



**Kariuki & another v Mubia (Suing as the Administrator of the Estate of Mubia Gitahi - Deceased) (Civil Appeal E078 of 2021) [2022] KEHC 16720 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16720 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E078 OF 2021  
FN MUCHEMI, J  
DECEMBER 20, 2022**

**BETWEEN**

**JOSEPH MURAGE KARIUKI ..... 1<sup>ST</sup> APPELLANT**

**JESSE WAHOME KARIMI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BONIFACE GITAHU MUBIA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MUBIA GITAHU -DECEASED) ..... RESPONDENT**

**RULING**

**Brief fact**

1. The application dated 28/10/2022 seeks for orders for reinstatement of the orders of stay granted by Hon. Macharia on 12/05/2022 in CMCC No. 109 of 2019. It is also seeks for settling aside the warrants of attachment and notification of sale dated 26/10/2022 and proclamation or any advertisement or sale of the proclaimed goods for having been obtained fraudulently/unlawfully. An order to restrain the employees of the 2<sup>nd</sup> respondent from executing the said warrants of attachment has also been sought and finally that the respondent be ordered to bear the auctioneers fees.
2. The respondent filed a replying affidavit opposing the application.
3. The Applicant relies on the grounds that the applicants were in the process of complying with the orders of Hon. Macharia to deposit half of the decretal amount in a joint interest earning account in the names of the advocates for the parties but delay in returning the account opening forms was caused by the respondent which resulted in the expiry of the 30 days given for depositing the funds. Further that an order for enlargement of time were sought but the determination of the application delayed. That despite there being orders in existence the respondent obtained warrants of attachment which was unlawful. The Applicant deposes that substantial loss is likely to be occasioned, if stay is not granted.



4. The respondent in his replying affidavit opposed the application on grounds that the applicant failed to comply with the orders of this court given on 30/06/2022 to deposit half of the decretal amount in a joint interest earning account in the names of the advocates on record for the parties within the period given of 30 days. The stay order was to lapse in case of default.
5. The respondent denies causing delay in the account opening process for he executed the documents sent to him and returned them to the applicant within three (3) days of receipt. The relevant receipts by G4S Courier were annexed to the replying affidavit. Despite having received the account opening forms duly executed, the applicant took no action in compliance for the twenty-two days at his disposal. As such, the order having lapsed, the Judgement debtor was at liberty to proceed with execution in my view.
6. The respondent argues that this application is sub-judice since this court heard and determined a similar application earlier. Further that the applicant has not satisfied the requisite conditions for grant of stay or reinstatement of stay orders granted earlier.
7. The respondent argue that the applicant is deliberately preventing the respondent from enjoying the fruits of his judgement which was delivered over one and a half years ago.
8. Is this application subjudice? The main prayers in this application are two fold. Firstly, for extension of the orders of the honourable Principal Magistrate. Secondly for staying sale of the motor vehicle; for restraining the 2<sup>nd</sup> respondent from selling the attached goods and for setting aside the warrants of attachment. The application dated 16<sup>th</sup> December, 2021 resulted in this court's orders of 30<sup>th</sup> June 2022 sought for orders for stay of execution. In my considered view, this application has different prayers, and therefore not subjudice.
9. Firstly whether the respondent caused delay in the process of opening the bank account and whether this court would be justified or in order to extend the stay orders of the Principal Magistrate. The court also requires to determine whether the warrants of execution were fraudulently or unlawfully obtained as well as whether a restraining order against the 2<sup>nd</sup> respondent should issue.
10. In regard to delay, the respondent in his affidavit deposes that the account opening forms were received by his advocate on 05/07/2022. The forms were then sent back to the respondent by G4S courier on 08/07/2022 on a covering letter. Attached to the said letter were the G4S receipts, shipment bill and other documents which demonstrate that the respondents counsel upon receipt returned the documents duly executed within three days. The applicant tendered no documentary evidence to the contrary. As such, the alleged delay on part of the respondents counsel was not established. This leads me to the conclusion that there was no delay on part of the respondent and that the applicant is only pleading a mere defence for the failure on his part to comply with the court orders issued by this court on 30/06/2022 to deposit half of the decretal amount within 30 days following grant of orders for stay.
11. As for extension of the orders of the magistrate, this court was not given a good reason why it should extend the said orders. The Honourable magistrate is still in the station and is the right person to extend his own orders in the event that he finds the applicant deserving of such orders. It is noted that the magistrate had earlier given orders for stay similar to those of the High Court made on 30/06/2022.
12. The other issue is whether the warrants of execution were fraudulently or unlawfully obtained by the respondent. Execution of a decree is a lawful process unless it is stopped by the court by issue of stay orders. In this case the orders for stay granted by the court expired on 29<sup>th</sup> of July 2022 upon the failure by the applicant to comply with the orders of the court. The proclamation of the applicant's goods was done on 30/10/2022 about three (3) months after the expiry of the period given for depositing half of



the decretal amount. The warrants of execution are dated 14/10/2022. As such, there were no orders for stay in place at the time proclamation of the goods was done. The respondent was only executing a lawful process.

13. Having found that the execution process was lawful, I am of the considered view that the applicant has no basis of asking the court to grant him a restraining order in respect of the attached goods. Neither has the applicant demonstrated any material to justify setting aside the warrants of attachment.
14. It is my considered view that this application is frivolous, vexatious and an abuse of the court process purposed to delay the respondent from enjoying the fruits of his judgement.
15. I find no merit in the application dated 28/10/2022 and I dismiss it with costs to the respondent.
16. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022**

