



**Morompi v Freight In Time Limited (Civil Appeal E015 of 2024)  
[2025] KEHC 166 (KLR) (14 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 166 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E015 OF 2024  
TM MATHEKA, J  
JANUARY 14, 2025**

**BETWEEN**

**JUSTUS KAKUO MOROMPI ..... APPELLANT**

**AND**

**FREIGHT IN TIME LIMITED ..... RESPONDENT**

**RULING**

1. The Notice of Motion before me is dated 27<sup>th</sup> February 2024. It is brought under sections 1 A, 1B ,3A and 63E of the Civil Procedure Act, Order 10 rules 6 and 1, order 42 rule 6 of the Civil Procedure Rules. The applicant seeks inter alia there be a stay of execution of the judgment delivered on the 1<sup>st</sup> March 2022 by the honourable Senior Resident Magistrate JD Karani in SPMCC E106 of 2019 at Makindu and the decree emanating there from as against the appellant pending the hearing and determination of the Appeal herein. The applicant also seeks that the costs of this application be in the course cause.
2. The application is supported by the grounds on its face and the supporting affidavit sworn on 27<sup>th</sup> February 2024 by the applicant Justus Kakuo Morompi.
3. The grounds are that the appellant/applicant filed an application dated 4<sup>th</sup> May 2022 to set aside the judgment delivered on 1<sup>st</sup> March 2022 on the ground that he had never been served with summons to enter appearance. By its ruling dated 29<sup>th</sup> January 2024 the court dismissed the application provoking the appeal and this application
4. He depones that following the dismissal of the application the respondent commenced the process of execution by instructing auctioneers who proceeded to his home with warrants of attachment and sale and proclaimed his attachable goods. He has annexed the warrants together with the proclamation and the fee by the auctioneer. He depones that it is in the interest of justice that a stay of execution of the said judgment and decree be issued by this court. He also depones that he has an arguable appeal with a high probability of success.



5. He filed a memorandum of appeal dated 7 February 2024 in which he challenges the ruling of the trial magistrate dated 29<sup>th</sup> January 2024.
6. He faults the trial Magistrate for inter alia, finding that the applicant had been properly served with summons to enter appearance in the initial suit.; for finding that he failed to prove that service of summons to enter appearance was improper; for failure to find that costs would have been sufficient compensation to the respondent for setting aside the judgment, and for dismissing the application dated 4<sup>th</sup> May 2022.
7. He seeks in the appeal for orders that the appeal be allowed the ruling and order of the honourable Senior Resident Magistrate JD Karani delivered on 29<sup>th</sup> January 2024 be set aside and the application dated 4<sup>th</sup> May 2022 be allowed on such terms as this honourable court finds fit plus costs of the appeal.
8. The application is opposed vide the replying affidavit of Lorna Malosoy the legal officer at GA Insurance Company Ltd. on the ground that the appeal has no chance of success before this court and that the applicant failed to fully prosecute their application dated 4<sup>th</sup> May 2022. She depones that the crux of the application was that the appellant claimed to have not been served with summons to enter appearance and that the affidavit of service by the process server was false. The appellant sought to challenge the competence of the service by cross examining the process server and they court found that service was proper and proceeded to dismiss the application.
9. The applicant filed a supplementary affidavit deponing that he indeed prosecuted the application to set aside the judgment before the lower court but the lower court found against him; that it is the decision of the court that he now seeks to challenge, and that the application was not dismissed for want of prosecution. He depones that the appeal has overwhelming chances of success. He adds that he will suffer substantial loss in that is an old man age 65 years and employed and without income and will have the utmost difficulty in raising the decretal sum.
10. Parties did not file submissions.
11. And the only issue for determination is whether the application has merit.
12. From the record it appears that the applicant was served with process but failed to enter appearance and judgment was entered against him. In the ruling the trial magistrate states that the matter proceeded to full trial and determination was made. Unfortunately, the neither the applicant nor the respondent placed before the court the alleged proceedings.
13. Order 10, rule 6 provides for interlocutory judgment.

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

14. Rule 11 provides for the setting aside of the interlocutory judgment

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

15. The application is opposed on the mistaken ground that the applicant did not prosecute the application. Hence that ground cannot stand.



16. The other ground is that the appeal stands no chance of success. I cannot go to the merits of the appeal until the same is heard.
17. I have carefully considered the ruling of the subordinate court. It demonstrates that the applicant prosecuted the application, it was heard on merit and was dismissed
18. The ruling before me shows that the trial magistrate exercised her discretion in determining the application. The outcome of the determination was that the matter proceeded without the applicant being heard despite the trial court's finding that the applicant's defence had merit
19. The application was filed without delay; the applicant stands to suffer prejudice if the orders is not granted.
20. In the circumstances, it is only fair that the applicant gets the opportunity to exercise his right of appeal.
21. The application is allowed in the following terms;
  - a. An order of stay of execution of the Judgment of the court in Makindu SPMCC E 106 of 2019 do issue pending the hearing and determination of the appeal herein.
  - b. The applicant will deposit in court the sum of Ksh 250,000 as security for costs within 30 days hereof.
  - c. The applicant to file and serve the record of appeal within 30 days hereof.
22. In default of any of the conditions, the order of stay will stand vacated and the application dismissed with costs to the respondent.
23. Otherwise, the costs will be in the cause.
24. Parties are encouraged to pursue ADR as provided for under Article 159(2)( c) of *the Constitution* of Kenya 2010.
25. Orders accordingly

**DATED, SIGNED AND DELIVERED THIS 14<sup>TH</sup> JANUARY 2025 VIA CTS**

**Mumbua T Matheka**

**Judge**

Ms Nelima/Ms Elizabeth CAs

Mutua Mathuva & Co Advocates for the applicant

Albert Kamunde & Co Advocates for the Respondent

