



**Busia Steel Limited v Mokaya & another (Civil Case 27 of 2003)
[2025] KEHC 3466 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL CASE 27 OF 2003
WM MUSYOKA, J
MARCH 21, 2025**

BETWEEN

BUSIA STEEL LIMITED PLAINTIFF

AND

SAMUEL OM MOKAYA 1ST DEFENDANT

FIDELITY COMMERCIAL BANK LIMITED 2ND DEFENDANT

RULING

1. The Motion, dated 31st October 2024, seeks the setting aside of orders that were made herein on 16th July 2024, leave to respond to notice to show cause, stay of execution, and a full hearing of the applications dated 12th October 2003, 16th October 2003 and 21st October 2003.
2. In the affidavit in support of the Motion, the applicant, the 1st defendant herein, avers that he had been shown a notice to show cause, dated 21st June 2024, by his employee. He explains that he had been unwell. He then instructed his current Advocates to make a follow up. Upon follow up, he was advised that a default judgement had been entered, and execution proceedings had commenced. He also established that he had been represented in the matter, but he has had no communication from his Advocates since 2006. He also states that there were applications that were still pending.
3. There is a response to the Motion, by way of grounds of opposition, dated 26th November 2024. It is averred that the application is belated, no reasons have been advanced for the delay, no offer of security has been made, among others.
4. The Motion was placed before Kamau J, on 5th November 2024. Directions were given on service, and temporary relief was granted.



5. Parties took directions, on 19th December 2024, for disposal of the application, by way of written submissions. I can only see written submissions by the plaintiff, which I have read and noted the arguments made.
6. I note that the orders of 16th July 2024 were by the Deputy Registrar, and I was tempted to pass the file to the Deputy Registrar to deal with the application. I note, though, that some of the prayers may require orders from a Judge.
7. Some background may be of some help. I see that a default judgement was entered on 11th August 2003, against the 1st defendant. An application was then filed herein on 15th October 2003, dated 14th October 2003. It was for injunctions and stay of execution, setting aside of the default judgement and leave to defend. The application was placed before the Deputy Registrar, who granted a temporary injunction, and fixed the matter for inter partes hearing on 28th October 2003. The application dated 14th October 2003 was allowed by consent on 3rd March 2004.
8. The 1st defendant then filed another application, on 16th October 2003, of even date, through another firm of Advocates, seeking stay of the default judgement, stay of execution, and unconditional release of his motor vehicles, which had been attached in execution. The matter was referred to the Judge, who ordered, on 17th October 2003, that there be stay of sale of the motor vehicles attached, pending hearing inter partes of the application, the said vehicles be released to the 1st defendant on a running attachment pending hearing, with a rider that the 1st defendant ought not dispose of them. The application, dated 16th October 2003, came up for mention and hearing several times, on 3rd November 2003, 2nd December 2004, 3rd March 2004, 31st March 2004 and 8th November 2004. It was stood over generally, on 31st March 2004. It was lastly before a Judge on 8th November 2004, who ordered that the file be returned to the registry, and nothing was heard about it till now.
9. The 1st defendant filed yet another application, on 21st October 2003, bearing an even date, seeking that the police break into premises, where the motor vehicles were being held by the auctioneer, who was frustrating enforcement of the orders of 17th October 2003. That application was placed before the Deputy Registrar, who granted the prayers, which were reiterated on 3rd November 2003, by the Judge. The said orders were extended several times, with the last order being made on 3rd March 2004.
10. I understand the 1st defendant to be arguing that, since there are applications still pending, the court should go slow on the execution proceedings.
11. Is there any pending business, by way of applications? In the application, dated 31st October 2024, the 1st defendant cites 3 applications, dated 12th October 2003, 16th October 2024 and 21st October 2024. I have very closely perused through the papers in the file herein, and I have been unable to find an application dated 12th October 2003. The first application to be filed in the suit is dated 14th October 2003. The application dated 16th October 2003 is still pending, for it was last before a Judge on 8th November 2004, when it was sent back to the registry. Since then it has never been fixed for hearing, and no orders have been made disposing it. That dated 21st October 2003 is no longer pending, for it sought only 1 prayer, to facilitate breaking-in by the police, and an order to that effect was made on 22nd October 2003, and that application was spent.
12. The only application, which is still pending, is that dated 16th October 2003. It sought several prayers, the principal one being the setting aside of the default judgment of 11th August 2003, with secondary prayers relating to motor vehicles that had been attached. The prayers on the motor vehicles have been overtaken by events. Firstly, the Judge made orders which released the motor vehicles to the 1st defendant on a running attachment. Objections, to the levying of execution on the motor vehicles,



were raised by several entities, and the attachment was lifted by consents that were recorded on 3rd March 2004. That left only 1 issue, the setting aside of the default judgement of 11th August 2003. That should be the only issue that could be outstanding.

13. Is that issue still outstanding? I do not think so. The 1st defendant had earlier filed the application dated 14th October 2003. It sought similar orders as that dated 16th October 2003. When the application dated 16th October 2003 was filed, no orders were made on that dated 14th October 2003, for it was not withdrawn, and it remained in the court file. It was disposed of by consent on 3rd March 2004.
14. This is what the original handwritten trial court record of 3rd March 2004 reflects:

“ 3/3/2004.

Before Mr. Justice Serгон.

C/S. Musundi

Ashioya:” I am for the Plaintiff/Respondent in the application dated 14/10/2003.

Mukele: I hold brief for Mr. Wandabwa for the 2nd Def. By consent the application dated 14/10/2003 be and is hereby allowed. Costs to be awarded to the 2nd Defendant as against the Plaintiff respondent.

Mr. Ashioya: That is correct.

Court: The consent is approved and adopted as the order of this court.

Signed

JK Sergon

J.”

15. The consent order, recorded on 3rd March 2004, allowed the application dated 14th October 2003. The principal prayer, in that application, sought “THAT judgement entered herein in default of entering appearance or defence be set aside and The applicant granted leave to file his defence on this suit.” The secondary prayers sought injunctions, with respect to the motor vehicles which had been attached, and an order for stay of execution of the orders of 11th August 2003. The effect of the said consent order was that the default judgement, of 11th August 2003, was set aside or vacated.
16. As stated above, the applications dated 14th October 2003 and 16th October 2003 sought similar orders. The prayers on the motor vehicles were disposed of, when orders were made along the lines that I have discussed above, leaving only the prayer relating to setting aside of the default judgement. That prayer was disposed of, on 3rd March 2004, in the consent that was adopted by the court that day. The effect, of the consent order of 3rd March 2004, was that the application dated 16th October 2003 became academic. The orders that it seeks to have set aside ceased to exist on 3rd March 2004.
17. As things stand, from 3rd March 2004, there is no default judgement in place, capable of being executed. There would be no basis, therefore, for granting stay of execution of a non-existent judgement. It would also mean that the order of 16th July 2024, for the arrest of the 1st defendant, never had a foundation. There is no pending application, other than what I am determining now, upon which the court can grant orders.
18. In view of everything said above, I can grant only 1 order, that relating to the warrant for the arrest of the 1st defendant. I declare that that order, of 16th July 2024, is null and void, and of no effect. Kiboi &



Company, Advocates, will not require leave to come on record, for there is no judgement and decree in place. The application, dated 31st October 2024, is disposed of in those terms. Each party shall bear their own costs.

19. This must be one of the oldest matters at the Busia High Court civil registry. It should be disposed of, one way or other, soonest. Accordingly, it shall be mentioned on 7th April 2025, for directions on disposal.

20. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 21ST DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the plaintiff.

Mr. Kiboi, instructed by Kiboi & Company, Advocates for the 1st defendant.

