



REPUBLIC OF KENYA



**Ngao v Kenya Medical Training College (Civil Appeal E22 of 2020)
[2022] KEHC 13577 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E22 OF 2020
WM MUSYOKA, J
SEPTEMBER 23, 2022**

BETWEEN

BERNARD NGAO APPELLANT

AND

KENYA MEDICAL TRAINING COLLEGE RESPONDENT

*(Being an appeal from orders made by Hon. E. Malesi, Principal Magistrate
(PM), on 11th December 2020, in Kakamega CMCCC No. 120 of 2019)*

JUDGMENT

1. The suit before the trial court was by the appellant against the respondent, for special damages of Kshs. 72, 400.00 and general damages. The alleged facts were that a son of the appellant had been admitted by the respondent to a nursing course at its Kakamega campus, and he had paid Kshs. 72, 400.00 as fees, but, on the date appointed for reporting to college, the son was denied admission on grounds that he had not met the necessary academic grade for admission. Thereafter, the respondent failed to refund the fees that had been paid, despite declining to admit the said child.
2. An interlocutory judgement was entered on June 17, 2019, for non-appearance. Subsequently, the matter proceeded on formal proof, and a final judgment was entered for the appellant on December 3, 2019, in terms of Kshs. 72, 400.00 special damages and Kshs. 150, 000.00 general damages.
3. The respondent filed an application, dated December 11, 2020, seeking the setting aside of the judgment of December 3, 2020., stay of execution of the said judgment, release of a motor vehicle that had been attached in execution of the judgment, and leave to defend. The principal case was that the respondent, upon being served, had instructed an Advocate, who had filed a notice of appointment, but did not file defence. It was argued that there was a good defence, and section 21 of the *Government Proceedings Act*, cap. 40, Laws of Kenya, had not been complied with. It was further contended that there was no entry of judgment and a certificate of order against Government was not served. Orders



were made on December 11, 2020, certifying the matter as urgent and allowing prayers 2 and 3 of the application.

4. The application dated December 11, 2020 was resisted by the appellant, through an affidavit sworn by him on December 17, 2020. It was averred that service of summons to enter appearance had been conceded. It was further averred that the parties had been in communication over the final judgment, and the respondent had made attempts to refund the amount they had received, but not to settle the judgment sum. The filing of a notice of appointment by the Advocate for the respondent was contested, on grounds that the document placed on record was forged, and that, in any case, it was purportedly filed after the filing of the suit.
5. The appellant was aggrieved by the orders of December 11, 2020, hence the appeal. He avers that the ruling was devoid of merit; the court did not consider the evidence available; the order setting aside the judgment and release of the motor vehicle did not meet the set standards; the court should have considered awarding throwaway costs; the trial court failed to appreciate that the respondent was aware of the proceedings and the eventual entry of judgement to warrant the setting aside of the judgment; litigation must come to an end; and the Attorney General had no locus standi to represent the respondent in the proceedings.
6. Directions were taken on November 22, 2021, for the canvassing of the appeal by way of written submissions. Only the appellant filed written submissions, on January 10, 2022, dated January 6, 2022. He principally submits that the proceedings of the trial court be upheld. No statutory provisions nor case law is cited.
7. This matter is fairly straightforward. It relates to orders that Hon. E Malesi PM, made on December 11, 2020. I hereby reproduce verbatim what transpired in court on that day as recorded by the trial court. It is recorded:

“ 11/12/20

Before Hon. Malesi, PM (Duty Court)

Ms. Shirika present for the def/applicant

Shirika

Before court is an appln dd December 11, 2020. We pray that prayer 1, 2, 3 and 4 be granted. There is a consent btwn the AG and counsel formerly on record the basis of prayer 2.

Court: The appln has merit and the same is certified urgent. Prayer 2 & 3 is also allowed. The applicant to serve for inter partes hg on December 22, 2020

Signed

December 11, 2020”

8. The application, upon which the orders of December 11, 2020 were predicated, is that dated December 11, 2020. It has a total of eight prayers, which I reproduce verbatim herebelow:
 - “ 1. That this Application be certified as urgent and service dispensed with in the first instance.
 2. That leave be granted exparte to the Honourable the Attorney General to come on record for the Respondent herein.



3. There be a stay of execution of the judgment and decree herein pending the interparties hearing of this Application.
 4. That Jakacha Auctioners be ordered to release motor vehicle registration number KBG 894K to the respondents herein pending the hearing of this Application.
 5. That the judgment entered on the 3rd day of December, 2019 and the decree extracted thereto together with all consequential orders made herein be set aside and or vacated forthwith.
 6. That in the alternative to Prayer 4 above, the execution by the Plaintiffs be set aside and motor vehicle registration number KBG 894K released to the respondent.
 7. That in the alternative to prayer.
 8. That the defendant/applicant be granted leave to file and serve their Defense and this matter be set down for hearing.”
9. When the prayers sought in the application dated December 11, 2020 are juxtaposed against the orders made on the same date, it becomes clear that the trial court only granted the first three prayers, relating to certification of the application as urgent, grant of leave to the Attorney General to come on record for the respondent, and stay of execution of the judgment pending the hearing and determination of the application. The central plank of the instant appeal is that the trial court had set aside the judgment of December 3, 2019 and ordered release of the motor vehicle attached in execution of that judgment. The appeal is clearly not well founded, as the trial court did not set aside the said judgment and did not order release of the attached motor vehicle in its orders of December 11, 2020.
10. The issue as to whether the judgment of December 3, 2019 ought to be set aside is still alive before the trial court, for it is the principal prayer in the application dated December 11, 2020, which application is still pending on that issue. That is borne out by the record. On December 22, 2020, the appellant consented to the respondent amending the application dated December 11, 2020. The amendments were effected on December 24, 2020. The said amendments did not affect the prayers in the original application, save for completing prayer 7, which was incomplete in the original application, to seek the striking out of the pleadings by the appellant. The main amendments were with respect to the grounds on the face of the application. So, the judgment of December 3, 2019 remains intact, only its execution was stayed by the orders of December 11, 2020, and whether it ought to be set aside is an issue that pends determination by the trial court. The appeal before me is clearly misconceived to that extent.
11. I reiterate that the issue of the release of the attached motor vehicle did not arise at all in the proceedings conducted on December 11, 2020. The respondent did not ask for it, and the court did not order it. The only order made on that date, which is close to affecting it, was the stay of execution of the judgment, but that by itself did not have the effect of ordering release of the attached motor vehicle. What I am saying is fortified by the orders that followed on December 22, 2020. On December 22, 2020, the respondent applied for the release of the attached motor vehicle, which application was resisted by the appellant, with the rider that he would not be averse to the motor vehicle being released, on condition that the respondent deposited security for costs, to which the respondent was agreeable, and the court accordingly directed the release of the motor vehicle, subject to the respondent depositing Kshs. 50,000.00 in court. The need for orders being sought on December 22, 2020, for release of the motor



vehicle, would not have arisen if the trial court had already made orders to that effect on December 11, 2020.

12. The only issue, arising from the orders of December 11, 2020, in respect of which the appellant may have some ground for complaint, was the leave granted to the Attorney General to come on record for the respondent. However, that is an issue that is still alive before the trial court. The appellant filed a notice of preliminary objection on it, dated January 11, 2021. Directions were given on January 12, 2021, for disposal of the said preliminary objection. The respondent filed detailed written submissions on that point on February 4, 2021, of even date. There would be no point for me to determine that issue, when the same is pending determination before the court seized of the principal dispute.
13. Overall, I find no merit in the instant appeal, and I accordingly dismiss it.
14. Should I award costs? I am persuaded that this is a good case for award of costs. This appeal challenges, in principal, orders that the trial court did not make. The appellant ought to have made himself familiar with what had transpired in court on December 11, 2020, before rushing to file appeal against orders that were non-existent, save for that on the Attorney General. Had he done so, he would have seen that the instant appeal was wholly needless. Even on the matter of the Attorney General, that is an issue that he is pursuing before the trial court. After filing this appeal, in December 2020, he was before the trial court, in January 2021, filing a notice of preliminary objection on the same issue of the involvement of the Attorney General. Anyhow, I note that the Attorney General stayed away from these appellate proceedings, and played no part at all in them. I shall accordingly not order the appellant to pay costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF SEPTEMBER 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Obwatinya, instructed by Obura-Obwatinya & Company, Advocates for the appellant.

