



**Rosemary Kaitany t/a Oriental Rose Home v Murphy & another;  
Lisajoy Auctioneers (Interested Party) (Miscellaneous Application  
E561 of 2022) [2023] KEHC 2868 (KLR) (Civ) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2868 (KLR)

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

**CIVIL**

**MISCELLANEOUS APPLICATION E561 OF 2022**

**JK SERGON, J**

**MARCH 29, 2023**

**BETWEEN**

**ROSEMARY KAITANY T/A ORIENTAL ROSE HOME ..... APPLICANT**

**AND**

**MARTIN TIMOTHY MURPHY ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIAN MUTHONI MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**LISAJLOY AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. Before me for consideration and determination are two (2) applications, both brought by the applicant herein: the first is the Notice of Motion dated 29<sup>th</sup> November, 2022 (“the first application”) supported by the grounds laid out on its face and the facts stated in the affidavit sworn by the applicant, who sought for the orders hereunder:
  - i. Spent.
  - ii. That this Court be pleased to reinstate the orders granted on 22<sup>nd</sup> September, 2022 by the Principal Judge.
  - iii. That the orders be and are hereby confirmed.
  - iv. That in the meantime, and for avoidance of doubt the ex parte judgment and resultant decree and/or order issued on 5<sup>th</sup> of August, 2022 before the Adjudicator, be and is hereby stayed.



- v. That the judgment and decree of 5<sup>th</sup> August, 2022 issued in SCCOM E1078/2021 be and is hereby set aside in its entirety.
  - vi. That costs of the application be provided for.
2. From the record, it is apparent that neither of the respondents nor the interested party responded to the first application.
3. The second application is the Notice of Motion dated 22<sup>nd</sup> September, 2022. The Motion is supported by the grounds laid out on its face and the facts stated in the affidavit of the applicant, and seeking the orders hereunder:
  - i. Spent.
  - ii. That this Court be pleased to call and examine the proceedings touching on Milimani Small Claims Cause No. E1078 of 2021 (Martin Timothy Murphy & another v Rosemary Kaitany T/A Oriental Rose Home) and E169 of 2022 (Rosemary Kaitany T/A Oriental Rose Home v Martin Timothy Murphy & another) and satisfy itself of its correctness and legality thereof.
  - iii. Spent.
  - iv. That the judgment and decree of 5<sup>th</sup> August, 2022 issued in SCCCOM E1078 of 2021 be and is hereby set aside in its entirety.
  - v. That costs of the application be provided for.
4. To oppose the second application, the 2<sup>nd</sup> respondent swore a replying affidavit on 27<sup>th</sup> October, 2022.
5. It is apparent from the record that the interested party did not participate at the hearing of the two (2) applications or file any documents in response thereto.
6. It is apparent from the record that at the interparties hearing thereof, their advocates chose to rely on the averments made in the respective affidavits.
7. I have considered the grounds set out on the face of the first and second applications, the facts deponed in the affidavit supporting them, and the replying affidavit in respect to the second application.
8. I will begin with the first application. I note that the orders sought therein are two (2)-fold in nature.
9. Concerning the order for reinstatement of the orders made on 22<sup>nd</sup> September, 2022; upon my perusal of the record, I note that upon certifying the second application as urgent, this court granted an order for stay of execution to last until the interparties hearing thereof, slated for 1<sup>st</sup> November, 2022.
10. However, the record shows that before the second application could be heard, the applicant filed the first application which was placed before this court on 30<sup>th</sup> November, 2022. Upon considering the urgent nature of the first application, this court granted an interim order for stay of execution of the decree in the suit on the condition that the applicant deposits the principal sum of Kshs.460,000/= in court within 45 days therefrom.
11. Going by the record, at the time of interparties hearing on 23<sup>rd</sup> February, 2023 counsel for the 1<sup>st</sup> respondent mentioned that the condition for granting an interim order for stay of execution had not been complied with and therefore the stay order lapsed. The applicant's advocate on his part was unable to confirm the true position on this subject.



12. Be that as it may, it is apparent from the foregoing circumstances that orders (ii), (iii) and (iv) of the first application are now spent.
13. Concerning the remaining order sought in the first application which is for the setting aside of the judgment and decree of 5<sup>th</sup> August, 2022 issued in SCCOM E1078/2021, from my study of the record and as mentioned hereinabove, it is apparent that this constitutes one of the substantive orders also sought in the second application.
14. In view of all the foregoing circumstances, I deem it practical to address that order under the second application. As it stands therefore, the first application is hereby struck out with no order on costs.
15. Turning to the second application, I note that the orders sought therein; though two (2)-fold in nature; are related. I will therefore address them simultaneously.
16. To support the orders sought, the applicant states that at the onset, the respondents instituted SCCOM E1078/2021 (“the first claim”) before the Small Claims Court and sought for the refund of their rent deposit in the sum of Kshs.460,000/= against her, plus costs of the claim and interest thereon.
17. The applicant states that the first claim proceeded ex parte and that the trial court delivered judgment in favour of the respondents and in the absence of the applicant.
18. It is stated by the applicant that prior to the judgment in the first claim, she had instituted CMCC NO. E169 of 2022 (“the second claim”) against the respondents and sought for the sum of Kshs.2,380,000/= being rent arrears due to her.
19. It is also the applicant’s averment that the respondents did not disclose the existence of the second claim to the trial court handling the first claim and which claim involves the same subject matter and the same parties.
20. The applicant states that in view of the above factors, the judgment delivered by the trial court in the first claim has occasioned an injustice to her. The applicant therefore urges this court to call for the lower court files in both the first and second claims, and to give appropriate directions on the same.
21. In retort, the 2<sup>nd</sup> respondent states that the judgment delivered by the trial court in the first claim is regular by virtue of the fact that the same was entered on the admission by the applicant who was at all material times represented by counsel, following which the matter was marked as closed.
22. The 2<sup>nd</sup> respondent further states that upon service of summons and the pleadings in the first claim, the applicant entered appearance and filed a response to the claim and a counterclaim dated 11<sup>th</sup> November, 2021.
23. The 2<sup>nd</sup> respondent states that subsequently, the applicant filed the notice of preliminary objection dated 26<sup>th</sup> October, 2021 seeking to have the claim transferred from the Small Claims Court to the Chief Magistrate’s Court on grounds that the former did not have jurisdiction to entertain the counterclaim.
24. It is stated by the 2<sup>nd</sup> respondent that upon hearing, the trial court handling the first claim dismissed the preliminary objection and struck out the counterclaim vide the ruling delivered on 27<sup>th</sup> May, 2022.
25. It is also stated by the 2<sup>nd</sup> respondent that upon filing the second claim, the applicant filed the application dated 4<sup>th</sup> April, 2022 and sought to have the two (2) claims consolidated, and which application was still pending hearing and determination.



26. Be that as it may, the 2<sup>nd</sup> respondent is of the view that the applicant is engaged in forum shopping while failing to disclose material facts, and therefore urges that the second application be dismissed with costs.
27. Upon my study of the record, it is not in dispute that the first claim was instituted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and against the applicant, praying for the sum of Kshs.460,000/=.
28. Upon my further study of the record, it is apparent that the applicant filed a response to the claim together with a counterclaim wherein she sought for the sum of Kshs.1,626,148/= and which sum is also being sought in the second claim filed subsequently.
29. Upon my consideration of the pleadings and material tendered, I find that the applicant did not tender any credible evidence to support her assertion that the judgment in the first claim was delivered in her absence.
30. Moreover and in the absence of any arguments or evidence to the contrary, I find the assertions by the respondents that the judgment was entered on the admission by the applicant to be more plausible than not.
31. In view of all the foregoing circumstances, I am of the view that the applicant has not established proper grounds for the setting aside the judgment delivered on 5<sup>th</sup> August, 2022 in the first claim.
32. In addition, it is apparent from the record that the applicant by way of the plaint dated 11<sup>th</sup> January, 2021 filed in the second claim is seeking for the sum of Kshs.1,626,148/= and which sum was equally sought in her counterclaim in the first claim.
33. It is also apparent that the second claim; which is still pending before the Chief Magistrate's Court; was filed during the pendency of the first claim.
34. Suffice it to say that, in the absence of any credible evidence, I am not convinced that sufficient reasons have been given to warrant the grant of an order calling for the examination of the proceedings in the respective subordinate courts.
35. The upshot therefore is that the Notice of Motion dated 22<sup>nd</sup> September, 2022 is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Similarly, the Notice of Motion dated 29<sup>th</sup> November, 2022 is hereby struck out with no order on costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 29<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... for the Interested Party

