



REPUBLIC OF KENYA



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**Azan Motors Ltd v Muthoni & 2 others (Civil Appeal E007 of 2024)  
[2025] KEHC 11167 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E007 OF 2024  
RM MWONGO, J  
JULY 23, 2025**

**BETWEEN**

**AZAN MOTORS LTD ..... APPELLANT**

**AND**

**SALESIO KAGAI MUTHONI ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC KARIUKI KAURU ..... 2<sup>ND</sup> RESPONDENT**

**CECILIA WANJIKU KARANJA ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal arising from the Ruling of Hon. Atieno Joan Otieno in  
Embu CMCC No. E058 of 2020 delivered on 29th January 2020)*

**JUDGMENT**

**The Appeal**

1. Through a memorandum of appeal dated 02<sup>nd</sup> February 2024, the appellant prays that the appeal be allowed with costs and the ruling of the trial court be set aside. The appeal is premised on the grounds that:
  1. The Learned Magistrate erred in law and in fact in dismissing the Appellant's Application dated 24<sup>th</sup> August 2023 on the ground that the same had been overtaken by events, without considering the doctrine of lis pendens which applies in this matter;
  2. The Learned Magistrate erred in law and in fact in disregarding the proof that nothing impeded that Court's right to exercise its discretion in this matter;
  3. The Learned Magistrate erred in law and in fact in failing to consider that the court may set aside or vary judgment and any consequential decree or order upon such terms as are just;



4. The Learned Magistrate erred in law and in fact in failing to issue an order of stay herein in order to estop the 1<sup>st</sup> Respondent from transferring the subject motor vehicle to any third parties;
5. The Learned Magistrate erred in law and in fact in failing to consider that despite the property of the Appellant having been seized and sold to a third party during the pendency of the suit, the court may order the restitution of such property or the discharge of the Appellant;
6. The Learned Magistrate erred in law and in fact in failing to consider that the Appellant had sold the subject motor vehicle to the 2<sup>nd</sup> Respondent as at the time of the accident in question;
7. The Learned Magistrate erred in law and in fact in failing to consider that it had ruled in the favour of the Appellant in applications for setting aside interlocutory Judgment and misjoinder applications in EMBU MCCC NOS. 059, 060 and 061 OF 2020, wherein the court found that the Appellant had been misjoined in the three matters arising from this same cause of action;
8. The Learned Magistrate erred in law and in fact in failing to consider that the grounds of liability in the misjoinder application and setting aside interlocutory judgment in these three matters are similar to the current case;
9. The Learned Magistrate erred in law and in fact in making contradictory determinations in matters arising from the same cause of action;
10. The Learned Magistrate erred in law and in fact in failing to consider that the 2<sup>nd</sup> Respondent, the insured, can settle the claim;
11. The Learned Magistrate erred in law and in fact in failing to consider that it was the 1<sup>st</sup> Respondent's misconduct that led to the sale of the subject motor vehicle during the pendency of the suit;
12. The Learned Magistrate erred in law and in fact in failing to consider that the main concern of the court is to do justice to the parties;
13. The Learned Magistrate erred in law and in fact in failing to consider that the Appellant had filed a defence raising triable issues;
14. The Learned magistrate erred in law and in fact in failing to consider that the defence raising triable issues having been on record compelled the court to allow the matter go to trial for adjudication;
15. The Learned magistrate erred in law and in fact in failing to consider that the Appellant had not been served with Summons to enter appearance, and that it had been condemned unheard;
16. The Learned Magistrate erred in law and in fact in failing to appreciate that to deny a litigant an opportunity to be heard should be the Court's last resort;
17. The Learned Magistrate erred in law and in fact in failing to appreciate that the right to be heard is a valued right and it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being offered an opportunity to be heard;
18. The Learned magistrate erred in law and in fact by disregarding all the evidence presented by the Appellant in support of its position that it had sold the subject motor vehicle as at the time of the accident in question; and
19. The Learned Magistrate erred in law and in fact in making a Ruling that is unfair, biased, unjust and an absurdity to the norms of equity and justice.



## **Background**

2. By a plaint dated 08<sup>th</sup> October 2020, the 1<sup>st</sup> respondent sought judgment against the appellant and 2<sup>nd</sup> respondent for general damages, special damages of Kshs.3,995/= and costs with interest. He claimed that on or about 05<sup>th</sup> December 2019, the Plaintiff was a lawful passenger travelling along Embu-Nairobi Road at Rupingazi river in motor vehicle registration number KCF 451G when the appellant and/or his driver and/or agent so carelessly and negligently drove, managed, and/or controlled motor vehicle registration number KCW 689F by overtaking motor vehicle registration number KCF 451G when it was not safe to do so. As a result, a head on collision occurred wherein the plaintiff sustained severe personal injuries.
3. In the plaint, the 1<sup>st</sup> respondent gave particulars of the negligence which they attributed to the appellant and 2<sup>nd</sup> respondent. According to the plaint, the appellant was the registered owner of the motor vehicle registration number KCW 689F while the 2<sup>nd</sup> respondent was the beneficial owner of the same motor vehicle.
4. The trial court noted that the plaint and all the accompanying documents and evidence were duly served upon the appellant and 2<sup>nd</sup> respondent but they failed to enter appearance or file a defense. Interlocutory judgment was thus entered against them and the matter was set down for formal proof.
5. At the hearing, the 1<sup>st</sup> respondent testified and produced documentary evidence in support of his case. He stated that the accident occurred when the motor vehicle he was travelling in collided with another vehicle at Rupingazi bridge. He suffered injuries and was treated at Embu Level 5 Hospital. He closed his case and the court gave its judgment in favour of the 1<sup>st</sup> respondent who moved to execute for the decretal amount.

## **The Application dated 24<sup>th</sup> August 2023**

6. Through an application dated 24<sup>th</sup> August 2023, the 3<sup>rd</sup> respondent sought stay of execution stating that she was never enjoined as a party to the proceedings. She claimed that she was the owner of the motor vehicle registration number KDG 521V which was intended to be attached by auctioneers to fulfil the decretal amount. That the said motor vehicle had nothing to do with the decretal amount and that she purchased it through hire purchase from the appellant.
7. The appellant also filed an application dated 24<sup>th</sup> August 2023 seeking orders that the interlocutory judgment be set aside, stay of execution be issued and it be granted leave to defend the suit. The application was based on grounds that it only learned of the suit when it was served with the decree and warrants of attachment by the auctioneers.
8. The appellant stated that it had sold motor vehicle registration number KCW 689F to the 2<sup>nd</sup> respondent through hire purchase and he was still servicing payments at the time of the accident. This explains why the appellant appears as the registered owner but the beneficial owner is the 2<sup>nd</sup> respondent who would have the vehicle registered to his name when he completed full payment.

## **Reply to the Appellant's Application**

9. The 1<sup>st</sup> respondent filed a replying affidavit stating that the plaint was duly served upon the appellant and that the application is not filed in good faith. That the appellant has not explained why its defense was not filed within good time. He stated that the issues raised through the draft defense were not triable and did not warrant setting aside the judgment.



10. He deposed that by the time the appellant filed his application, the motor vehicle registration number KCW 689F had already been sold and a part of the decretal amount already recovered through execution. He produced a letter from auctioneers indicating that the vehicle had already been sold.
11. On its part, the trial court found no merit in the application and stated that it had been overtaken by events, since the subject motor vehicle had already been sold and part of the decretal amount realized. Both applications were found to have been overtaken by events/spent.

### **Parties' Submissions**

12. The appeal was canvassed by way of written submissions.
13. The appellant relied on the cases of Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited (2014) eKLR, Elizabeth Gathoni Thuku (suing as the legal representative of the estate of Charles Gitonga Wathuta) v Peter Kamau Maina & another [2021] KEHC 2995 (KLR), Anne Jepkemboi Ngeny v Joseph Tireito & another [2021] KECA 464 (KLR) and Jared Magwaro Bundi & another v Primarosa Flowers Limited [2018] eKLR.
14. It argued that liability against it was not proved and that for the motor vehicle registration number KCW 689F to have been sold, defies the doctrine of lis pendens. That even though at the time of the accident the vehicle was in its name, the same was under hire purchase by the 2<sup>nd</sup> respondent. When the vehicle was taken away by auctioneers, it cannot have been sold legitimately to another person since it denied the hire purchaser his rights over it. It argued that ownership of a motor vehicle is subject to section 8 of the Traffic Act and that the registered owner's ownership of a vehicle is a rebuttable presumption.
15. The 1<sup>st</sup> respondent relied on the cases of Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123 and Republic v Kenya Maritime Authority & another; Zam Zam Shipping Limited (Interested Party) (Judicial Review 10 of 2020) [2021] KEHC 309 (KLR) and urged the court to consider the evidence adduced before the trial court. He stated that the trial court had already considered that the sale of the motor vehicle had already been completed hence the orders were overtaken by events.
16. Following the judgment of the trial court, he took his place as judgment-debtor and lawfully executed for the decretal amount. He relied on the case of Ngetich v Metto (Miscellaneous Application E046 of 2021) [2022] KEELC 14758 (KLR) and argued that the trial court was correct in its finding since it would have been a futile stay order since the subject property had already been sold through lawful execution.

### **Issue for determination**

17. From the foregoing, the sole issue for determination is whether the doctrine of lis pendens should have applied in this case.

### **Analysis and Determination**

18. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of Williamson Diamonds Ltd and another v Brown [1970] EA 1, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”



19. The impugned finding of the trial court is that the appellant’s application for stay of execution and setting aside of the interlocutory judgment had been overtaken by events since the subject motor vehicle had already been sold to redeem part of the decretal amount. The fact that the said motor vehicle had been sold appeared through the 1<sup>st</sup> respondent’s replying affidavit to the application, through which he annexed a certificate of sale dated 02<sup>nd</sup> September 2023 from the auctioneers. He also produced a letter dated 15<sup>th</sup> September 2023 from the auctioneers who had indicated that they had forwarded the money recovered from the sale to the judgment-debtor.
20. Based on these annexures, the trial Magistrate satisfied herself that even if the stay order is granted, it will exist in a vacuum, without a purpose since execution had already occurred. An order of stay of execution is a relief that is granted through the court’s discretionary power to prevent or pre-empt the effectuation of execution. In the case of *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the court laid down factors to be considered when exercising discretion on the issue of stay. The court pointed out that:
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to avail security of costs as ordered will cause the order for stay of execution to lapse.

(see also the case of *Matata & another v Rono & another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR))

21. The certificate of sale indicates that the vehicle was sold on 02<sup>nd</sup> September 2023 through a public auction. The stay application had been filed a few days earlier on 24<sup>th</sup> August 2023 but the same had not been prosecuted. Therefore, there was no stay order in place as at the date of the auction. The appellant argues in this appeal that the doctrine of *lis pendens* ought to have applied to prevent the 1<sup>st</sup> respondent from selling the subject vehicle while there was an application concerning it pending before court.

22. The 9<sup>th</sup> Edition Black’s Law Dictionary defines *lis pendens* as:

“The jurisdiction, power, or control acquired by a court over property while a legal action is pending.”

23. The Court of Appeal discussed the doctrine of *lis pendens* in the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] KECA 911 (KLR) as follows:

“*Lis Pendens* is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:-



“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of *Mawji v US International University & another* [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of *lis pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case at page it was observed *inter alia* that:-

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation *pendete lite* for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.””

24. In *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* (*supra*) the Court of Appeal found that the High Court had erred in failing to apply the doctrine of *lis pendens* and denying an injunction order on the basis that a *prima facie* case had not been established. The circumstances in the present case are distinguishable and very different. Here, the 1<sup>st</sup> respondent filed a suit against the appellant who failed to enter appearance or defend it. Interlocutory judgment was entered and a decree issued. The trial court satisfied itself that the appellant had been sufficiently served before entering interlocutory judgment. Once judgment was entered, the status of the suit changed; it was concluded following the judgment, the 1<sup>st</sup> respondent moved to execute since he was successful in the suit which was undefended.
25. Clearly, after judgment was entered, the suit against the appellant was not pending. It was already complete and a decree had been issued. It followed that the 1<sup>st</sup> respondent started pursuing execution which is a lawful process since he was the decree-holder. The lawfulness of the execution process was discussed in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR).
26. Given the circumstances of this case, the doctrine of *lis pendens* was not applicable for the following two reasons:
  - a. There was no order of stay stopping the decree holder from executing for the decretal amount; and
  - b. The judgment of the court had already been delivered on 30<sup>th</sup> August 2022, long before the stay order was sought. The case was closed and a bill of costs was already assessed.



## **Conclusions**

27. Were the trial magistrate to set aside the interlocutory judgment and grant the appellant leave to defend the suit, it would defeat the purpose because the subject of the suit was already alienated and remains non-existent. An order of the court should be given in consideration of its overall effect and purpose. If an order is given over a non-existent subject, it becomes a waste of judicial time and resources and there is the risk that it will never effectively be executed. The trial magistrate considered that the orders sought had been overtaken by events and declined to make any orders thereon. To that end, the trial Court did not err.
28. As to whether the appellant was misjoined in the suit, that issue was also painfully overtaken by events and there was nothing that the court could have done to consider it at that point.

## **Disposition**

29. In light of the foregoing discussion, I find that the appeal lacks merit and must be dismissed. It is hereby so dismissed.
30. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23<sup>RD</sup> DAY OF JULY, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Chelangat holding brief for Muia for 1<sup>st</sup> Respondent

No Representation for Osoro for Appellant

No Representation for Nyamwea Advocate for 3<sup>rd</sup> Respondent

Francis Munyao - Court Assistant

