



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**APA Insurance Limited v Rotich (Civil Appeal 13 of 2019)  
[2023] KEHC 3516 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3516 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL 13 OF 2019**

**JK SERGON, J**

**APRIL 27, 2023**

**BETWEEN**

**APA INSURANCE LIMITED ..... APPELLANT**

**AND**

**MICHAEL KIPKORIR ROTICH ..... RESPONDENT**

*(Being an appeal against the ruling and Order of the Hon. Aziza Ajwang  
(RM) in Kericho C.M.C.C No. 290 of 2016 delivered on 9th May, 2019)*

**JUDGMENT**

1. The Respondent in this instance instituted a suit before the Chief Magistrate's Court in Kericho CMCC No. 263 of 2015 by way of a plaint dated 26<sup>th</sup> May, 2015 pursuant to a road accident that occurred on 17<sup>th</sup> June, 2014 along Sotik-Kisii Road near Mercy Academy area and sought for reliefs against the appellant's insured one John B. Ndung'u Charles in the nature of special damages, general damages plus costs of the suit and interest thereon.
2. The Respondent obtained a default judgement against the said Appellant's insured on 4<sup>th</sup> April, 2017 for a sum of Kshs. 1,762,500/= together with costs assessed at Kshs. 177,605/= and interest.
3. Consequently, the Respondent filed a plaint dated 8<sup>th</sup> September, 2018 against the Appellant and sought for a declaration that the Appellant was obliged and liable to satisfy the decree and costs arising from Kericho CMCC No. 263 of 2015, interest at court rates from 4th April, 2017 till payment in full and the cost of the suit.
4. The appellant entered appearance on the 16<sup>th</sup> November, 2018 and subsequently filed their statement of defence denying every averment made in the plaint and the Respondent filed a Reply to the Appellant's Statement of Defence reiterating the entire content of the Plaint.



5. Consequently, the Appellant filed an application under certificate of urgency and Notice of Motion dated 18<sup>th</sup> April 2019 whereby interim stay of execution of decree was granted pending the hearing and determination of the application inter partes. The Respondents never filed any ground of opposition.
6. The application proceeded by way of oral submissions in the absence of the counsel for the Respondent and upon hearing the Appellant on the abovementioned application, the trial magistrate issued the following orders:
  - i. Set aside the ex parte judgement delivered on 20<sup>th</sup> November, 2018 and all consequential orders
  - ii. Orders that the Defendant's Statement of Defence filed on 21<sup>st</sup> November, 2018 be deemed to be properly on record and the suit proceed for hearing a fresh with a defence case.
  - iii. Orders the Applicant to pay the Respondent throw away costs of Kshs. 20,000/= for the inconvenience caused and delay in prosecuting the matter.
  - iv. Orders each party shall bear its own cost for this application.
7. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated 18<sup>th</sup> March, 2019 the appellant put forward the following grounds:
  - i. That the learned trial magistrate grossly misdirected herself in law and fact in failing and/or disregarding the fact that execution was based on the decree issued in the original suit and was therefore patently unlawful, wrong and irregular.
  - ii. That the learned trial magistrate grossly misdirected herself in law and fact in failing to take into account the fact that no 10 days' notice of entry of judgement was served upon the Appellant in line with Order 22 Rule 6 of the Civil Procedure Rules, 2010 hence arriving at a decision unsustainable in law.
  - iii. That the learned trial magistrate erred in law and in fact in failing to hold and find that the Respondent's suit was a suit seeking a declaration and not a liquidated sum hence it could only proceed to formal proof yet execution had ensued on an interlocutory judgement.
  - iv. That the learned trial magistrate erred in law and fact in failing to hold and find that the Appellant's Statement of Defence dated 16<sup>th</sup> November, 2018 and filed on 21<sup>st</sup> November, 2018 was validated by the filing of a reply to Defence dated 2<sup>nd</sup> January, 2019 by the Respondent.
  - v. The learned trial magistrate erred in law and fact in awarding costs of Kshs. 20,000/= against the Appellant in favour of the Defendant.
  - vi. The learned trial magistrate misdirected herself in ignoring the clear provisions of Order 10 Rule 4 of the Civil Procedure Rules, 2010 hence arriving at a decision unsustainable in law.
  - vii. The learned Trial Magistrate erred in law and fact in failing to determine liability to bear the Auctioneers fees
  - viii. The learned trial magistrate erred in law and grossly misdirected herself on facts by failing to judiciously determine the matter canvassed by the Advocate's submissions in its application dated 18<sup>th</sup> April, 2019 thereby occasioning miscarriage of justice.



- ix. The learned Magistrate misdirected herself in law and fact by failing to take into consideration relevant matters and judicial and statutory guidelines in determining application to set aside judgement/leave to defend suit thereby arriving at a decision unsustainable in law.
8. This court gave directions on the filing of written submissions on the appeal. It is apparent from the record that the respondent did not participate in the appeal.
9. In its submissions, the Appellant put forward two issues for determination as follows:
  - i. Whether the commenced execution of the decree issued on 25<sup>th</sup> July, 2018 by Hegeons Auctioneers was irregular, unlawful and wrong.
  - ii. Who should bear the Auctioneer's costs?
10. On the first issue, the Appellant submitted that the learned trial magistrate in her ruling erred in failing to address, consider and determine the issue of the unlawful and improper execution levied against the appellant brought fourth in the application dated 18<sup>th</sup> April, 2019, that the application subject of the disputed ruling was premised on the wrongful execution by Hegeon Auctioneers who executed a decree issued on 25<sup>th</sup> July, 2018 and intended to proceed with attachment anytime from 24<sup>th</sup> April, 2019.
11. The Appellant further submitted that the decree upon which the said execution was levied was issued on 27<sup>th</sup> July, 2018, two months prior to the commencement of the declaratory suit (Kericho CMCC No. 290 of 2018) which was filed on 20<sup>th</sup> September, 2019, that no decree was ever issued in respect of the said declaratory suit and that the decree issued by the Respondent/Plaintiff related only to the primary suit (Kericho CMCC No. 263 of 2015).
12. It was the Appellant's submissions that no Notice of Entry of Judgement was served upon the defendant in accordance with Order 22 Rule 6 of the Civil Procedure Rules, 2010 hence the said execution was irregular, unlawful and wrong exposing them to irreparable loss and commercial embarrassment in the insurance industry.
13. The Appellant reiterated that the orders sought by the Respondent are of declaratory nature not falling within order 10 Rule 4 of the Civil Procedure Rules, 2010 hence the court could not be used to empower entry of interlocutory judgement in that regard and therefore dispensing with the issue of ex parte judgement being irregular and unlawful.
14. Relying on the provisions of Order 10 Rule 4 and Order 22 Rule 6 of the Civil Procedure Rules, 2010, the Appellant's submitted that since the claim was declaratory in nature and not a liquidated claim, the same should have been set down for formal proof hearing by the Respondent instead of proceeding with a wrongful execution and the Appellant should have been served with not less than 10 days' notice of entry of judgement before execution issues.
15. The Appellant further relied on the court's decision in Shaffique Allibhai v William Ochanda Onduru T/A Ochanda Onguru & Company Advocates & Another [2014] eKLR where the court when commenting on the provisions of Order 22 rule 6 of the Civil Procedure Rules, 2010 opined as follows:

“The above proviso is cast in mandatory terms; no execution by payment, attachment or eviction shall issue on judgment in default unless at least a ten days' notice of the entry of judgment has been given to the judgment-debtor either at his address of service or is served upon him personally. There are good reasons why the proviso was enacted and I suspect it was informed by the constitutional desire to bring to the attention of the Defendant the fact



of entry of judgment, and that would also prevent unscrupulous plaintiffs who may seek to abuse the process of the Court through execution of a judgment where there has been no or no proper service of summons to enter appearance and the plaint. I say these things because it is not uncommon that unscrupulous plaintiffs have obtained judgment in default of appearance or defence on false return of service. The notice will expose such mischief and provide opportunity for remedy.

... But I needed to emphasize the importance of the said notice; it sanctifies the right of the plaintiff to execute and legitimizes the execution. It is, therefore, an important facet of and serves a useful purpose in administration of justice. It is not to be treated as mere technicality.”

16. The Appellant prayed that the Court find that the execution levied against them by Hegeons Auctioneers was irregular, unlawful and wrong in the circumstances for failure to follow the laid down legal procedure.
17. On the second issue the Appellant submitted that where an application for execution is brought before court, as a matter of procedure, the court should make an order pursuant thereto as required under order 22 Rule 13(4) of the Civil Procedure Rules, 2010 hence without a minute made on the court file pursuant to a formal application for execution, any warrants issued thereto are null and void and the proceedings bound to be set aside.
18. The Appellant prayed that the Respondent Advocate and/or the Respondent himself bear the Auctioneers charges for the wrongful execution of the decree issued on 27<sup>th</sup> July, 2018.
19. For the above reasons, the Appellant prayed that the Appeal be allowed with costs and the ruling and order of the trial magistrate delivered on 9<sup>th</sup> May, 2019 be set aside with costs on terms that are just.
20. I have considered the appellant’s submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.
21. The first limb of appeal concerns itself with whether the commenced execution of the decree issued on 25<sup>th</sup> July, 2018 was irregular, unlawful and wrongful.
22. In the abovementioned Application dated 18<sup>th</sup> April, 2019, the Appellant’s stated that the interlocutory judgement entered against Defendant on 20<sup>th</sup> November, 2018 was still pending formal proof but the Respondent through Hegeon Auctioneers had executed the decree purportedly issued on 25<sup>th</sup> July, 2018 and were to proceed attachment anytime from 24<sup>th</sup> April 2019 and that the said decree upon which execution had been levied was issued two months prior to the commencement of the suit at hand , which suit was filed on 20<sup>th</sup> September, 2019.
23. The Appellants further stated that no decree had been issued in respect of instant suit the decree used by the Plaintiff related to the primary suit, that no Notice of Entry of Judgement was served upon the Defendant in accordance with Order 22 Rule 6 of the Civil Procedure Rules hence the execution commenced against the Defendant was irregular, unlawful and wrongful.
24. Upon hearing the Appellant on the Application, the trial magistrate noted that from the Defence filed, the Defendant has denied liability and defence raises triable issues which raise a prima facie defence which should go for trial for adjudication and therefore set aside the ex-parte judgement delivered on 20<sup>th</sup> November, 2018 and all the consequential orders.



25. Order 10 Rule 4 of the Civil Procedure Rules, 2010 provides for instances where an interlocutory judgment can be entered as follows:

- (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
- (2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

26. Order 22 Rule 6 on the other hand provides for Application for execution as follows:

Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.

27. Upon my study of the records, it is clear that the Warrant of attachment dated 16<sup>th</sup> April, 2019 was with regards to the decree passed on 15<sup>th</sup> July, 2018 in respect of the original suit between the Respondent and the purported Appellant insured one John B. Ndung'u Charles In Kericho CMCC No. 263 of 2015 two months before the commencement of the instant suit.
28. I have also observed from the records that upon the institution of the instant suit, on application of the Respondent's advocate, an interlocutory judgment was entered against the Appellant on 20<sup>th</sup> November, 2018 for failing to enter appearance.
29. I am in agreement with the Appellants that execution of decree cannot ensue on the said interlocutory judgment as the suit is a declaratory suit and not a liquidated claim. I have also noted from the records that there is no decree with regards to the interlocutory judgment issued on 20<sup>th</sup> November, 2018.
30. From the above provisions, it is clear that for any claim that is not liquidated, the matter should be set down for formal proof hearing and the trial magistrate having observed that the defence raised triable issues, the matter ought to proceed for hearing.
31. On the issue of service of Notice of Entry of judgment upon the judgment debtor as provided under Order 22 rule 6 stated above, there is no evidence that such notice was served upon the appellant. It is worth noting that the demand letter of the intention to file the instance declaratory suit is dated 15<sup>th</sup> August 2018 and filed on 20<sup>th</sup> September 2018 which was received by the Appellant on 24<sup>th</sup> August 2018 almost one month after the decree that informed the warrant of attachment and the proclamation of Appellant goods was passed.



32. I am in agreement with the sentiments in *Shaffique Allibhai v William Ochanda Onduru* (supra) cited by the Appellant that the proviso to Order 22 rule 6 is cast on mandatory terms to “prevent unscrupulous plaintiffs who may seek to abuse the process of the Court through execution of a judgment where there has been no or no proper service of summons to enter appearance and the plaint.”
33. In *Syrilla A. Barasa & 2 others v Margaret Aseka Barasa* [2022] eKLR the court in allowing the appeal held as follows:
- For the Reasons set out above, the Appeal must succeed with costs. The Judgment in Default dated 7th December 2016 was irregular and unenforceable and is set aside. The Warrant of Execution issued on 8th February 2017 are also set aside. Notice of Judgment was not served and therefore, there was no act of default to justify issuing a warrant. In addition, to the Execution being set aside as a consequence of the Appeal succeeding (the domino effect), the Warrant of Execution and the Proclamation are also separately and expressly set aside. Execution was irregular and in breach of the Auctioneer’s Act and the Auctioneer’s Rules. (Emphasis supplied)
34. The trial magistrate focused on the interlocutory judgement issued on 20<sup>th</sup> November, 2018 while the Appellant on the aforementioned application sought that the decree issued and which the Respondent had began executing be set aside for being irregular. The trial magistrate misdirected herself in not addressing this issue at all and instead focused on the interlocutory judgment that was still pending formal proof in which no decree had issued at all.
35. Upon my consideration of the above, I am of the view that the trial magistrate misdirected herself in focusing on the principles of setting aside the interlocutory judgement in the instant declaratory suit while disregarding the fact that the subject of the Appellant’s application was based on the decree issued in the original suit hence failing to apply the applicable law.
36. I find that the said decree was irregular for failure by the Respondent to serve the mandatory not less than 10 days’ notice of Entry of Judgement upon the Appellant and for the fact that the said decree was in regard to the primary suit in which the Appellant was not a party. Therefore, grounds (i), (ii), (iii), (vi) of the appeal succeed.
37. The second limb of the appeal touches on who should bear the auctioneers charges. The Appellant prayed that the Respondent’s advocate or the Respondent himself bear the Auctioneers charges for the wrongful execution of the decree issued on 27<sup>th</sup> July, 2018.
38. Upon my study of the impugned ruling, I find that indeed the trial magistrate did not address the issue on which party should bear the Auctioneer’s fees.
39. In *James O’makorit/A Lifewood Traders Auctioneers v Star Publications Ltd* [2022] eKLR the court held as follows:
- “The foregoing issues about irregular execution were raised by the respondent in the notice of Motion dated 14/1/2016, but the taxing master did not determine the same. Instead, he only dealt with the taxation of the bill of costs and ignored the protest by the respondent in the bill. The taxing master never made any determination that the respondent (applicant herein) was the one liable to pay the taxed costs. With due respect, the taxing master was obliged to determine the issue of the party to pay the auctioneers costs for the nullified execution, and especially after the opposing party protested that the bill of costs was prematurely filed.”



40. Upon my consideration of the above, I am in agreement with the Appellant that the Respondent should bear the auctioneer charges arising from the irregular execution of decree. Ground (vii) of the appeal therefore succeeds.
41. The third limb of the appeal has to do with whether the trial magistrate failed to hold and find that the Appellant's statement of Defence was validated by the filing of a Reply to defence by the Respondent.
42. The trial magistrate in the impugned ruling observed that even though the reason for delay in filing the defence had not been properly explained, she noted that the statement of defence filed albeit late was responded to by the Plaintiff and negotiations were initiated on the basis of the same and that said defence raises triable issues which should go to trial for adjudication.
43. Upon my study of the impugned ruling, I have not come across anything to indicate that the trial magistrate overlooked the matters canvassed by the Appellants regarding this issue. Grounds (iv), (viii) and (ix) of the appeal cannot therefore stand.
44. The fourth limb of the appeal concerns itself with the award of costs of Kshs. 20,000/=against Appellant in favour of the Respondent.
45. The trial magistrate in her ruling explained that the filing of the Reply to Defence by the Respondent paved way for negotiations and that it was only after the Appellant went quiet again that the Respondent proceeded to apply for execution of the orders hence the said costs were awarded for the inconvenience caused and delay in prosecuting the matter.
46. I find that the trial magistrate correctly explained the reason for awarding the said cost and therefore ground (v) of the appeal fails.
47. The upshot therefore is that the appeal partly succeeds, thus giving rise to the following orders:
  - i. The Decree and Certificate of Costs dated 25<sup>th</sup> July, 2018 was irregular and unenforceable and is set aside.
  - ii. The Warrant of Execution issued on 16<sup>th</sup> April 2019 is also set aside. Notice of Judgment was not served and therefore, there was no act of default to justify issuing a warrant.
  - iii. Consequently, the Warrant of Attachment of movable property in execution of decree for money dated 16<sup>th</sup> April, 2019 and the Proclamation of Attachment dated 17<sup>th</sup> April, 2019 are also separately and expressly set aside as the execution was irregular and in breach of the Civil Procedure Rules.
  - iv. Respondent to bear the Auctioneer's charges arising from irregular execution.

SUBPARA v.

Since the Appeal has partly succeeded, I order that each party bear its own costs.

**Dated, Signed and Delivered at Kericho this 27th day of April, 2023.**

**J.K. SERGON**

.....

**JUDGE**

I certify that this a true copy of the original

Signed



**DEPUTY REGISTRAR**

**In the presence of:**

C/Assistant - Rutoh

Fundi for the Appellant

