



**Al Husnain Motors v Njoroge (Civil Appeal E183 of 2024)  
[2024] KEHC 15213 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15213 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E183 OF 2024  
FN MUCHEMI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**AL HUSNAIN MOTORS ..... APPELLANT**

**AND**

**SYLVIA WANJIRU NJOROGE ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 11<sup>th</sup> September 2024 seeks for orders of stay of proceedings in Thika CMCC No. E258 of 2024 pending the hearing and determination of the appeal. It further seeks for orders to set aside the ruling delivered on 23<sup>rd</sup> July 2024 and to reinstate the ruling delivered on 25<sup>th</sup> June 2024 in Thika CMCC No. E258 of 2024.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 23<sup>rd</sup> September 2024.

**Applicant's Case**

3. The applicant states that the respondent filed a suit Thika Civil Case No. E258 of 2024 Sylvia Wanjiru Njoroge vs Al Husnain Motors Limited together with an application dated 16<sup>th</sup> April 2024 whereas he sought orders that motor vehicle registration number KDL xxxS returned to her after it was repossessed by the applicant.
4. The lower court in its ruling delivered on 25<sup>th</sup> June 2024 held that the applicant clears all outstanding arrears within 30 days and parties do agree on auctioneers fees by 15/7/2024 failure to which the auctioneers were at liberty to file their bill of taxation in court. The learned magistrate further issued a temporary injunction barring the respondent from selling by way of auction or private treaty or interfering with motor vehicle registration number KDL xxxS pending further orders scheduled for 22/7/2024. The court directed the respondent do send the applicant a statement of all arrears within 7



- days and upon payment of all the amount so demanded failure to which the motor vehicle registration number KDL xxxS was to be released unconditionally.
5. The applicant states that they complied with the said orders and shared a statement of arrears with the respondent/plaintiff's advocate. The applicant further states that the respondent did not comply with the court's orders. Instead, the applicant filed another application dated 13<sup>th</sup> July 2023 seeking review of the orders issued on 25<sup>th</sup> June 2024. The trial court delivered its ruling on 23<sup>rd</sup> July 2024 and held that the respondent herein deposits Kshs. 200,000- in court and execute an affidavit undertaking to avail the subject motor vehicle in court or as directed in its ruling when so required. Further, upon compliance with the aforesaid, the subject motor vehicle be released to the respondent forthwith and unconditionally. The trial magistrate further ordered that the applicant herein do file a statement of the auctioneers and storage fees payable and that the respondent herein do ensure that she continues paying the monthly installments of Kshs. 60,000-.
  6. The applicant states that what the learned magistrate read in court did not match what was contained in the ruling itself. In particular the magistrate stated that before the release of the subject motor vehicle, a car track was to be installed and monitored by the applicant. Further that Kshs.200,000- was to serve as a security for storage fees/auctioneers fees and that the respondent should pay all the installments as they fall due failure to which all orders relating to the subject motor vehicle will be vacated and the vehicle will be released to court for onward transmission to the applicant. The applicant further states that the learned trial magistrate read out in open court that the respondent should pay installments as stated in the sale agreement which is an amount of Kshs. 105,000- However, in his ruling, the magistrate stated that the sum of Kshs. 60,000- should be paid. The applicant further argues that the learned magistrate erred in facts by stating that there was a meeting of minds of payment of Kshs. 60,000- as monthly installments yet there is nowhere in their pleadings where they accepted the said sum. The applicant avers that the correct monthly installment in the agreement is for the sum of Kshs. 105,000- which the respondent ought to have cleared by 17<sup>th</sup> July 2024.
  7. The applicant further argues that the ruling and orders issued on 23<sup>rd</sup> July 2024 were contradictory, biased and tantamount to an appeal of the trial court's previous ruling. The applicant further argues that the learned trial magistrate misapplied the law on review as per Order 45 of the Civil Procedure Rules as they were no grounds to review the orders issued on 25<sup>th</sup> June 2024.

### **The Respondent's Case**

8. The respondent states that she filed a suit in the trial court for the irregular repossession of her motor vehicle registration number KDL xxxS. The respondent further states that she filed an interlocutory application dated 16/4/2024 which was opposed by the applicant herein and the trial court rendered its ruling on 25<sup>th</sup> June 2024 which in principle set out conditions for injunction and release of the subject motor vehicle.
9. The respondent avers that parties failed to agree as directed by the trial court in its ruling dated 25<sup>th</sup> June 2024 that she filed an application for review dated 13/7/2024 which the trial court determined in its ruling on 23/7/2024 .
10. The respondent avers that the matter in the trial court is scheduled for mention on 25/9/2024 but she filed an application for amending her plaint which raise factual issues in contest such as interest rates and penalties levied; manner of repossession of the subject vehicle; existence and execution of the hire purchase agreement; whether there were oppressive and capricious terms in the hire purchase agreement contravening the *Consumer Protection Act* and the amount paid against the purchase price.



11. The respondent argues that the review was necessitated by the fact that the parties did not agree on the amounts due in terms of arrears. The respondent further argues that the learned trial magistrate was allowed to review the impugned ruling for sufficient reasons. Thus the misconstruction by the applicant on the contents of the ruling based on allegations of what counsel heard ought to be cross checked against the ruling delivered.
12. The respondent states that the learned trial magistrate correctly observed that the parties could not agree on the arrears and took into account that she had paid Kshs. 2,456,000- against the applicant's desired purchase price of Kshs. 3,450,000-.
13. The respondent avers that the subject motor vehicle is currently registered in the name of the applicant despite paying a substantial amount for it.
14. The respondent argues that the applicant does not stand to be prejudiced by allowing her to use the subject motor vehicle as she will keep paying monthly installments Kshs. 60,000- as directed by the court. The respondent further states that the court can issue orders of usage of the subject motor vehicle as the car has a tracking device thus the vehicle can be tracked with ease and traceable and would not be a challenge to ensure it is operating upon release to her.
15. The respondent states that the trial court took into account the parties competing claims and issued a payment of Kshs. 200,000- which was within its discretion to do so.
16. Parties put in written submissions.

### **The Applicant's Submissions**

17. The applicant submits that the ruling dated 23<sup>rd</sup> July 2024 appears to be an appeal of the ruling dated 25<sup>th</sup> June 2024. The applicant relies on the cases of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR and Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR and submits that the trial magistrate misapplied the law on review as per Order 45 of the Civil Procedure Rules as there were no grounds to review the orders issued on 25<sup>th</sup> June 2024. Thus, the orders were biased and inappropriate in the circumstances.
18. The applicant submits that it has an arguable appeal which shall be rendered nugatory unless the court grants stay of execution of the impugned ruling.
19. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Ena Investment Limited vs Bernard Ochau Mose & 2 Others [2022] eKLR and submits that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties.
20. Relying on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR, the applicant submits that it shall suffer substantial loss if the subject motor vehicle is released to the respondent as the applicant is in possession of the vehicle which is registered to its name. Thus handing over possession of the subject motor vehicle to the respondent would be a toll order as she may tamper with the same pending appeal. The applicant argues that the respondent has already defaulted in paying her monthly instalments and there is no guarantee that the balance of the purchase price of Kshs. 1,153,830- shall be paid if the subject vehicle is released to her. The applicant further argues that its right to repossession will be lost and that the subject vehicle is a depreciating asset which it shall not be able to sell at its market value and may have no recourse to the respondent.
21. The applicant submits that the ruling was delivered on 23<sup>rd</sup> July 2024 and the application and memorandum of appeal were filed on 25<sup>th</sup> July 2024. Thus, the application was filed timeously.



22. On the issue of security, the applicant states that it is ready and willing to abide by the court's direction. The applicant states that it has been in possession of the motor vehicle and has not sold the same.
23. The applicant states that the respondent has not given any plausible reason why the court should deny issuing the orders sought.

### **The Respondent's Submissions**

24. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the cases of Antoine Ndiaye vs African Virtual University [2015] eKLR and James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and submits that the applicant has not demonstrated what substantial loss it is likely to suffer, neither has the applicant demonstrated how it stands to be prejudiced if the orders of stay of execution are not granted. The respondent submits that the suit motor vehicle is solely registered in the applicant's name. Furthermore, the applicant does not stand to be prejudiced by allowing her to use the subject vehicle whereas she keeps paying Kshs. 60,000- per month.
25. The respondent further submits that stay of execution orders sought should not be granted because the hearing in the lower court has not commenced whilst the applicant has brought the issues forming the substratum of the main suit in the guise of the current appeal.
26. The respondent submits that the honourable magistrate is by law allowed to review a ruling for good and sufficient reasons. The respondent further submits that the applicant has not addressed the issue of security for costs and is therefore not deserving of the orders sought.
27. The respondent relies on the cases of Civil Case No. E258 of 2024 Sylvia Wanjiru Njoroge vs Al Hussein Motors Limited, Kenya Wildlife Service vs James Mutembei (2019) eKLR and Global Tours & Travels Limited Nairobi HC Winding Up Cause No. 43 of 2000 and submits that the applicant has not met the test for stay of proceedings which is high and stringent. In the instant case the applicant has not given good grounds to warrant the said orders of stay of proceedings save for misleading allegations.
28. The respondent argues that staying the proceedings in the lower court will amount to stopping the hearing of her case before it is even heard. The respondent further submits that it will lead to violation of their constitutional right to expeditious trial under Article 50(2)(e) and 159(2)(b) of *the Constitution*. Furthermore, the respondent argues that the applicant's appeal is frivolous, an abuse of the court process, baseless and is too weak to amount to a successful appeal.
29. On the issue of setting aside the ruling delivered on 23<sup>rd</sup> July 2024, the respondent submits that the applicant has not demonstrated reasonable grounds or met the necessary requirements to warrant the issuance of the orders. Furthermore, the respondent argues that the trial court looked at the evidence in form of affidavits and annexed documents by the parties and exercised its discretion judiciously and made the impugned ruling. To support her contentions, the respondent relies on the case of Mbogo & Another vs Shah [1968] EA and submits that the trial court exercised its discretion judiciously.
30. The respondent further argues that setting aside the impugned ruling without sufficient cause will not meet the interests of justice as the impugned ruling was entered regularly and procedurally after the trial court considered the parties affidavits. The respondent further relies on the case of David Ouma Gor vs Moly Credit Limited & Another [2021] eKLR and submits that the issue of setting aside the impugned ruling is the subject of the appeal, it is premature and irregular for the applicant to seek the setting aside of the said ruling through the instant application.
31. The respondent submits that the court should not reinstate the ruling delivered on 25/6/2024 as it was reviewed pursuant to her application dated 13/7/2024 which led to the delivery of the impugned ruling



dated 23/7/2024 . The respondent further submits that the ruling dated 23/7/2024 was delivered in the presence of both counsels for both parties and there was no leave for appeal sought. Further, there was no stay sought by the applicant's counsel on record. Thus, the respondent argues that it is malicious for the applicant to request for reinstatement of the said ruling dated 25/6/2024 without sound basis or reasonable grounds for the same.

32. The respondent submits that the grounds advanced in the memorandum of Appeal are frivolous, misleading and frivolous. It is neither arguable nor does it stand a chance of succeeding. The respondent argues that the appeal is too weak to be rendered nugatory.
33. Relying on the case of *Satya Bhama Gandhi vs Director of Public Prosecutions & 3 Others* [2018] eKLR, the respondent argues that the instant application is an abuse of the court process as the applicant is trying to prosecute the substratum of the lower court matter in the high Court in the guise of an appeal or application seeking various orders.

### **Issues for determination**

34. The three main issues for determination herein are:-
  - a. Whether the application is res judicata.
  - b. Whether the applicant has met the prerequisite for grant of stay of proceedings.
  - c. Whether the ruling dated 23<sup>rd</sup> July 2024 ought to set aside and the ruling dated 25<sup>th</sup> June 2024 be reinstated.

### **The Law**

#### **Whether the application is - res judicata**

35. The doctrine of res judicata is anchored in Section 7 of the *Civil Procedure Act*. It provides:-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which issue has been subsequently raised, and has been heard and finally decided by such court.
36. The Court of Appeal in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR held:-

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

  - a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That the former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.



37. From the foregoing, it is clear that for res judicata to suffice, a court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.
38. The applicant filed an application dated 25<sup>th</sup> July 2024 between the same parties seeking for the orders of stay of proceedings and to set aside the ruling dated 23<sup>rd</sup> July 2024 and reinstate the ruling delivered on 25<sup>th</sup> June 2024 in Thika CMCC No. E258 of 2024. This court rendered its ruling on 11<sup>th</sup> September striking out the application for being incurably defective as it was devoid of a supporting affidavit. In the instant application, the applicant seeks similar orders verbatim and the application is between the same parties. The only thing the applicant has changed is the party swearing its supporting affidavit to the application. It is evident that although the court struck out the previous application, it did not determine the said application on its merits. Therefore, it is my considered view that this application is not res judicata and it will be determined on its merits.

### **Whether the applicant has met the prerequisite for grant of stay of proceedings.**

39. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

40. Similarly the threshold for stay of proceedings has been illuminated in the passages in Halsbury's Law of England, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332 that:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in



equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

41. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-
- a. Whether the applicant has established that he has a prima facie arguable case;
  - b. Whether the application was filed expeditiously; and
  - c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

#### **Whether the applicant has established that it has a prima facie arguable case**

42. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. *Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR*.
43. I have keenly perused the memorandum of appeal and noted that the applicant’s main contention is that the trial court reviewed the orders it made on 25<sup>th</sup> June 2024 yet there were no grounds for review. He argues that the magistrate was sitting on his own appeal. I have further perused the trial court’s ruling as well as its merits. The magistrate has powers under Order 45 of the Civil Procedure Rules to review his own ruling without going to the merits of the appeal, I find that the applicant has not raised any arguable grounds of appeal.

#### **Whether the application was filed expeditiously**

44. The ruling was delivered on 23<sup>rd</sup> July 2024 and the applicant filed the instant application on 11<sup>th</sup> September 2024. Thus the application has been filed expeditiously.

Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought

45. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice. This has been demonstrated in the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR* the court observed that:-

“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

46. The applicant has not given any reasons why the proceedings in the trial court should be stayed. However the applicant has argued that it stands to suffer substantial loss if the subject motor vehicle is released to the respondent as it is in possession of the vehicle which is registered to its name. The applicant further argues that the respondent may tamper with the said vehicle during appeal yet she has already defaulted in her loan and there is no guarantee that the balance of the purchase price shall be paid by the respondent if the motor vehicle is released to her. The magistrate directed that the respondent continue paying monthly installments towards the outstanding loan. As such, the applicant has not been deprived of his rights as the lender. The allegations of the respondent being likely to tamper with the vehicle is just speculation not supported by any evidence. In the event that



happens, the applicant can take legal action, if need be, since the respondent's conduct is subject to the law where rights of others are violated or likely to be violated.

47. The respondent on the other hand argues that the matter in the trial court has not yet began and the issues raised by the applicant in its appeal include the substratum of the main suit in the lower court. This is the correct position and the magistrate's court should be allowed to determine the suit. The applicant has introduced issues touching the main suit in his application. This court cannot decide those issues at this stage.
48. This application seeks to stay the proceedings in the lower court which would amount to this court usurping the trial court's powers to determine the matter. Therefore it is my considered view that the applicant has not established any of the grounds for staying proceedings in Thika CMCC No. E258 of 2024. He has failed to give plausible reasons why the proceedings should be stayed.

**Whether the ruling dated 23<sup>rd</sup> July 2024 ought to set aside and the ruling dated 25<sup>th</sup> June 2024 be reinstated.**

49. The applicant argues that the ruling and orders issued on 23<sup>rd</sup> July 2024 were contradictory, biased and tantamount to an appeal of the trial court's previous ruling. The applicant further argues that the learned magistrate misapplied the law on review as per Order 45 of the Civil Procedure Rules as they were no grounds to review the orders issued on 25<sup>th</sup> June 2024.
50. Setting aside of an order is at the discretion of the court. This principle was enunciated in the court of Appeal case of CMC Holdings Ltd vs James Mumo Nzioka [2004] eKLR where it was held inter alia:-  
The discretion that a court of law has in deciding whether or not to set aside an ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.
51. On perusal of the record, the respondent filed an application dated 16/4/2024 seeking a temporary injunction barring the applicant from selling motor vehicle registration number KDL xxxS pending the hearing and determination of the suit and a mandatory injunction compelling the applicant to release the suit motor vehicle to the respondent. Upon hearing the application, the trial court rendered its ruling on 25<sup>th</sup> June 2024 directing the respondent to clear all outstanding arrears within 30 days and issued a temporary injunction barring the applicant from selling the suit motor vehicle. The trial court further directed that the applicant do send to the respondent a statement of all arrears within 7 days and upon payment of the amount so demanded, the suit motor vehicle to be released unconditionally. The respondent thereafter filed an application dated 13<sup>th</sup> July 2024 seeking for the orders of review and varying of the ruling issued on 25<sup>th</sup> June 2024 directing the unconditional release of the suit motor vehicle to the respondent on the basis that parties could not agree on arrears due to be paid and the purchase price payable. The application was opposed by the applicant and the trial court considered both parties position and rendered its ruling on 23<sup>rd</sup> July 2024. The trial court noted that the parties could not agree on the outstanding amount and ordered for the release of the suit motor vehicle as long as the respondent continued paying Kshs. 60,000- as the monthly installment. The trial court further ordered the respondent to deposit a sum of Kshs. 200,000- in court and execute an affidavit undertaking to avail the suit motor vehicle in court when so required.
52. It is therefore evident that the ruling was made after the trial court heard both parties. Being aggrieved by the ruling, the applicant has lodged an appeal. A cursory look at the grounds of appeal shows that the impugned ruling forms the substratum of the appeal. Therefore it would cause an injustice to both



parties to set aside the ruling delivered on 23<sup>rd</sup> July 2024 without giving a chance for both parties to ventilate the appeal. Since the impugned ruling is the subject of the appeal and it was delivered upon hearing both parties, the said ruling was entered lawfully and legally. The applicant at this juncture ought to prosecute his appeal whereby this court can make a determination based on the merits of the appeal. In my view, the reasons advanced by the applicant for the prayer of setting aside do not justify exercise of this court's discretion in his favour. No sufficient cause to warrant the setting aside of the ruling dated 23<sup>rd</sup> July 2024 and reinstating the ruling dated 25<sup>th</sup> June 2024 has been shown.

### **Conclusion**

53. Consequently, I find the application dated 11<sup>th</sup> September 2024 lacking merit and hereby dismiss it with costs.
54. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024.**

**F. MUCHEMI**

**JUDGE**

