



REPUBLIC OF KENYA



**Kimani & another v Nzyuko & another (Civil Appeal E374 of 2021)
[2022] KEHC 12571 (KLR) (Civ) (25 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12571 (KLR)

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

CIVIL

CIVIL APPEAL E374 OF 2021

JK SERGON, J

AUGUST 25, 2022

BETWEEN

JOSEPH MWANGI KIMANI 1ST APPELLANT

JAMES NJENGA 2ND APPELLANT

AND

BERNARD MBALU NZYUKO 1ST RESPONDENT

TAIFA AUCTIONEERS 2ND RESPONDENT

RULING

1. The 1st and 2nd applicants took out the summons dated 8th April, 2022 in which they sought for the following orders:
 - i. That service of this application be dispensed with in the first instance.
 - ii. That this honourable court be pleased to hold the respondents in contempt of the court order granted by this honourable court on 11th February, 2022 requiring the 2nd respondent to release motor vehicle registration number KCH 797T to the applicants/appellants upon deposit of the entire decretal sum in a joint account to be held by both advocates.
 - iii. That this honourable court be pleased to order the immediate and unconditional release of motor vehicle registration KCH 797T to the applicant/appellant.
 - iv. That this honourable court be pleased to order that the 2nd respondents bear the cost of loss of income/use incurred by the defendants/applicants from 23rd march, 2022.
 - v. That this honourable court be pleased to order OCS of Buruburu Police Station to assist the appellants to enforce prayer number 3 above.



- vi. That this honourable court be pleased to order the 2nd respondent to tax his fees as per the provisions of the *Auctioneers Act* cap 526 Laws of Kenya.
- vii. That the costs of this application be borne by the 1st and 2nd respondents.
2. The appellants/applicants filed the affidavit sworn by Joseph Mwangi Kimani in support of the aforesaid summon.
 3. When served with the application the 1st respondent filed a replying affidavit he swore to oppose the same.
 4. I have considered the grounds set out on the face of the summons plus the facts deponed in the rival affidavits and the oral rival submissions.
 5. The appellants stated that on 21st October, 2021 the 2nd respondent was ordered to release to them motor vehicle registration no. KCH 797T upon the appellants depositing the entire decretal sum in an interest earning account in the joint names of both advocates and or firms of advocates. The appellants aver that on 23rd March, 2022, they deposited a sum of ksh.208,705/= in Equity Bank Ltd in compliance with the court order.
 6. It is argued that the auctioneer, the 2nd respondent herein refused to release the motor vehicle despite having been served with the court order. This court was beseeched by the appellants to issue the orders sought to prevent the respondents from selling the attached motor vehicle.
 7. The respondent opposed the application arguing that the appellants had failed to deposit the entire decretal sum as ordered in an interest earning account therefore the conditional orders issued by the court lapsed.
 8. The 1st respondent averred that it proceeded to instruct the auctioneer, the 2nd respondent herein to proceed and execute the decree when it became apparent that the appellants had failed to make the deposit in compliance with the court order.
 9. The respondent further pointed out that the amount the appellants deposited is less than the decretal sum hence the respondent was right to execute the decree.
 10. It is not in dispute that on 11th February, 2022, this court delivered its ruling in which it ordered the appellants to deposit in an interest earning account in the joint names of the advocates or firms of the advocates, the decretal sum within 45 days.
 11. This court further ordered the respondents to forthwith release to the appellants motor vehicle registration number KCH 797T, upon the appellants depositing the decretal sum. This court was categorical that failure to comply with the aforesaid condition within the timelines, the order for stay would lapse.
 12. It is also not in dispute that the motor vehicle has not been released to the appellants. The 1st respondent is of the submission that the appellants did not deposit the entire decretal sum and that is why the motor vehicle was not released.
 13. The appellants denied the respondents' assertion stating that they deposited the money. The record shows that the principal amount of the judgment is ksh.208,750/= exclusive of interest and costs.
 14. It would appear that the aforesaid amount is what the appellants/applicants deposited in compliance with the court order. In its ruling, this court did not specify the decretal amount. None of the parties informed this court of the entire decretal sum. It would appear from the annexure attached to the



replying affidavit that the decretal amount as of 15th August, 2021 stood at ksh.285,677/58. The above figure will continue to attract interest hence the figure may rise further.

15. This court cannot at this stage find the appellants as having intentionally failed to deposit the entire decretal. By the time of delivering the ruling, the entire decretal amount had not been ascertained. At the same time, the assertion by the 1st respondent that the appellants had not deposited the entire decretal sum is not also farfetched.
16. To be fair to the parties, this court will take the sum of ksh.285,677/58 as the entire decretal sum. In view of the confusion created in this matter, it is only fair to grant the appellants a chance to top up the balance and the respondents should forthwith release the motor vehicle.
17. In the end, I find the chamber summons dated 8th April, 2022 to be meritorious. The same is allowed thus giving rise to issuance of the following orders:-
 - i. The order for stay of execution of the decree pending appeal granted on 11th February, 2022 shall continue to subsist.
 - ii. The appellants are given 30 days from today's date to deposit in an interest earning account in the joint names of advocates appearing in this case being the balance of the decretal sum of ksh.76,927/58 tabulated as follows:
$$285,677/58 - 208,750 = 76,927/58$$
 - iii. The 1st and 2nd respondents to unconditionally release motor vehicle registration no. KCH 797T to the appellants upon them making the deposit in (ii) above.
 - iv. The 1st respondent to tax its charges.
 - v. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants/Applicants

..... for the 1st Respondent

..... for the 2nd Respondent

