



**Auto Express Ltd v Auto Express Ltd & another (Civil Appeal  
E095 of 2023) [2024] KEHC 11263 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11263 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E095 OF 2023  
JK NG'ARNG'AR, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**AUTO EXPRESS LTD ..... APPELLANT**

**AND**

**MULTIPLES HAULIERS (EA) LTD ..... 1<sup>ST</sup> RESPONDENT**

**MULTIPLES HAULIERS (ICD) LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondents/Applicants filed a Notice of Motion application dated 18<sup>th</sup> April 2024 under Certificate of Urgency pursuant to Article 50 of the *Constitution* of Kenya, 2010, Section 1A, 1B, 3A of the *Civil Procedure Act* Cap 21 laws of Kenya and Order 40 Rule 1 and 2, Order 9 Rule 9, Order 22 Rule 22 (1) of the *Civil Procedure Rules* 2010, and any other enabling provisions of law for stay of execution pending the determination of an appeal against the judgment delivered by this court on 29<sup>th</sup> February 2014.
2. The Respondents/Applicants pray for orders that there be a temporary injunction directing the Appellant/Respondent either by themselves, servants, employees, and/or agents to immediately release motor vehicle registration number KCN xxxN Prime Mover, KBD xxxG lorry and trailer registration number ZE xxxI to them and the Appellant/Respondent be restrained from advertising for sale, selling, disposing of, and/or interfering in any manner with the Applicant's motor vehicle registration KCN xxxN prime mover, KDN xxxG lorry and trailer registration number ZE xxxI pending hearing and disposal of this application.
3. The Respondents/Applicants also pray for orders that the alleged attachment herein be declared null and void, illegal and in total contravention of the legal process, that there be a stay of execution of the judgment pending hearing and determination of the intended appeal, and that costs of this application be in the cause.



4. The application is premised on grounds on its face and the affidavit of Rajinder Singh Baryan, the Managing Director of the Applicants, sworn on 18<sup>th</sup> April 2024. It is deponed that judgment was delivered on 29<sup>th</sup> February 2024 and the Applicants' motor vehicle was physically attached without issuing a proclamation giving the Applicants time to pay the debt as required in law. That the Auctioneer has issued a date for the sale of the Applicants' motor vehicle without advertising the same for sale as required and without considering the time frame provided for in law.
5. The application was also based on grounds that the Auctioneer by the name Betico Auctioneers are not licensed auctioneers for the year 2024 and that the Auctioneer that attached the Applicants' motor vehicle is not authorized and or licensed to carry any attachment or repossession in Mombasa. That the Applicants having been dissatisfied with the outcome of the judgment have filed a notice of appeal to initiate the appeal process. That the Applicants have requested for copies of the judgment and certified copies of proceedings to enable the Applicant file its record of appeal in the court of appeal. That the Applicants' motor vehicles have been attached or proclaimed on 12<sup>th</sup> April 2024 and are likely to be physically attached unless an order of stay is granted.
6. The Appellant/Respondent in their Replying Affidavit sworn on 7<sup>th</sup> May 2024 by Stanley Mwandoe Righa, the advocate having the conduct of the matter on behalf of the Appellant/Respondent stated that the judgment herein was entered on 29<sup>th</sup> February 2024 against the Applicants who failed to settle the same despite being issued with the judgment notice. That the Applicants are at liberty to exercise their right to appeal against the judgment but an appeal does not operate as a stay of a lawful judgment.
7. The Appellant/Respondent stated that Betico Auctioneers was instructed to carry out execution of the court judgment but it is not true that they visited the Applicants' premises in Mombasa and proclaimed the goods as alleged. That the Auctioneers visited the Applicants' headquarters in Nairobi at Embakasi and it is then that they first issued a proclamation notice to the Applicants but they did not remove any items as they gave them a 7-day notice and left the goods in their custody. That the Auctioneers duly followed the procedure for execution as set out in the [Auctioneers Act](#), that a proclamation notice was served upon the Applicants which they acknowledged receipt and that they have been licensed to carry out business.
8. The Appellant/Respondent further deponed that the Applicants have not demonstrated that they are deserving of the orders sought and that the court having delivered the judgment herein, this court is functus officio and the orders sought cannot be issued. That the Applicants have come to court with unclean hands as they have furnished the court with false and misleading information with regards to the registration status of the auctioneer and therefore the balance of convenience cannot shift in their favour. That the Respondent herein lawfully commenced execution against the judgment debtor and the process should be allowed to continue to its conclusion. The Respondent prayed that the application be dismissed with costs to the Respondent.
9. The Application was canvassed by way of written submissions. The Applicants in their submissions dated 18<sup>th</sup> July 2024 averred that lodging an appeal does not automatically stay the execution of a judgment of the court and therefore to stay or postpone such a process, one must file an application to be considered by the court. The Applicants submitted that Rule 5 (2) of the [Court of Appeal Rules](#) is a procedural innovation designed to empower the court to entertain an interlocutory application for preservation of the subject matter of the appeal to ensure just and effective determination of the appeals. That given Rule 5.2 of the [Court of Appeal Rules](#), it is trite law that a party to invoke jurisdiction of the court, he must first file a Notice of Appeal following Rule 77 of the [Court of Appeal Rules](#). The Applicant contended that Order 42 (6) Sub Rules 1,3,4,5,6,7, and 9 of the Civil Procedure Rules give this court the jurisdiction to issue a stay of execution on such terms as the court may deem fit. The



Applicants relied on decisions of the court in *David Morton Silversein v Atsango Chesoni* (2002) eKLR and *Transouth Conveyors Limited v Kenya Revenue Authority* (2007) eKLR and submitted that the Applicant has an arguable appeal.

10. The Appellant/Respondent in their submissions dated 5<sup>th</sup> July 2024 on whether the court is functus officio argued that the Applicant is inviting the court to sit on an appeal in respect of its own judgment by requesting for an injunction to issue post judgment as was held in the case of *Clesoi Holdings Limited v Prime Bank Limited* (2021) eKLR which cited with authority the case of *Chembe Katana Changi v Ministry for Lands & Settlement & 4 Others* (2014) eKLR. That the Supreme Court of Kenya when expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5, *Raila Odinga & Others v IEBC & Others* (2013) eKLR as was quoted in the case of *Asige Keverenge and Anyanzwa Advocates v Kenya Revenue Authority & Another* (2021) eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in 'The origins of functus officio doctrine, with specific reference to its applications in administrative law' (2005) 122 SALJ 832
11. The Appellant/Respondent submitted on whether the attachment was illegal and ought to be declared null and void by citing the case of *Syrilla A. Barasa & 2 Others v Margaret Aseka Barasa* (2022) eKLR which set out the steps to be followed in the process of execution by an auctioneer of an order of the court. The Appellant/Respondent stated that the auctioneer confirmed that he is duly licensed and attached his current license for 2024, he confirmed that he duly applied for warrants of attachment and the same were duly issued by the honourable court and he attached the proclamation notices that were served on the judgment debtors and giving them sufficient notice. That upon expiry of the notices, he confirmed that he proceeded to procedurally attach the subject motor vehicles and subsequently prepared notification of sales that were duly attached to the affidavit. That the list of auctioneers attached to the supporting affidavit shows that the same are from Tanzania and not Kenya.
12. The Appellant/Respondent submitted on whether the applicant herein has satisfied the conditions to warrant grant of an order for stay of execution pending appeal to the Court of Appeal by relying on the holding in Nairobi HCCC No. 1900 of 1995, *Lalji Shimji Builders & Contractors v Nairobi Golf Hotels Kenya Limited* which set out the conditions to include that the applicant may suffer substantial loss unless the order is made, whether the application has been made without unreasonable delay, and whether the applicant has given such security as the court may order for the due performance of the decree or order which may ultimately be binding on him. According to the Appellant/Respondent, the Applicant has not met the conditions herein above.
13. I have considered the Respondents/Applicants Notice of Motion application dated 18th April 2024 for stay, Appellant/Respondent's Replying Affidavit sworn on 7th May 2024 and submissions by both parties. The issue for determination is whether the Respondents/Applicants have demonstrated that the orders of stay of execution pending appeal are merited.
14. Order 42 Rule 6 of the *Civil Procedure Rules* provides: -

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.



15. This court has observed that judgment was delivered in this court on 29<sup>th</sup> February 2024 by Justice Chemitei. However, the Respondents/Applicants being dissatisfied with the decision intend to appeal at the Court of Appeal and they have filed a Notice of Appeal dated 13<sup>th</sup> March 2024 to that effect.

16. The court in *Dickson Muricho Muriuki v Timothy Kagundu Muriuki & 6 others* (2013) eKLR held the position that: -

“We take cognizance that when this Court has delivered judgment; all pertinent issues and points of law have been fully canvassed and considered. Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of execution that will make this Court change its mind after delivery of judgment and order stay of execution? If there are new points of law or circumstances that arise after judgment, this Court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court ...”

17. It is trite law that a court cannot sit on appeal of its own judgment. I find that this court lacks jurisdiction to entertain the Respondents/Applicants’ application dated 18<sup>th</sup> April 2024. The Respondents/Applicants ought to pursue the application for stay in the Court of Appeal which ranks higher than this court. The Respondents/Applicants’ application therefore lacks merit and is dismissed.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....  
**J.K. NG’ARNG’AR, HSC**

**JUDGE**

In the presence of: -

Kemue Advocate for the Appellant

Kiwinga Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

