



**Abdi & another v Mewe (Civil Appeal E015 of 2021)  
[2023] KEHC 1900 (KLR) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E015 OF 2021  
DO CHEPKWONY, J  
FEBRUARY 24, 2023**

**BETWEEN**

**MOHAMED NASSIR ABDI ..... 1<sup>ST</sup> APPELLANT**

**MWANATUMU KHAMISI HUSSEIN ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEOFFREY JOSEPH MEWE ..... RESPONDENT**

**RULING**

1. The application pending for determination in this matter is the appellants/applicants Notice of Motion application dated 2 March 3, 2021 brought under article 159, 165 (3)(a) of the Constitution of Kenya, Order 50 Rule 6 and Order 51 Rule 1 both of the Civil Procedure Act and sections 1A, 1B, 3A and 95 of the Civil Procedure Act and all the other enabling provisions of the law. The application seeks for the following orders:-
  - a. Spent;
  - b. Spent;
  - c. Spent;
  - d. That this honourable court be pleased to vary its orders issued on January 28, 2021 and allow the Applicants to deposit half the decretal amount in C.M.C.C No. 383 of 2017 in court;
  - e. That this honourable court be pleased to order the unconditional release of motor vehicle registration number KCF 476E currently being held by Kiriiyu Merchants;
  - f. That the costs of this application be provided for.
2. The application is premised on among other grounds that; the appellants had sought orders for stay of execution through an application dated September 18, 2020 and the same were allowed vide a Ruling



delivered by this court on January 28, 2021 on condition that the appellants pay half of the decretal sum to the respondent and the other half be deposited in a joint interest-earning account in the names of both advocates. The applicants aver that they have partially complied with those orders by paying half the decretal sum to the respondent but have been unable to comply with the second part of the ruling because the respondent's advocate has refused to give their details for purposes of opening the joint account. Therefore, it is only reasonable for the court to vary its orders for the appellants to deposit the other half of the decretal sum in court so that it would proceed with the appeal without fear of execution.

3. The application is further supported by the 2<sup>nd</sup> appellant's affidavit sworn on the March 23, 2021 wherein he reiterates the grounds on the face of the application and adds that the Respondent has failed to execute the bank details for purposes of opening the joint account in order to proceed with the unlawful execution. He further avers that he purchased the subject motor vehicle with a loan facility advanced to him by SMEP Micro-finance and the execution has deprived him of his sole source of livelihood. He has also annexed a copy of the cheque remitting half the decretal sum to the Respondent.
4. The respondent opposed the application through his replying affidavit sworn on June 14, 2021. He is of the view that similar prayers have been made in Misc. HCCC No.196 of 2020 hence the instant application is sub judice. In any event, his case is that he had instructed auctioneers who proclaimed among other properties the appellants Motor Vehicle Registration No.KCF 476E on the August 24, 2020 and proceeded to attach the said motor vehicle right away. Somehow, the appellants managed to obtain stay orders through an application dated September 18, 2020. Thereafter, a consent was executed between the parties on the November 17, 2020 hence the stay orders granted by the court were spent and ceased to be operative.
5. The Respondent adds that its auctioneers proceeded to issue a Proclamation of Attachment on January 16, 2021 and attached the subject motor vehicle on January 27, 2021 since there were no stay orders in force. The respondent thus believes the execution was lawful and legal. According to him, the orders of stay of execution issued by this court on January 28, 2021 were overtaken by events since execution had already been undertaken. Based on the foregoing, the Respondent craves for the court to dismiss the application at hand.
6. The application was canvassed by way of written submissions and the record shows that the appellant/applicants filed their submissions on May 13, 2021 while the Respondent filed theirs on June 15, 2021. I have read through the said submissions and they reiterate the position taken by the parties as summarized above and I wish not to repeat the same here.

### **Analysis and Determination**

7. I have considered the application and the submissions made by both parties. In my view, the following issues crystalize for determination and which will be addressed jointly. The same are:-
  - a. Whether or not to vary the orders issued on January 28, 2021 so as to allow the appellants deposit half the decretal amount in CMCC No.383 of 2017 in court; and
  - b. Whether an order can be issued for the unconditional release of Motor Registration No.KCF 476E.
8. Firstly, the court record confirms that it is indeed true that the court delivered a Ruling on the January 28, 2021, wherein it granted stay of execution of the Judgment in Mombasa CMCC No.383 of 2017 on condition that the Appellants pay half the decretal sum to the Respondent and deposit the other in a joint interest earning account in the name of the advocates on record for the parties. From the evidence



presented by the parties, the court is satisfied that the appellants are desirous of complying with the conditions set in the ruling as they have already paid to the respondents half of the decretal sum but aver that they could not comply with the order directing the deposit of the other half to be deposited in a joint interest-earning account because the respondent and/or his counsel are uncooperative and had failed to avail the details for the purposes of opening the joint account. The appellant therefore seeks the court to vary its orders and instead direct that the other half of the decretal sum be deposited in court so as to avert the fear of execution.

9. The respondent on the other hand avers that the ruling delivered on January 28, 2021 was overtaken by events given that the 2<sup>nd</sup> appellant's motor vehicle had been attached prior to the delivery of the Ruling. The respondent further blames the appellants for not complying with a Consent Order that was recorded in court on the November 18, 2020 thus they are authors of their own misfortune.
10. In that respect, I have considered the terms of the said consent order which was recorded in the following terms;

“By Consent:-

1. That the motor vehicle registration number  
KCF 476E Nissan being held by Kiriiyu Merchants Auctioneers be released immediately to the registered owner, the Applicant herein; and,
2. That, there shall be no orders as to costs”

This consent is hereby adopted on November 18, 2020 as an order of this court.

11. It is on the same date the consent order was adopted that a Ruling date to the instant application was reserved. Nonetheless, in the plain eye sight, the terms of the consent order are not ambiguous to understand. In its interpretation, the respondent believed he had been directed to release the appellants' motor vehicle then await the court's decision on the application for stay of execution. However, this seems not to have been the case as it is clear that the subject motor vehicle was not released back to the appellants. Therefore, the allegation that the Appellants had failed to satisfy the Consent Order is a sheer smoke screen in the hope of justifying the attachment of the subject motor vehicle.
12. In the end, I am persuaded that the proclamation and subsequent attachment of Motor Vehicle Registration No.KCF 476E flouted the Consent Order and the further directions issued by this court that after recording the Consent Order, the parties would await the determination of the appellants' application dated September 18, 2020 seeking stay of execution of Judgment.
13. Accordingly, it is the court's finding that the applicants have established a case against the respondent on a balance of probability hence the balance of convenience tilts in their favour. It should also be noted that a litigant who has lost his case (as the applicants herein have) has a right to appeal against the findings of the court all the way to the apex court. The courts should therefore always endeavor to balance the two competing interests of the decree holder and that of the Appellant. In the instant case, such balance had been drawn by the conditional stay order issued in the Ruling delivered on January 28, 2021.
14. Now since the appellants have already paid half the decretal sum to the respondent as directed in the court's Ruling, the interests of both parties would be safeguarded by directing that the other half be deposited in court pending the hearing and determination of the appeal and then the subject motor vehicle be released to its registered owner.



15. Lastly, I will address the concerns by the respondent that the application is res-subjudice as there is a similar prayer pending in Mombasa High Court, Misc. Case No.196 of 2020 between the same parties. Although the appellants did not comment on that issue, I have perused the record in Mombasa High Court Miscellaneous Case No.196 of 2020, and established that the same was instituted purposely to seek orders for extension of time for filing the appeal and orders for stay of execution. Those issues were determined in the Ruling delivered on January 28, 2021 and after leave was granted to the appellant, the instant appeal was filed. Therefore the miscellaneous case was spent and any other substantive issue between the parties should be addressed in this appeal. Consequently, the averment on the application herein as being sub-judice is highly misplaced and this court declines that line of challenge.
15. In conclusion, the upshot of my decision is that the application dated March 23, 2021 is merited and the same is allowed in terms of the following orders:-
- a. An order be and is hereby issued varying this court's orders issued on January 28, 2021 to allow the Applicants to deposit half the decretal amount in CMCC No.383 of 2017 in court.
  - b. An order is hereby issued for the unconditional release of Motor Vehicle Registration No.KCF 476E currently being held by Kiriiyu Merchants.
  - c. The appellants shall have costs of this application.

It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, SIGNED AND DATED AT NAIROBI THIS ...24<sup>TH</sup> ..... DAY OF ...FEBRUARY..., 2023.**

**D. CHEPKWONY**

**JUDGE**

**In the presence of:**

No appearance for and by either party

Court Assistant - Simon

