



REPUBLIC OF KENYA



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

Mburu v Kariki (Civil Appeal E542 of 2022)
[2022] KEHC 16822 (KLR) (Civ) (22 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16822 (KLR)

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

CIVIL
CIVIL APPEAL E542 OF 2022

JK SERGON, J
DECEMBER 22, 2022

BETWEEN

MARY WANJUHI MBURU APPELLANT

AND

JOHN NJOROGE KARIKI RESPONDENT

RULING

- 1) The appellant/respondent herein took out the motion dated November 7, 2022 whereof she sought for the following orders:
 - i. That this application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
 - ii. That pending the interpartes hearing and determination of this application the court be pleased to issue temporary orders for stay of execution restraining the respondent through its agents; M/S Icon Auctioneers and/or any other persons whomsoever from selling the attached motor vehicle registration number KAT 4XXX belonging to the applicant in execution of the impugned judgment/decree made on June 23, 2022 by the small claims court.
 - iii. That the attached motor vehicle registration number KAT 4XXX belonging to the applicant be released unconditionally by M/S Icon Auctioneers to the applicant.
 - iv. That pending the hearing and determination of the appeal herein the court be pleased to issue orders for stay of execution of the impugned judgment/decree made on June 23, 2022 by the small claims court.



- v. That the costs of this application to abide the outcome of the appeal.
 - vi. The appellant filed an affidavit she swore in support of the motion. The respondent filed the affidavit sworn by Joan Kibiku to oppose the application.
- 2) I have considered the material placed before this court together with the oral submissions of learned counsels appearing in this appeal. The appellant is seeking to be granted two main orders. The first is for an order for stay of execution of the decree pending appeal and secondly is for an order directing the release of motor vehicle registration no KAT 4XXX to the appellant.
 - 3) It is the submission of the appellant that unless the order for stay of execution of the decree is granted she would suffer substantial loss in that the respondent is not in a financial position to make a refund should the appeal turn successful.
 - 4) The respondent filed a financial statement from Madison General Insurance Kenya Ltd for the year ending 2020 to show that the respondent is in a financial position to refund the decretal sum when required. The appellant pointed out that the financial statement did not relate to the respondent.
 - 5) In determining an application for stay three conditions must be fulfilled. First, the application for stay must be filed without unreasonable delay. It is apparent that the decision sought to be challenged on appeal was delivered on June 23, 2022. The instant motion was filed on November 7, 2022. I find that there was delay in filing the instant motion but the delay is explained hence excusable.
 - 6) The second principle is that an applicant must show that she would suffer substantial loss if the order for stay is not granted. In this appeal, the appellant/applicant is categorical that she would suffer substantial loss because the respondent is not in a pecuniary position to repay the decretal sum if paid to him.
 - 7) With respect, I am persuaded by the submissions made by the appellant that the financial statement of Madison General Insurance (K) Ltd cannot be said to belong to the respondent. The respondent has therefore not explained his financial capability to refund the decretal sum when required. I am satisfied that the appellant has demonstrated the substantial loss she would suffer if she is denied the order for stay.
 - 8) The final condition is the provision of security for the due performance of the decree. The appellant has offered to deposit the outstanding balance of the decretal sum. I am satisfied that the appellant is entitled to the order for stay.
 - 9) The second prayer is for an order directing the release of motor vehicle registration no KAT 4XXX to the appellant. The appellant stated that since she will have deposited the decretal sum, then there is no reason to keep holding the attached motor vehicle.
 - 10) The appellant further pledged to settle the auctioneer's fees to the tune of Kshs 100,000/=. It is pointed out by the appellant that the continued attachment of the aforesaid lorry will impact negatively on the appellant's business thus rendering her financially a destitute.
 - 11) The respondent is of the submission that since the aforesaid motor vehicle was lawfully attached there is no good reason to have it released.
 - 12) Having considered the rival submissions, I am convinced that if the appellant can deposit the decretal sum and settle a substantial portion of the auctioneer's charges, then there is no good reason to continue holding the appellant's motor vehicle.



- 13) In the end, I find the appellant's motion dated November 7, 2022 to be meritorious. It is allowed thus giving rise to issuance of the following orders:
- i. An order for stay of execution of the decree of the trial court is granted pending appeal on condition that the appellant/applicant deposits in court a further sum of Kshs 150,000/= within 30 days from the date hereof.
 - ii. The attached motor vehicle registration no KAT 4XXX should be released forthwith to the appellant/ applicant upon the appellant/applicant paying the auctioneer's charges of Kshs 100,000/=.
 - iii. The auctioneer to tax the auctioneer's charges to determine the outstanding balance if any.
 - iv. Costs of the application to abide the outcome of the appeal.
 - v. The appeal to be mentioned on February 2, 2023 for further orders and directions on the hearing.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF DECEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

