021 on the Appellants Notice of Motion Application dated 14<sup>th</sup> December 2020 in the Milimani CMCC No. 8435 of 2018 where the Appellants herein sought to stay execution of e decree dated 28<sup>th</sup> October 2020 against them.
2. The background of the matter is that following a road traffic accident that occurred on 15<sup>th</sup> May 2018 along Mombasa Road involving the 1<sup>st</sup> Appellant's motor vehicle registration KBN 395D (which was then being driven by the 2<sup>nd</sup> Appellant) the Respondent who was travelling therein as a fare paying passenger instituted proceedings in the lower court on 21<sup>st</sup> September 2018 seeking compensation against the Appellants for the injuries suffered in the accident.
3. The Appellants filed their defence on 29<sup>th</sup> November 2018 through the firm of M.J. Okumu Advocates, denying liability.



4. On 16<sup>th</sup> December 2019, a consent was recorded between the parties where liability was apportioned in the ratio of 85:15 in favour of the Respondent. Parties then proceeded by way of written submissions on the issue of quantum and a judgment was eventually delivered on 13<sup>th</sup> March 2020 where damages were awarded in the sum of Kshs. 600,000/- (subject to 15% contribution) was awarded to the Respondent as compensation for the injuries.
5. The Appellants failed to satisfy the decretal sum and the Respondent consequently instructed the firm of Betabase Auctioneers, licensed auctioneers, to undertake execution of the decree on his behalf.
6. In the course of the execution of the decree, Betabase Auctioneers served the 1<sup>st</sup> Appellant with a warrant of attachment dated 28<sup>th</sup> October 2020 demanding payment of Kshs. 681,831.14 plus auctioneers' charges of Kshs. 175,000/= failure to which the 1<sup>st</sup> Respondents vehicles registration numbers KBN 395D and KBK 983V, together with household goods would be attached and auctioned in satisfaction of the decretal sum.
7. Upon service with the proclamation notice, the Appellants filed a notice of motion application dated 14<sup>th</sup> December 2020 in the trial court seeking an order of stay of execution of the decree against them on the basis that they had not been served with any pleadings in matter and that they therefore no prior notice of the subject suit against them. The Appellants asserted that they only became aware of the proceedings when they were served with the proclamation notice.
8. The Application was opposed by the Respondent vide his Replying affidavit sworn on 11<sup>th</sup> January 2021. According to the Respondent, the Application for stay of execution of the decree was unmerited since the Appellants had been served with the summons and the plaint on 29<sup>th</sup> October 2018 and that following service, they entered appearance on 7<sup>th</sup> February 2019 through the firm of M. J. Okumu Advocates who participated in the hearing until the matter was concluded vide the trial court's judgment of 13<sup>th</sup> March 2020.
9. On 30<sup>th</sup> April 2021, the trial court (Hon. J.B. Ofisi-RM) delivered her ruling dismissing the Appellants' application for stay of execution on the basis that from her review of the proceedings, the Appellants had participated in the proceedings and consent judgment on liability accordingly entered in the ratio of 85%:15% in favour of the Respondent. The court found the reasons advanced by the Appellants in their application for stay not plausible.

### **The Appeal**

10. Aggrieved by the trial court's ruling of 30<sup>th</sup> April 2021, the Appellant vide his memorandum of appeal dated 23<sup>rd</sup> August 2022 lodged an appeal to this court raising eight grounds of appeal against the whole of the aforesaid ruling. However, in their submissions, the Appellants only argued the following four grounds; -
  - i. That the trial court erred by ignoring the Appellants submissions that they were never served with the plaint and summons in question and were therefore condemned unheard contrary to the rules of natural justice.
  - ii. The trial magistrate erred in declining the Appellants' request to call J.M. Okumu Advocates who allegedly represented the Appellants for cross examination on the source of their instructions.
  - iii. The trial magistrate erred in declining the Appellants' request to call the process server, Paul K. Mwanja who allegedly served the Appellants with the summons for cross examination.



- iv. That the trial court failed to appreciate the import of section 10 of the Insurance (Motor Vehicle Third Party Risk) Act, which in mandatory language obligates the insurer to settle a claim of this nature. That the Respondent ought to have filed a declaratory suit against the insurer, compelling them to pay the decretal sum.

### **Submissions**

11. The appeal was canvassed by way of written submissions. The Appellants filed their submissions dated 1<sup>st</sup> March 2024 whilst the Respondent filed his dated 11<sup>th</sup> March 2024.
12. The Appellants submitted that the trial court erred by ignoring their evidence that they were never served with the plaint and summons in question and were therefore condemned unheard contrary to the rules of natural justice. It was further the Appellants' submissions in this appeal that the trial court breached their fundamental rights by declining their application to call for cross examination, the process server (Paul. K. Mwanja) who allegedly served the summons on them as well as the firm of M. J. Okumu Advocates who allegedly represented them in the suit before the trial court.
13. The Appellants insisted that at no time did they appoint the said firm of M. J. Okumu Advocates to act for them in the lower court. According to the Appellants, the Advocates may have been appointed by X-plico Insurance Company Limited who at the material time was the insurer of the subject motor vehicle under Policy No. EPL/0300/5950.
14. Citing the decision in INM v AJMN [2022] eKLR (Civil Appeal No. E021 of 2021), the Appellants asked this court to uphold their right to fair hearing and allow this appeal so that they may be heard on merits in their defence in the main suit before the trial court.
15. On his part, the Respondent supported the trial court's ruling and stated that contrary to the Appellants' assertions, service had been effected on them on 29<sup>th</sup> October 2018 and that they entered appearance on 7<sup>th</sup> February 2019 through the firm of M. J. Okumu Advocates who participated in the hearing until the matter was concluded vide the trial court's judgment of 13<sup>th</sup> March 2020 after a consent on liability had been entered between the parties in the ratio of 85%:15% in favour of the Respondent.
16. The Respondent submitted that this appeal by the Appellants is an afterthought since no appeal has been preferred against the judgment in the main suit to date by the Appellants, despite being aware of the same.
17. Regarding the Appellants' submissions of being denied opportunity to call the Advocates and the process server for cross-examination, the Respondent submitted that no such prayers were made in the Appellants' Application dated 30<sup>th</sup> April 2021 which is the subject of this Appeal. The Respondent therefore urged this court to dismiss the same.
18. Relying on Civil case No. 2252/1989: Arbuthnot Export Services Ltd. Vs Manchester Outfitters Suiting Division Ltd & Another the Respondent submitted that the Appellants are bound by the proceedings conducted by their advocates.

### **Analysis and determination**

19. It is settled law that the duty of the first appellate court is to reassess and reevaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. [See: Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424]. In so doing the court must take into account that it had no opportunity to hear and see



witnesses, and must therefore make due allowance for that. (See: *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968 (E.A. 123)).

20. Having pointed out above, I now wish to turn to the Appellants' Notice of Motion Application dated 14<sup>th</sup> December 2020 and the trial court's ruling of April 30, 2021 thereon which is the subject of this appeal.
21. The Appellants' said Notice of Motion was primarily seeking stay of execution before the lower court. It was expressed to have been brought under Order 40 Rule 2 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. However, Order 40 of the Civil Procedure Rules generally deals with temporary injunctions and not stay of execution. The Order provides as follows; -

“Order 40 Temporary Injunctions and Interlocutory Orders

[Order 40. rule 1] Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

a. ....

[Order 40, rule 2.] Injunction to restrain breach of contract or other injury.

2.

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

22. The Application before the lower court being one of stay of execution, it is obvious that the application was brought under the wrong provisions of the law. This court will however in the spirit of Article 159 (2) of *the Constitution* and Section 1 A and B of the *Civil Procedure Act*, preserve the application. It is my position that failure by a party to cite the correct provisions of law is not fatal and would not, in my view warrant dismissal of the application. See the case of *Purity Kagendo Anampiu & another v Nelie Mugambi & another* [2021] eKLR where Muriithi J, in dealing with a similar situation adopted the reasoning by the Court of Appeal (P. N. Waki JA, M. Warsame JA and F. Sichale JA) in the case of *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu* (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR where the judges held as follows: -

“Lastly, having established that the respondent's application dated 17<sup>th</sup> December 2010 had been brought under the wrong law, we agree with the court's finding that the irregularity was not serious enough to prevent the court from exercising its discretion, hearing and determining the said application on its merit. Taking note that the rules of procedure should be used as handmaids of justice but not to defeat it, the court weighed the issues before it



and found that there would be no injustice visited on the appellant in the spirit of Article 159 (2)(d) of *the Constitution* and Sections 1A and B of the *Civil Procedure Act*.”

23. The proper procedure in my view ought to have been an application for setting aside the judgment, probably under order 10 Rule 11 of the Civil Procedure Rules with an application for stay of execution under Order 22 Rule 25 being a secondary prayer.
24. The defect in the application notwithstanding, I will nevertheless proceed into the merits of the appeal as indicated above.
25. In their Notice of Motion Application dated 14<sup>th</sup> December 2020 before the trial court, the Appellants sought the following substantive order; -

“That this Honourable Court be pleased to issue a stay of Execution against Charles Kyalo Matheka, the Decree holder/Respondent herein and Betabase Auctioneers and any other person, their employees, servants, agents, or any other person claiming through them from executing the warrant of attachment of movable property in execution of decree for money dated 28/10/2020 against Duncan Gatuiku Irungu & Joshua Musyoka Nzau, the Judgment debtors/Applicants herein, pending the hearing and determination if this suit”
26. I have reviewed the record of appeal and the respective parties’ submission in this appeal, including the authorities cited. In note that the gist of the Appellant’s application for stay of execution is that they were not served with the summons and pleadings in the primary suit before the trial court. I also note that the trial court, after considering the application by the Appellants rendered its ruling in the application on 30<sup>th</sup> April 2021 dismissing the application. The court stated that there was sufficient evidence on record demonstrating that the Appellants participated in the proceedings.
27. From the record, it is evident that personal service of the summons was effected on both Appellants on 29<sup>th</sup> October 2018 and an affidavit of service by a process server, one Paul K. Mwanja dated 29<sup>th</sup> October 2018 filed in court in that regard.
28. Following service of the summons, I also note that the law firm of M. J. Okumu Advocates entered appearance on 7<sup>th</sup> February 2019 for both the Appellants and also filed a defence on their behalf on the same date denying liability for the accident.
29. It is also evident from the proceedings that on 16<sup>th</sup> December 2019, a consent on liability in the ratio of 85%:15% in favour of the Respondent was recorded between the parties. It was further agreed that the issue of quantum would be left for the trial court’s determination and parties were to file submissions in that regard.
30. On 13<sup>th</sup> March 2020, judgment was delivered in the matter and the magistrate awarded a sum of Kshs. 600,000/- in general damages (subject to 15% contribution) in favour of the Respondent. A further sum of Kshs. 3,500/- was also awarded by the court in special damages.
31. In their application for stay of execution before the trial court, the Appellants did not deny the occurrence of the accident on 15<sup>th</sup> May 2018 involving the 1<sup>st</sup> Appellant’s motor vehicle registration number KBN 395D, then driven by the 2<sup>nd</sup> Appellant.
32. In his affidavit dated 14<sup>th</sup> December 2020 in support of the application for stay of execution, the 1<sup>st</sup> Appellant stated that he was aware that from the aforesaid accident, six people were injured and that out of the six victims, only one of them, a Ms. Cynthia Muthoni Chui had lodged a claim for compensation.



33. Looking at the totality of the evidence in this matter, like the trial court, I am not convinced that the Appellants were totally unaware of the suit in the lower court. The Appellants having admitted the occurrence of the accident and the injury of six persons thereat, the Appellants, at least the 1<sup>st</sup> Appellant, was expected to have taken up the matter with his insurers, X-plico Insurance Company Limited, who according to the Appellants, appointed the law firm of M. J. Okumu Advocates in the matter.
34. Contrary to the Appellants submissions in this appeal, I am of the view that the Appellants, particularly the 1<sup>st</sup> Appellant, were aware that the law firm of M. J. Okumu Advocates had been appointed to act for them in this matter. If that were not the case, one would have seen some form of correspondence from the Appellants to the Advocates questioning the source of their instructions. No such evidence was adduced by the Appellants before the trial court.
35. The Appellants in their submissions argued that the trial court erred in declining their request to summon the process server (Mr. Pau Mwanja) and M. J. Okumu Advocates for cross-examination. I have looked at the Notice of Motion Application the subject of this appeal and note that no such prayer was made by the Appellants. This ground therefore fails on that basis.
36. This court equally finds as unmerited the Appellants' argument that Respondent ought to have instead proceeded against the insurers pursuant to section 10 of the Insurance (Motor Vehicle Third Party Risk) Act since the insurance cover in respect of the subject motor vehicle was still valid as at the time of the accident.
37. This court finds and holds that the Respondent was in the circumstances of this case, perfectly entitled to proceed against the Appellants in the manner they did notwithstanding the fact that the Respondent still had an option of proceeding against the insurer as well by way of a declaratory suit.
38. Before concluding on this matter, it is important that I point out that the Appellants application before the lower court was poorly drafted.
39. Apart from the fact that the application was brought under the wrong provisions of the law, the orders sought were also in their nature uncertain. At the very least, one would have expected an application for stay and setting aside of the judgment, or an application for stay pending appeal. All the Appellants sought in their application was an order of stay of execution with no clear indication of what they wanted to do once the order of stay of execution is granted.
40. It is a fundamental factor that a successful party in a litigation must enjoy the fruits of the judgment delivered in his favour. This was aptly captured in the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR where the court stated as follows: -

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
41. Accordingly, having considered the grounds of appeal and the respective parties' submissions, it is my considered view that the appeal lacks merit and is hereby dismissed with costs.



42. It so ordered.

**SIGNED DATED and DELIVERED IN VIRTUALLY ON 26<sup>TH</sup> SEPTEMBER 2024**

**ADO MOSES**

**JUDGE**

In the presence of: -

C/A – Moses

N/A.....For Appellant

Muhindi.....For Respondent.

