



**Kassam Hauliers Limited v Matheri (Civil Appeal E115 of 2023)
[2024] KEHC 8383 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 8383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E115 OF 2023
GL NZIOKA, J
FEBRUARY 14, 2024**

BETWEEN

KASSAM HAULIERS LIMITED APPELLANT

AND

JAMES MATHERI RESPONDENT

RULING

1. The respondent filed Civil Suit No E190 of 2023 in the Small Claims Court against the appellant seeking for judgment in the sum of Kshs. 620,500. On 3rd July, 2023, a default judgment was entered against the appellant in the sum of Kshs. 620,500 plus costs and interest.
2. The appellant then filed a notice of motion application dated 5th December 2023 brought under a certificate of urgency seeking for orders:
 - a. That the instant application be certified as urgent, and service is dispensed with in the first instance.
 - b. That the Honourable court do issue orders for the release of the shipping container TCLU 7893161 (23/11) held at Okuku Auctioneers Premises at Makutano Junction.
 - c. That the Honourable court order the respondents to deposit Kshs 60,000 as reasonable amount at its discretion before the Honourable court and or through the claimant's counsel.
 - d. That the Honourable court order the unconditional release of the motor vehicle registration number KBT 266H to the respondent.
 - e. That the Honourable court grant the respondent 14 days leave to file a declaratory suit against the insurer.



- f. That the Honourable court order the OCS Industrial Area Police Station to ensure compliance with the said orders as well as maintain the peace.
 - g. Any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.
3. On 6th December 2023, the Adjudicator Hon. Cherop considered the application in chamber and gave the following ex-parte orders that the application to be served before close of business 8th December 2023 and fixed it for inter-parties hearing on 10th January, 2024.
4. However, before the hearing date, the appellant filed another notice of motion application dated; 11th December 2023, brought under a certificate of urgency seeking for the following orders:
 - a. That the instant application be certified as urgent, and service is dispensed with in the first instance.
 - b. That status quo be maintained until hearing and determination of this application.
 - c. That a caveat be placed against the sale and or transfer of the motor vehicle a Mercedes Benz Prime Mover registration number KBT 266H by the National Transport and Safety Authority.
 - d. Any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.
5. From the record of the trial court, there is no evidence that the application was brought to the attention of the court and in the circumstances no orders were issued therein.
6. Unperturbed, the appellant filed a third notice of motion application dated 13th December 2023, brought under a certificate of urgency praying for the following orders:
 - a. That the instant application be certified as urgent, and service is dispensed with in the first instance.
 - b. That the Honourable court issue orders for the release of the motor vehicle registration number KBT 266H a Mercedes Benz Prime Mover by the claimant and his agents.
 - c. That the OCS and or OCPD, Kikuyu Police Station be ordered to assist with compliance the court orders as well as maintain the peace.
 - d. That the matter be mentioned within sixty (60) days from the date of the application herein for hearing of all the applicant's applications.
 - e. Any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.
7. On the 13th December 2023, the appellant's advocate wrote a letter to the Court Administrator, Small Claims Court at Nakuru seeking to have the application dated; 13th December 2023 placed before the duty court. On 15th December 2023, the file was placed before Hon. D N Macharia, Resident Magistrate (RM) and after hearing Mr. Makumi for the respondent and Mr. Mogaka for the appellant, the court stated as follows: -

“Hearing considered the certificate of Urgency dated 13th December 2023, and motion dated 13th December 2023 and the depositions therein, and having considered the application



dated 11th December 2023, it is hereby order that: The applications dated 11th December 2023 and 13th December 2023 be served for inter-parties hearing on 10th January 2023”.

8. When the applications came up for hearing before the Adjudicator Hon. Cherop on the 10th January 2024, learned counsel Mr. Makumi, for the respondent was the only one present, and submitted that all the three applications were overtaken by events and prayed that they be dismissed.

9. The trial court upon hearing the counsel stated as follows: -

“I note that there are three (3) applications dated 11th December 2023, 13th December 2023 and 5th December 2023 fixed for hearing today. The respondent is absent. All the three applications are therefore dismissed for want of prosecution with costs.”

10. The appellant being aggrieved by the ruling of the court delivered by Hon. D N Macharia (RM) delivered on 15th December, 2023, on 19th December, 2023, filed a Petition of Appeal and simultaneously with a notice of motion application dated under a certificate of urgency seeking for the following orders: -

a. That this application be certified as extremely urgent, and its service be dispensed with in the first instance.

b. That this Honourable court be pleased to issue an order staying the execution of the ruling and or the order of the Honourable DM Macharia (RM) dated delivered and issued on 15th day of December 2023; in Naivasha Small Claims Court Civil Suit No. E190 of 2023 specifically ordering that the applications proceed for inter-parties hearing without conservatory orders as to the subject matter, the appellant’s motor vehicle registration number KBT 266H, a Mercedes Benz Prime Mover and all consequential orders arising therefrom pending inter parties hearing hereof and final disposition of this application.

c. That summons to issue to the respondents’ agents and or auctioneers to appear before the court and clarify the status of the auction.

d. That this Honourable court be pleased to order conservatory orders against the respondents, his agents, employees and or persons acting on his instructions against the disposal, sale and or transfer of the motor vehicle registration number KBT 266H ZE 5485 a Mercedes Benz Prime Mover pending hearing and determination of the lodged appeal herein.

e. That the Honourable court order the release of the motor vehicle registration number KBT 266H ZE 5485 a Mercedes Benz Prime Mover to the appellant on an interim basis as a tool of trade pending the hearing and determination of the appeal.

f. That the Honourable court grant the appellant a further 90 days to complete compliance of the decretal sum.

g. That this Honourable court do grant any and further order as may be just and expedient and for the interest of justice.

h. That cost of this application be provided for.

11. The application was considered on 20th December 2023, in chambers and the court ordered that the application be served for directions inter-parties on 18th January 2024 and granted prayer (2) until the 18th January 2024.



12. However, before the hearing date, the appellant filed a second notice of motion application dated 12th January 2024, under a certificate of urgency seeking for the following order:
 - a. That this application be certified as extremely urgent, and heard ex-parte during the vacation period and its service be dispensed with in the first instance.
 - b. That the Honourable be pleased to issue an order for the release of the motor vehicle registration number KBT 266H ZE 5485 to the appellant on an interim basis as a tool of trade pending the hearing and determination of the appeal.
 - c. That the Honourable be pleased to issue an alternative order for the release of the motor vehicle registration number KBT 266H ZE 5485 to the Officer Commanding Station (OCS) Kikuyu Police Station pending inter parties hearing hereof and final disposal of this application.
 - d. That this Honourable court do grant any and further order as may be just and expedient and for the interest of justice.
 - e. That cost of this application be provided for.
13. The application was considered on 16th January 2023, by Hon. Lady Justice Gichohi, J, the duty court, during the court vacation and ordered that the application be served on the respondent and be heard on the 18th January 2024.
14. On the 18th January 2024, Mr. Mogaka for the appellant and Mr. Makumi for the respondent appeared before the court. Mr. Makumi informed the court that the first application had been overtaken by events. Further the appellant had replicated the applications in the lower court.
15. However, Mr. Mogaka submitted that they were only seeking for grant of prayer five (5) in the application in the subsequent application and the application dated 12th January 2024, be marked as withdrawn. The court allowed the withdrawal of the application dated 12th January 2024, and noted that the only remaining application was the one dated, 19th December 2023.
16. Be that as it were, the application dated 19th December, 2023, is supported by the grounds therein and the affidavit of the even date sworn by Mohamed Kassam, applicant's director. He averred that, the respondent sued applicant in Naivasha Small Claims Court Civil Suit No. E190 of 2023. That, judgment was entered in favour of the respondent and he drew a decree and certificate of costs.
17. That, upon service of the proclamation and subsequent attachment, Mr. Kassam reached an agreement with the auctioneer that upon paying part of the decretal sum, the subject vehicle would be released to allow work in the month of December, and further payments would be paid in January and February through post-dated cheques.
18. That, Mr. Kassam paid Kshs. 300,000 being part payment of the decretal amount, however, the subject vehicle was not released. Consequently, the applicant made three applications including applications dated; 5th, 11th and 13th December, 2023 before the trial court seeking to have the subject vehicle released.
19. However, by a ruling and/or orders by Hon. D.N. Macharia Resident Magistrate (RM) dated 15th December, 2023, ordered that the applications be served for inter-partes hearing on 10th January, 2024.
20. That the applicant is aggrieved by the impugned ruling of the trial Magistrate as he strictly complied with the provisions of section 38 of the *Civil Procedure Act* and Order 22 Rules 7, 13(1) & (4) and 20 of the Civil Procedure Rules.



21. The applicant further avers that, the trial Magistrate failed to consider and appreciate the import of; Order 22 Rule 26 of the Civil Procedure Rules before ordering the matter to proceed without issuing conservatory orders. Furthermore, the learned trial Magistrate misapprehended the salient provisions of sections 22, 23 and 24 of the *Civil Procedure Act* and Order 22 Rule 18 and 35 of the Civil Procedure Rules.
22. The applicant averred that he has an arguable appeal that raises triable issues thus the appeal should be determined on its merits but any execution of the impugned ruling will render the appeal nugatory.
23. Further, that the applicant has paid half of the decretal sum within three months of the decree but the respondent has refused to release the subject vehicle despite the vehicle not been disposed of, transferred and/or sold by the insurer.
24. The applicant averred that the subject vehicle is his only tool of trade and failure to release it has made it difficult for him to work. That, if the subject vehicle is released to him he shall comply with the terms the Honourable court will impose. However, if a stay is not granted he stands to suffer irreparable harm.
25. That, there is a high and probable likelihood that execution of the order of the impugned ruling may issue at any time in absence of stay orders by the court. Further, in administering justice the court should balance between the competing rights and interests of the different parties. As such, the best cause in the instant matter is to preserve the substratum being the subject vehicle by releasing it to the applicant. That no prejudice shall be suffered by the respondent if the orders sought are granted.
26. However, the application was opposed by the respondent vide grounds of opposition dated 15th January, 2024 which states:
 - a. That Hon. D. N. Macharia failure to grant any interim orders on 15th December 2023 amounts to a negative order incapable of being stayed hence this appeal and the application dated 19th December 2023 are totally incompetent.
 - b. That the appellant's applications dated 11th December 2023 and 13th December 2023 which the appellant had in this appeal sought issuance of preservative orders pending their hearing on 10th January 2023 and subsequent determination were on 10th January 2023 heard and dismissed by the trial court hence there is nothing left for this court to preserve.
 - c. That the respondent's decree issued on 3rd July 2023 was not appealed against or stayed hence none of the conditions for grant of orders for stay of execution have been met by the appellants who have not provided any security or demonstrated that the respondent cannot remedy their loss in the very unlikely event it arises.
 - d. That since the attachment of motor vehicle registration number KBT 266H the appellant only paid Kshs. 200,000 towards the decretal amount Kshs 100,000 towards auctioneers' charges thus leaving an unpaid decretal sum of Kshs. 487,690 which the respondent have a right to execute on and recover.
27. I have considered the application in the light of the materials placed before the court and note that the only prayer in the subject application for consideration is prayer five (5) where the applicant is seeking for the release of the subject vehicle.
28. In that regard, there is no dispute that a judgment has been entered in favour of the respondent in the sum of Kshs. 687,690. The vehicle was taken by the auctioneer in execution of that judgment. There is evidence that a payment of Kshs. 300,000 was made but it is not clear to the court, if the entire amount was to go to the decretal sum or some was auctioneers' dues. According to the respondent, Kshs.



200,000 was part payment of the decretal amount while Kshs. 100,000 was payment of auctioneer's fees.

29. Be that as it may, the appellant has not sought an order for stay of execution based on the fact that he indicated he is only seeking prayer (5) of the application dated 19th December, 2023. The court can only grant a prayer that has been sought for. If there no prayer for stay of execution, how can the court release the subject vehicle that was attached as part of execution of the court's decree. In the absence of a pray of stay of execution it means that the judgment is not contested.
30. As such, I find that, the applicant should have returned to the trial court for review and/or reinstatement of the applications filed therein as they were dismissed for want of prosecution and not heard on merit and therefore the trial court still has jurisdiction to hear the applicant.
31. However, it does not mean that the applicant cannot be heard on merit on the appeal, but the court cannot order for the release of a motor vehicle which is lawfully held as part of the execution of the decree of a court and which decree has not been set aside.
32. Further at the expense of repeating what is said, there is no prayer seeking for a stay of execution to allow the court to interrogate the conditions of stay and therefore there is no basis for releasing the motor vehicle. Therefore, prayer (5) is not granted.
33. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 14TH DAY OF FEBRUARY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mogaka for the appellant/applicant

Ms. Kisotu H/B for Mr. Makumi for the respondent

Ms. Ogutu court assistant

