



**APA Insurance Limited v Muchoki & another (Miscellaneous Civil Application
E005 of 2023) [2023] KEHC 21519 (KLR) (17 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E005 OF 2023
FN MUCHEMI, J
AUGUST 17, 2023**

BETWEEN

APA INSURANCE LIMITED APPLICANT

AND

ISAAC KABURIA MUCHOKI 1ST RESPONDENT

MAMALO ENTERPRISES AUCTIONEERS 2ND RESPONDENT

RULING

Brief Facts

1. The application for determination dated January 19, 2023 and brought under article 159, 165(6) & (7) of the *Constitution*, section 3A of the *Civil Procedure Act*, order 51 rule 1 of the *Civil Procedure Rules*, seeks for orders that this court do exercise its supervisory jurisdiction in Nyeri CMCC No 274 of 2022 and call for the original record for purpose of its inspection and consider allocation of the case to a different court other than the court presided over by Hon James Muriuki, Senior Principal Magistrate
2. The respondent filed grounds of opposition dated February 7, 2023 and replying affidavit dated March 15, 2023 in opposition to the application.

The Applicant's Case

3. The application was supported by the affidavit of Kennedy Ochieng' the advocate of the applicant whereas he deposed that the applicant was served with summons to enter appearance on October 24, 2022 and instructed its advocates who entered appearance on November 1, 2022. Together with the memorandum of appearance, the deponent states that he filed an application dated October 31, 2022 seeking for orders that the said matter be referred for arbitration according to the terms of the insurance contract between the applicant and the 1st respondent. It was further stated that both the memorandum of appearance and the application dated October 31, 2022 were duly served upon the



- 1st respondent on November 1, 2022. The deponent thereafter fixed the application for hearing which was scheduled for February 7, 2023 and served the 1st respondent's advocates with a hearing notice.
4. The deponent states that to date, he has never been served with a response to the said application.
 5. On January 17, 2023, counsel explained that he received frantic phone calls that the applicant's driver had been accosted by auctioneers who attached its motor vehicle registration number KCS 750Z pursuant to a judgment decree and warrants of attachment and sale issued in favour of the 1st respondent in Nyeri CMCC No 274 of 2022. The counsel further explained that he made a phone call to the court administrator at the Chief Magistrate's Court in Nyeri where he learnt that there was an ex parte judgment entered on December 9, 2022 which he found strange due to the fact that the pending application dated October 21, 2022 had not be heard. The court record also confirmed that even with the irregular judgment and consequential orders, the mandatory notice of entry of judgment was never served upon the applicant before the execution process commenced. Furthermore, the deponent states that the auctioneer did not give the applicant any notice of proclamation of attachment at all. The applicant argues that the execution process was motivated by the ulterior sinister motive to ambush and extort it of the decretal sum and the auctioneers exorbitant fees.
 6. The deponent contends that the court record shows that a request for judgment was made by the 1st respondent's advocates on November 21, 2022. The request for judgment was placed before Hon Mathias Okuche who declined to enter judgment on account of the pending application dated October 31, 2022. On December 9, 2022, the 1st respondent's advocates initiated another request for judgment using the same application dated November 21, 2022 but was placed before a different court, Hon Macharia (SPM) who immediately entered ex parte final judgment on December 9, 2022 against the defendant as prayed followed by consequential decree and warrants for attachment and sale for a sum of Kshs 1,420,000/-. Thus, it is upon entry of the irregular judgment that the 1st respondent proceeded to extract a decree and consequential warrants of attachment and sale culminating with the illegal/irregular attachment of its motor vehicle on January 17, 2023.
 7. The deponent states that he wrote a letter of complaint on January 17, 2023 asking for the matter to be placed before the court for mention inter parties on January 18, 2023 and made a formal application for the immediate and unconditional release of the said motor vehicle. The application was placed before Hon J Macharia (SPM) who failed to certify the application as urgent, gave orders of stay of execution and directed service of the application for interparties hearing on January 24, 2023. As for the release of the motor vehicle, the learned magistrate merely ordered that the same should not be disposed off pending the hearing and determination of the application.
 8. Counsel avers that upon serving the respondents with the application dated January 17, 2023, the 1st respondent's counsel engaged him with a view to chart a way forward and directed for the release of the motor vehicle. However, the 2nd respondent demanded to be paid a sum of Kshs 392,000/- before the said motor vehicle could be released. Thus bringing the matter to a standoff which leaves the applicant in a precarious position as it is to continue to wait and denied the use of the motor vehicle for an unknown period of time on account of the irregular/illegal ex parte judgment entered by the court in favour of the 1st respondent.
 9. Counsel argues that the pursuit of the respondents and handling of the matter in the subordinate court starting from the point of request for and illegal entry of the ex parte judgment smirks of utter mischief and is not consistent with the business of a court of justice. He further argues that the applicant has been greatly prejudiced by the cartel like proceedings before the lower court and denied a hearing contrary to the cardinal principles of the law which calls for the intervention of this honourable court under its supervisory jurisdiction over the subordinate court. The current total amount demanded on



account of the illegal judgment stands at Kshs 1,812,000/- which counsel explains that if it is paid will never be recovered as it is not clear on whose behalf how much is being recovered.

The Respondents' Case

10. The respondents state that the application is misconceived, incompetent, bad in law and an abuse of the court process and ought to be dismissed. The respondents contends that the applicant has not raised any substantive issues to have the matter before the trial court transferred to this honourable court or for this court to exercise its supervisory jurisdiction and/or indication of bias by the trial court. The respondents argue that the applicant has not proved bias by the trial court as its applications dated October 31, 2022 and January 17, 2023 are still pending determination in the magistrate's court. In fact, the respondent argues that the trial court gave interim orders in favour of the applicant by granting orders for stay of execution against attachments of the applicant's motor vehicle registration number KCS 750Z.
11. The respondents argue that the applicant appears to be pre-empting the outcome of the two applications by bringing the current application. In any event, the respondents state that the applicant has a right of appeal if he shall be dissatisfied with the decision of the lower court in determining the applications.
12. The respondents state that the application is a calculated scheme of forum shopping which this honourable court ought to condemn and strike a blow to the principle of judicial decisional independence of the court as guaranteed under article 160 of the *Constitution*. The respondents further state that the court should frown upon a litigant who chooses which court to hear and determine their matter as such practice would erode confidence of the public in the independence of the judiciary.
13. The applicant filed a supplementary affidavit dated March 16, 2023 whereby counsel states that the learned trial magistrate exhibited open bias when he made orders contrary to the orders of his brother Hon Mathias Okuche. Further, the trial magistrate proceeded under an erroneous presumption of jurisdiction and sat on appeal whilst it made contrary orders as those of his brother and despite the glaring overwhelming evidence of irregularities and illegalities on record, the trial magistrate failed to order the immediate release of the applicant's attached motor vehicle.
14. The deponent states that the learned magistrate committed acts that call for exercise of the supervisory powers of this court because the applicant does not believe that it is a case of want of competence on basic issues of the applicable law.
15. The deponent further states that the applicant is not forum shopping and is ready to appear before any other judicial officer to determine all the matters pending before the lower court. To the contrary, it is the respondent who is clearly insisting on remaining before the specific impugned court for reasons that are obvious.
16. That as a matter of fact, the objective of the illegality and irregularities complained of were partially achieved as the applicant is already arm twisted and extorted of Kshs 200,000/= pursuant to the irregularities committed by the respondents and apparently aided by the said court.
17. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

18. The applicant reiterates what he deposed in his affidavit and submits that pursuant to article 165 (6) & (7) of the *Constitution*, this honourable court has the jurisdiction to exercise its supervisory powers over all subordinate courts including magistrate's courts. The applicant submits that the trial court



has exhibited open bias against it and went against the decision of his brother on the same issue within the same file. The applicant further submits that the bias is exhibited by the said irregular entry of judgment despite the fact that there is a pending application before the court to refer the matter to arbitration which ought to have been heard and determined in priority to any other proceedings in the matter. The applicant argues that the court record glaringly shows that the application had already been fixed for hearing on February 7, 2023 and yet the learned magistrate made the orders for entry of judgment as he did.

19. The applicant further argues that the bias is further exhibited by the fact that the 1st respondent had already made a request for judgment which was rejected by the Honourable Mathias Okuche but the Honourable Macharia (SPM) still went ahead to take over the file from his brother and grant the request for judgment despite the pending application for reference to arbitration.
20. The applicant relies on the case of *New International Consultancy Company Limited (Suing by a power of attorney No P/A65175/1 of Apex Vision Limited) vs Telkom Kenya & another* [2019] eKLR and submits that it was not obligated to file a statement of defence once it had filed an application for reference of the matter to arbitration. As such, the applicant contends that the entry of judgment in the said CMCC No 274 of 2022 is therefore void *ex debito justitiae* and is for setting aside. The applicant further submits that it had brought the issue of irregular judgment to the attention of the court in an application dated January 17, 2023 and it was at that point that the court ought to have realized the mistake made and unconditionally ordered the release of the attached motor vehicle pending the inter parties hearing. The applicant further argues that it does not believe that the entry of judgment was a case of incompetence but that the same was done with the full knowledge of the previous order of the court declining the request for judgment and of the law relating to the subject application.
21. The applicant further relies on the case of *Republic vs Jared Wakhule Tubei & another* [2013] eKLR and submits that the supervisory powers of this honourable court are not limited to judgments and rulings of the subordinate courts but they also extend to the conduct of persons exercising judicial authority as well as supervision over the proceedings of the subordinate courts. It is thus not necessary for a determination to be made or an appeal to be filed before this court can exercise its supervisory jurisdiction over subordinate courts.
22. The applicant further argues that the fact that the request for judgment had already been rejected by the Hon Mathias Okuche, the Hon Macharia clearly usurped the position of an appellate court by determining the same request that had already been rejected and thus acting beyond the limits of his authority. Thus, the applicant argues that there is need for this court to intervene and exercise its supervisory powers over the magistrate's courts to prevent a miscarriage of justice. To support its contentions, the applicants rely on the case of *Republic vs Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 Others (Interested parties); ex parte Applicant: Pravin Galot* [2020] eKLR.
23. The applicant submits that it is reasonably apprehensive that the Hon Macharia is already biased and there is therefore risk of a biased hearing and determination of the matters between the parties in the lower court. The applicant therefore submits that there is need for this court to intervene and exercise its supervisory powers and order that the allocation of Nyeri CMCC No 274 of 2022 before any other magistrate apart from Hon. Macharia for hearing and determination.

The Respondents' Submissions

24. The respondents reiterate the contents of their affidavit and submit that the applicant has failed to give reasons for this honourable court to exercise its supervisory jurisdiction over the magistrate's court.



There is no proof of bias by the magistrate's court and the applications dated October 31, 2022 and January 17, 2023 are still pending determination.

25. The respondents contend that the application is devoid of legal and factual basis and is a scheme to prolong litigation pending before the trial court. Furthermore, the respondents rely on article 160 of the *Constitution* and the case of *Kaplana Rawal & 2 Others vs JSC & 3 others* [2016] eKLR and states that the current application seeks to undermine the principle of judicial independence and ought to be dismissed.

Whether the Applicant Ought to be Granted the Orders Sought.

26. Article 165(6) & (7) of the *Constitution* provide for the supervisory jurisdiction of the High Court over subordinate courts in the following terms:-

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

27. Mwongo J in *Director of Public Prosecutions vs Perry Mansukh Kansagara & others* [2020] eKLR outlined circumstances where this court can exercise its constitutional supervisory jurisdiction as follows:-

"I can readily identify the following situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:-

- a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;
- b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;
- c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation;
- d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice."

28. The learned judge went on to state that:-

"Where, or if, it is intended to exercise supervisory jurisdiction under the Constitution, I think the following safeguards should be observed:

- a. A balance has to be struck in the exercise of constitutional supervisory jurisdiction to ensure there is no appearance that its object is to micro-manage the trial court's independence in the conduct and management of its proceedings;



- b. Ideally, constitutional supervisory jurisdiction should be exercised only after the parties are heard on the subject matter in question;
 - c. Supervisory jurisdiction should not be used where the option of revision is appropriate or applicable;
 - d. Supervisory jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
 - e. Supervisory jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice."
29. I have considered the pleadings and submissions of the parties in this application. It is not disputed that the court file was forwarded to Hon Okuche o November 22, 2022 upon a request for judgement having been filed. The honourable magistrate declined to enter ex parte judgement on November 22, 2022 on grounds that there was an application on record. The file was sent to the trial court for action. It is also not in dispute that before the issue was pointed out by Okuche, J, the 1st respondent applied afresh for ex parte judgement to be entered. The file was taken to Hon Macharia SPM for action on December 9, 2022. The honourable magistrate entered judgement in favour of the respondents was accordingly entered.
30. The court record shows that on November 21, 2022, the applicant filed the application seeking orders for referral to an arbitrator dated October 31, 2023 and that this application was given a hearing date of February 7, 2023. The 1st respondent's advocate was duly served with the application and notified of the date of hearing through a letter dated November 14, 2022. It is noted that it was after filing this application that the request for judgement was filed. The respondent's counsel filed grounds of opposition to the said application on November 21, 2022 but did not serve the applicant's counsel. It is important to note that ex parte judgement was declined by the first magistrate who dealt with the file for reasons that there was an application pending hearing which he knew that it ought to be heard before the court took another step. The 2nd magistrate entered judgement which had been declined by his counterpart and with the knowledge that there was a pending application that had a hearing date. In my view, the action of the 2nd magistrate was irregular and unprocedural.
31. The applicant states that he had filed his application dated October 31, 2022 seeking for orders to have the dispute referred for arbitration as per clause 9 of the agreement known as private motor policy of the parties. Such arbitration clauses are a common feature in agreements between parties and especially companies. The aim of the said clauses is to decongest courts and to promote article 159 (2)(c). It is therefore, right and fitting to allow parties to pursue such avenues of dispute resolution. The applicant ought to have been accorded the right of hearing of his application that had a hearing date.
32. With the knowledge that another magistrate competent to deal with the case had refused to enter ex parte judgement and that the application dated October 31, 2022 had not been heard and that it had a hearing date, it was wrong for the learned magistrate Hon Muriuki to enter ex parte judgement as he did on 9/12/2022 . The applicant was therefore denied the right to be heard under article 50 of the Constitution. This is a situation that calls for the intervention of this court in exercise of its supervisory jurisdiction over the subordinate courts.
33. On the allegation of bias, it is evident that the parties had not appeared before Hon Muriuki for mention or hearing. As such, the magistrate cannot be said to have been biased, but he acted unprocedurally by entering exparte judgement in the suit whereas the applicant was still awaiting to be heard. It goes without saying that the outcome of the hearing and determination of the pending



application would have affected the request for judgement. This expectation seems to have resulted in the counsel for the respondent filing and serving his grounds of opposition of the opposite party and filing a second request for ex parte judgement. In my view, the applicant's counsel did not act in good faith. The counsel had a duty to advise his client to hold on until the application was disposed of. In a situation like this one, it is in the interests of justice that the counsel be condemned to pay costs.

34. In conclusion I make the following orders:-

- a. That the ex parte judgement entered on December 9, 2022 is hereby set aside.
- b. That the motor vehicle registration number KCS 750Z is hereby released to the applicant APA Insurance Ltd with immediate effect.
- c. That the 1st respondent's advocates Warutere & Associates do pay the auctioneers fees.
- d. That the costs of this application shall abide in the suit.
- e. That this file be remitted to the Chief Magistrate Hon A Kibiru for hearing and disposal.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 17th day of August 2023.

