



REPUBLIC OF KENYA



Kevin Kipkosgei t/a Kogo Junior Auctioneers & another v Kipsang (Civil Appeal E192 of 2022) [2022] KEHC 16792 (KLR) (23 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E192 OF 2022
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

KEVIN KIPKOSGEI T/A KOGO JUNIOR AUCTIONEERS 1ST APPELLANT

MWANANCHI CREDIT LTS 2ND APPELLANT

AND

BENJAMIN NGETICH KIPSANG RESPONDENT

RULING

1. Before me is an *ex-parte* chamber summons filed in pursuant of [Auctioneers Act rules 1997](#), sub-rule no 9, 1(c) of the laws of kenya seeking the following orders.
 1. That this honourable court do authorize the applicant to break in to the respondent's premises/homestead or any other premises that motor vehicle registration no KBZ 257Y is kept and or parked for the purpose of distraining/repossessing the same.
 2. That the OCS Ainabtich police station, and or any other police officer whose jurisdiction the aforesaid motor vehicle registration no KBZ 257Y is kept to provide security to the applicant during the break in and/or repossession of the same.
 3. That cost of this application be provided.
2. The application was supported by an affidavit sworn by Kevin Kipkosgei t/a Kogo Junior Auctioneers and the ground on the face of it. The affidavit in opposition to the application was sworn by Benjamin Ngetich Kipsang who also expressed himself to be fully aware of the matters concerning the case. The applicant is aggrieved by the order Chief Magistrate Mikoyan dated November 24, 2022 which read as follows;
 1. That this application be and is hereby certified urgent.



2. That the order of this Honourable court dated November 14, 2022 be and is hereby vacated and/or set aside.
 3. That the application dated November 24, 2022 be served upon the respondents within three (3) days from the date hereof.
 4. That *inter-partes* hearing on November 30, 2022.
3. In their memorandum of appeal the applicants/appellants have listed the following grounds of appeal namely;
1. That the learned trial magistrate erred in law and in fact by finding the appellants in contempt of court orders.
 2. That the learned trial magistrate erred in law and in fact by sentencing the appellants to 6 months in jail.
 3. That the learned trial magistrate erred in law and fact by sentencing the appellants to an alternative fine of kshs 100,000/=.
 4. That the learned trial magistrate erred in law and fact by arrogating himself powers and Jurisdiction that he does not have.
 5. That the learned trial magistrate erred in law and fact by applying the wrong provisions of the law and legal principles.
 6. That the learned trial magistrate erred in law and fact by holding the appellants in contempt of a court and yet no opportunity to show cause was ever presented to them.
 7. That the learned trial magistrate erred in law and fact by finding the appellants in contempt of a court order of another court and without meeting the necessary evidentiary threshold required by the law.
 8. That the learned trial magistrate erred in law and fact by holding the appellants in contempt of a court Orders despite discharging its own orders.
 9. That the learned trial magistrate erred in law and in fact by entertaining a defective application by the respondent that did not meet the legal provisions of the law.
 10. That the learned trial magistrate erred in law and by failing to uphold the principal that once orders are given in a miscellaneous application the same is dispensed with and a court becomes *functus officio*.
 11. That the learned trial magistrate erred in law and fact by holding the 2nd appellant in contempt despite the fact that it was not party to the proceedings in court.
 12. That the learned trial magistrate erred in law and fact by failing holding the parties in contempt yet the application and order issued by the court is in respect of a different motor vehicle.
 13. That the learned trial magistrate erred in law and fact by ignoring and or failing to consider the 1st appellants replying affidavit and oral submissions made in court.
 14. That the learned trial magistrate erred in law and in fact by failing to appreciate that section 151 of the [Public Health Act](#) can only be implemented by the county government officials or anyone acting under their instructions.



4. It is plain that this stage what is at stake is the relief on stay of the contempt orders issued by the lower court pending the hearing and determination of the instant appeal. In considering the question whether the plaintiff had satisfied the requirements of section 1(a), 3, 3(a), 63(e) of the Civil Procedure Act and order 46 rule 6 of the Civil Procedure Rules. I am guided the principles in Joseph Mung'aya Makotsi v Kenya Power and lighting company ltd and another (2018) eKLR and National Bank of Kenya ltd v Alfred Owino Bala (2015) the court held
 - a. The application is brought without undue delay.
 - b. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. See also Syokimau Bright Homes -v- Virginia Mwelu Musembi (2018) eKLR paragraph 7 and Nicholas Stephen Okaka and Another v Alfred Waga Wesonga (2022) eKLR.
5. In the instant application from the affidavits evidence of both counsels it appears to me that there are split on the decision made by the learned trial magistrate. My attention has been drawn to a number of averments in the aforesaid affidavits and the alleged breaches committed in the impugned proceedings before the session magistrate. As such the main question debated in this case is whether in the event of the applicant being successive in his appeal it would be rendered nugatory if stay is declined.
6. The discretion given by order 42 rule 6 of the Civil Procedure Rules is wholly unfettered and the only limitation on the exercise of discretion is the usual and inevitable one namely that the exercise must be judicial based on reasons and not caprice. In the case at bar there are a number of factors which come into play and of significance is possibly the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted. Primarily this might not be the time to delve into the subject matter of the appeal in which this court will have an opportunity to interrogate the exercise of judicial discretion of the trial court when all the materials necessary have been availed by the parties. That is when the sins committed by the applicant leading to the contempt proceedings can be examined.
7. As a consequence, considering the notice of motion on stay of execution pending the determination of the intended appeal I do exercise discretion to grant prayer number (c) on condition that the applicant do deposit ksh 100,000/= with the Deputy Registrar of the high court within 7 days of issuance of this order. In the circumstances, the applicant should comply with the following directions.
 - i. The record of appeal be filed in the instant case and served upon the respondents in the next 21 days accompanied with written submissions on the issues raised in the memorandum of appeal.
 - ii. Thereafter the respondent upon being served shall be at liberty to file rejoinder and written submissions on the subject matter of the appeal within a corresponding 21 days.
 - iii. The decision of the court is hereby scheduled to be delivered on 13th February 2023.
 - iv. There can be no doubt that the condition precedent of deposit of security carries a higher weight for compliance within the stipulated period before any action in (i) (ii) and (iii) above.
 - v. The costs of this application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23TH DAY OF DECEMBER, 2022.

R. NYAKUNDI



JUDGE

