



**Kenjap Motors Limited v Zeki Wanjala t/a Zeki Motors (Civil Suit 74 of 2016) [2022] KEHC 16889 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 74 OF 2016  
RB NGETICH, J  
DECEMBER 20, 2022**

**BETWEEN**

**KENJAP MOTORS LIMITED ..... PLAINTIFF**

**AND**

**ZEKI WANJALA T/A ZEKI MOTORS ..... DEFENDANT**

**RULING**

1. This is a ruling on four (4) applications which have been partially dealt with by the court. The applications are dated June 12, 2020, August 11, 2020, September 10, 2020 and October 20, 2020.
2. The fourth application dated June 12, 2020, seeks the following orders:
  - a. Spent
  - b. there be a stay of execution of the judgment and decree of this honourable court delivered on May 14, 2020.
  - c. There is an extension of time within which the applicant is to file an appeal out of time.
  - d. The notice of appeal dated June 5, 2020 be deemed as duly filed.
3. The application is supported by the affidavit sworn by Zeki Wanjala, he disposes of that the defendant/ applicant is dissatisfied with the judgment of the court and wishes to appeal against the said judgment. The time within which defendant is to file an appeal has lapsed. They urge the court to extend the time for filing the appeal.
4. The plaintiff/respondent opposed the application and filed a replying affidavit in response however the response is not in the court file.



5. The application dated August 11, 2020 seeks the following orders:
  - a. spent
  - b. spent
  - c. that this honourable court does and hereby reinstate and extend the order of status quo pending the determination of the application for stay and extension of time to file a Notice of appeal.
  - d. that this honourable court order that Motor Vehicle Registration No KBZ 766C Toyota Premio, chassis No ZRt265-3006434 7 Engine No 2ZR-A171408 which the respondent/ plaintiff reposed be hereby released to the third party that purchased it from the applicant/defendant.
  - e. that the costs of the application be provided in the cause.
6. Grounds of the application is the status quo orders were not extended in court when the advocate for the applicant failed to attend court and the vehicles were repossessed from the 3<sup>rd</sup> parties and the repossession was outside the substantive orders of the judgment and has occasioned extreme hardship to 3<sup>rd</sup> parties who are not parties to the suit.
7. The application was supported by the annexed affidavits of Stanely Kagunza & Zeki Wanjala Wanjama. He deposed that the applicant failed to attend court and the orders for status quo were not extended and mistake of counsel should not be visited on an innocent party.
8. The application dated September 10, 2020 seeks the following orders:
  - a. Spent
  - b. Spent
  - c. That pending the hearing of this application inter-parties, motor vehicle registration number KBX 822F Nissan Vannette be released to Everline Kemunto on running attachment.
  - d. That the court be pleased to require the directors of Kenjap Motors Ltd, the Respondent holder herein to appear before it and show cause why they should not be punished for disobedience of court orders herein.
  - e. That failing a just explanation for their action in disobeying the court's orders, the said directors be committed to civil jail for 6 months.
9. The application is based on the grounds that the respondent has attached the motor vehicle KBX 822F belonging to the objector and held by the applicant, through the auctioneers Bemca Auctioneers. The vehicle was repossessed with milk produce which will go bad. The respondent and the auctioneers have failed to adhere to the court orders issued on August 11, 2020 reinstating the status quo.
10. The application is supported by the annexed affidavits of Zeki Wanjala Everline Kemunto and Bernard Momanani. She averred that the respondent has violated the orders of August 11, 2020 reinstating the status quo and proceeded to repossess the motor vehicle belonging to other 3<sup>rd</sup> parties.
11. The application dated October 20, 2020 seeks the following orders:
  - a. Spent



- b. That this honourable court does and hereby order that the corporate veil of the plaintiff is lifted and that the plaintiff's directors are liable for criminal actions and or contempt of the orders of court issued on September 30, 2020, and the court does order that they are committed to civil jail for six months.
  - c. That this honourable court does and hereby finds and/or orders that the 2<sup>nd</sup> proposed contemnor is in contempt of the court orders issued on September 30, 2020, and committed to civil jail for a period of six months.
  - d. That the costs be provided for.
12. The application is premised on the grounds that the respondent is in disobedience of the court orders of September 30, 2020 for the release of the motor Vehicle KBX 822F; that the respondent be committed to civil jail.
13. The application is supported by the annexed affidavit of Everline Kemunto, she disposes she is the legal owner of the motor vehicle KBX 822F having purchased the same from the defendant. The court orders issued on September 30, 2020 for the release of the motor vehicle were served upon the plaintiff / respondent who has blatantly ignored the said orders.
14. Directions were taken to have the applications canvassed by way of written submissions in which parties complied.

### **Applicants Submissions**

15. Counsel has condensed the issues in the various applications and framed the following issues for determination.
- a. Whether the proposed contemnors are in contempt of court orders as sought in the applications dated September 10, 2020, and October 20, 2020.
  - b. Whether the application dated June 12, 2020 has met the threshold set to extend the time to file a notice of appeal /appeal.
  - c. Whether the application dated June 12, 2020 has met the threshold to issue stay orders.
  - d. Whether this honourable court may grant the order of the release of the Motor vehicle KBZ 766C as per the application dated August 11, 2020.
16. On the first issue, counsel submitted that the respondents were in contempt of the court orders issued on August 11, 2020 by failing to release motor vehicle KBX 822F and despite numerous services of the said orders, the respondents failed to release the said motor vehicle prompting the filing of application seeking to have the corporate veil of the respondent lifted to cite the directors for criminal contempt of court.
17. On the second issue of the extension of time to file a notice of appeal, counsel submitted that the applicants learned of the judgment delivered on May 14, 2020 on June 3, 2020 and filed a notice of appeal on June 5, 2020. He submitted that the judgment was delivered in the absence of the parties due to the demise of the applicant's counsel in 2019 and the outcome of the judgment was not communicated to the applicants; and further submitted that there were disruptions of the normal court proceeding by the Covid 19 pandemic which contributed to delay for only 7 days; that the appeal has arguable issues.



18. Counsel further submitted that immediately the applicant learned of the judgment, it instructed the current advocate to file a notice of appeal and submitted that the applicant will suffer irreparable loss as the decree is for a colossal amount.
19. Counsel submitted that the application dated June 12, 2020 meets the threshold for granting an order for a stay of execution as the applicant will suffer irreparable loss if the stay is not granted and further submitted that the respondent's economic means are unknown and therefore cannot refund the amounts if the appeal succeeds; that the application for a stay of execution is brought without undue delay as the judgement was delivered on May 14, 2020 while the application was filed on June 12, 2020.
20. On the application dated August 11, 2020, counsel submitted that there were no express orders made for the release of the motor vehicle registration number KBZ 766C and if a stay of execution is granted then the motor vehicle KBZ 766C ought to be released as attaching the motor vehicle due to the failure to extend the interim orders amounts to stealing a match before the appeal is determined.

### **Respondents Submissions**

21. Counsel for the respondent filed submissions with respect to the application dated June 12, 2020 and urged the court to be guided by order 42 rule 6 of the *Civil Procedure Rules*.
22. Counsel submitted that the applicant has not tendered sufficient evidence to show the substantial loss to be suffered and the allegations that the economic means of the respondent are not known and may not be in a position to refund the money is a mere assumption devoid of proof as required by section 107 of the *Evidence Act*; that the applicant has failed to demonstrate to the court that the execution will create a state of affairs that will irreparably affect or negate its essential core as a successful party.
23. Counsel submitted that the court should balance between the respondent's right to enjoy the fruits of the judgment and the applicant's right to appeal and stated that the cause arose in 2016 and the respondent has been deprived of their money for 5 years; the respondent stands and continues to suffer irreparable loss.
24. On the issue of inordinate delay, counsel submitted that the applicant has not come to court with clean hands as a representative from the office of the deceased counsel consented to have the judgment delivered virtually and reasons given for delay are not therefore sufficient.
25. Counsel further submitted that the offer of security should come from the applicant and should not be inferred or implied or left to the court; and the applicant has failed to furnish any security and the application should therefore have dismissed.
26. On the issue of extension of time, counsel submitted that the reasons alluded to are not sufficient they are an afterthought; that reasons for the delay have not been satisfactorily addressed; that the death of the applicant's advocate in November 2019 could not cause a delay in filing an appeal as the judgment was delivered on May 14, 2020 by the consent of both parties.
27. That the applicant has not shown sufficient cause as to why he deserves an extension of time to file appeal and the application is intended to further delay the respondent from enjoying the fruits of the judgment.
28. In response to the applications dated September 10, 2020 and October 20, 2020, on the issue of contempt of court, counsel submitted that the Respondent was not acting in breach of any terms of an order by the court as at the time the repossession was done, there were no orders in place and urged court to dismiss the application.



29. Counsel further submitted that the applicants have not demonstrated sufficient grounds to warrant the lifting of the corporate veil of the respondent.
30. On the application dated August 11, 2020 seeking the release of motor vehicle registration number KBZ 766C, counsel submitted that the applicant is abusing the objective of the court on expeditious and timely disposal of cases.
31. Counsel further submitted that the respondent has been experiencing financial difficulties due to the breach of the agreement by default in payment of vehicles delivered to the applicants; and since the delivery of the judgment, the respondent has faced obstacles from the applicants in the realization of the judgment which has resulted in the continued suffering of loss and damage by the respondent to the tune of millions of shillings as the vehicles are in possession of 3 parties.
32. Counsel for the respondent urged this court to weigh the rights of the applicants as against the success of the litigant who should not be deprived of the fruits of the judgment. The court should ensure no party suffers prejudice that cannot be compensated.
33. In conclusion, counsel urged this court to disallow the applications as the applicants have failed to show that it is deserving of the orders sought and is intend to delay the execution of the judgment.

### **Analysis and Determination**

34. I have considered the grounds of all the 4 applications, averments herein and submissions filed by counsels in respect to issues raised. I will start with two applications dated September 10, 2020 and October 20, 2020. The application dated September 10, 2020 seeks the release of motor vehicle KBX 822F and to show cause why the respondents should not be punished for contempt of the orders issued on August 11, 2020 maintaining the status quo and for the release of the motor vehicle.
35. Record show that motor vehicle KBX 822F has already been released to the applicant. The application has been overtaken by events. The application further sought an order to have the respondent called to show cause why they should not be punished for contempt. The contempt orders emanated from the failure to release the motor vehicle KBX 822F.
36. The application dated October 20, 2020 seeks orders of lifting the veil on the incorporation of the respondent in order to cite its directors for contempt of court for failing to obey the orders issued on September 30, 2020 for release of the motor vehicle KBX822F. These are the orders the applicant seeks to cite the respondents for contempt of court.
37. Order 40 rule 3 of the *Civil Procedure Rules 2010* provides for sanctions for disobedience of court orders as attachment of the property of the defaulter or detention in prison for a term not exceeding 6 months.
38. Before a person is cited for contempt of court it must be proved there was willful and deliberate disobedience of the court orders. The applicant must also prove that the respondent was served with the orders and that the orders were not ambiguous.
39. The court has the discretion to grant orders of contempt. The punishment for contempt is to ensure the court orders are adhered to and the dignity of the court is observed and respected.



40. The importance of obeying court orders was emphasized in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828 the court stated: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void”.

41. From the record, it is admitted by the parties the respondent has complied with the orders for release of the motor vehicle KBX 822F. I, therefore, find the orders of the court on the release of the motor vehicle have been adhered to. There is no prove of deliberate disobedience of the court orders. The applicant has not therefore proved the issue of contempt to the required standards. I, therefore, decline to allow prayers sought.

42. I now proceed to deal with the application dated August 11, 2020 seeking the reinstatement of the status quo order and the release of KBZ 766C. The order for status quo was reinstated and has been extended. The application has therefore been overtaken by events.

43. Lastly I will deal with the application dated June 12, 2020 seeking leave to appeal out of time and for the notice of appeal filed on June 5, 2020 to be deemed as duly filed, and stay of execution granted pending hearing and determination of appeal.

44. The extension of time to file appeal is an equitable remedy available to a deserving party at the discretion of the court. The party seeking an extension of time must satisfy the court that they are deserving of the orders sought.

45. In the instant application, the reason for the delay the applicant's counsel died in the year 2019 and the applicant was not therefore represented when judgment was delivered virtually on May 14, 2020 and it was not communicated to the applicant. Counsel blames the unfortunate turn of events during the Covid 19 scale-down time and argues that the intended appeal is arguable with high chances of success.

46. In the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR, the court stated as follows: -

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

47. The applicant stated that upon being aware of the outcome of the judgment on June 3, 2020, he immediately instructed counsel to file a notice of appeal which was filed on June 5, 2020, and filed the current application seeking to extend time on June 12, 2020; the delay is for 7 days.

48. This court has the discretion to extend the time to file an appeal out of time on sufficient explanation on the delay being given.

49. From the record, I note the judgment was delivered in the absence of the parties. The applicants have stated that counsel died in 2019. In view of the reason given and the fact that Covid -19 also posed



- challenges in operations of court, I find that the delay for 7 days has been sufficiently explained and the delay is not inordinate. In my view, the delay is excusable and I am inclined to allow extension of time to file appeal.
50. On whether the intended appeal is arguable appeal, the grounds for the appeal will be canvassed in the appeal. At this stage, I will not delve into the merits of the appeal. I will leave it to the Court of Appeal to determine as to whether there was an error in my findings.
51. The next issue is on the stay of execution of the judgment delivered on May 14, 2020. The grant of stay of execution pending appeal is provided for under order 42 rule 6(2), the applicant must satisfy that: -
- a. that substantial loss may result to the applicant unless the order is made,
  - b. that the application has been made without unreasonable delay, and
  - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
52. The applicant is required to demonstrate to the court, that substantial loss would be occasioned if the orders sought are not granted. The applicants fear is that the respondent would not be in a position to refund the decretal sum paid out in the event the appeal succeeds. No evidence has however been availed to show the respondent will not be able to refund the amount paid out.
53. The issue in dispute emanates from the contract entered between the applicants and the respondent where the applicant sold motor vehicles to the respondent on deposit and upon full payment, the respondent would release the logbook to the applicant. The respondent contends the applicant failed to pay for the motor vehicle supplied to them thereby occasioning loss. Judgment was issued in favour of the respondent for the sum of Kshs 36,000,000. It is this judgment the applicant intends to appeal.
54. In view of the above, it cannot be correct to say that the economic means of the respondent are not known by the applicant. The agreement between the applicants and respondent confirm that the respondent is motor vehicle dealer and in my view it would be wrong to conclude that the respondent will not be able to refund decretal amount if the appeal succeed.
55. I take note of the fact that cars supplied to the applicants have not been paid for yet the motor vehicles have already been sold to 3<sup>rd</sup> parties. The respondent has been denied returns from sale of vehicles which are already in hands of third parties and have been denied opportunity of ploughing back proceeds of sale to business. However, in view of the colossal sum of decretal amount, I will allow the application for a stay of execution on the condition that the applicant does pay the respondent half of the decretal sum and deposit the other half of the decretal sum in a joint interest-earning account in the name of both advocates within 60 days herein.
56. **Final Orders: -**
- 1) The application dated August 11, 2020, has already been spent.
  - 2) The application dated September 10, 2020, has already been overtaken by events.
  - 3) The applicant has failed to meet the threshold for granting the orders sought in the application dated October 20, 2020, the application lacks merit and the same is dismissed.
  - 4) For the application dated June 12, 2020, the application for an extension of time to file the appeal is granted. Appeal filed is deemed as duly filed.



- 5) Stay of execution is granted on the condition the applicant pays the respondent half of the decretal amount the other half deposited in a joint interest-earning account in the name of both advocates.
- 6) The costs of the applications to be in the cause.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF DECEMBER 2022**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Martin - Court Assistant**

**Ms. Kamau for plaintiff/Respondent**

**No appearance for applicant**

