



**Mungai v Omondi (Miscellaneous Civil Application E054 of 2023)
[2024] KEHC 1095 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E054 OF 2023
FN MUCHEMI, J
FEBRUARY 8, 2024**

BETWEEN

SALOME NYOKABI MUNGAI APPLICANT

AND

JOSEPH WANDERA OMONDI RESPONDENT

RULING

Brief Facts

1. The application dated 27th November 2023 seeks for orders for payment of throw-away costs of Kshs. 20,000/- as ordered on 1st November 2023 and be ordered to file her defense, witness statement and pertinent documents in SCCCOMM No. E223 of 2023 within seven (7) days and the matter proceeds for hearing on merits on 31st January 2024 as earlier ordered on 1st November 2023.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 6th December 2023.

Applicant's Case

3. The applicant states that default judgment in SCCCOMM No. E223 of 2023 was set aside on 1st November 2023 on condition that she pay throw away costs of Kenya Shillings Twenty Thousand (Kshs. 20,000/-), file her defence and witness statements within seven (7) days. The applicant contends that she was unable to comply with the court orders on time as she was supervising the just concluded Kenya Certificate of Primary Examinations as well as applying for a loan to offset the throw away costs.
4. The applicant states that she was arrested on 24th November 2023 and arraigned in court on 27th November 2023 where the court ordered that she pay the sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) in default she be committed to thirty days (30) in civil jail. She further states that she was on the verge of complying with the court orders issued on 1st November 2023 as



she was awaiting the processing of the funds from the Sacco until she was arrested which curtailed her movements.

5. The applicant contends that she is not aware of the monies purportedly claimed in the pleadings as filed by the respondent resulting in the default judgment, proceedings having proceeded ex parte and the arrest and detention affects her right to a fair trial pursuant to Article 50 of the Constitution. The applicant further contends that she is yet to be granted audience to ventilate her claim or offer a substantive rebuttal against the respondent as her intended defence raises triable issues of law and fact and is meritorious. In the circumstances, the applicant states that she seeks the intervention of the court to be released from prison and be allowed to comply with the orders of 1st November 2023 within seven days as she is on the verge of losing her job by virtue of being incarcerated.

The Respondent's Case

6. The respondent opposes the application on the premise that it is frivolous, vexatious and has been brought in bad faith, under the wrong provisions of law and is meant to act as a back door appeal to the judgment and the subsequent ruling issued in the primary suit.
7. The respondent argues that the application is substantively defective as this honourable court can only be moved as an appeal where a party is aggrieved by a judgment/ruling of the lower court and in so doing, the mode of moving the court is guided by the rules of an appeal. By failure to do so, the application cannot stand.
8. The respondent states that the applicant is seeking to appeal the orders of the small claims court issued on 27th November 2023 which the applicant has sought to hood wink the court into issuing by filing the instant application to set aside the said orders.
9. The respondent states that he filed a small claims suit being SCCCOMM No. E223 of 2023 and duly served the applicant with all the pleadings and notices. The applicant however, refused, failed and/or neglected to participate in the matter by filing any response and/or attending court. The respondent further states that his advocates personally reached out to the applicant for the purpose of trying to settle the matter out of court but despite the promises by the applicant to avail herself at the advocates' offices, she ultimately failed to do so.
10. Consequently, he sought orders for default judgment as against the applicant which was entered on 2nd May 2023. The applicant was then served with a decree and request for payment which she refused to adhere to leading to seeking of a Notice to Show Cause why the applicant should not be committed to civil jail. The Notice to Show Cause was scheduled for hearing on 4th June 2023 and the same was duly served upon the applicant.
11. The respondent states that on the hearing date of the Notice to Show Cause, the applicant was represented by an advocate who albeit filing a notice of appointment was indulged by himself and the court and the applicant was given time to file the necessary response to the Notice to Show Cause. The matter was scheduled for a further hearing and on the said date, the applicant and her counsels had not filed the Notice of Appointment or a response to the Notice to Show Cause. Furthermore, the applicant was not able to give a reasonable explanation for failure to do so which then informed the court to issue the warrants of arrest.
12. The respondent states that he took out the warrants of arrest but the applicant got wind that the police were looking for her and ran to court vide her application dated 18th August 2023 seeking stay of the said warrants and leave to file her defence. The court in a bid not to lock out the applicant's right to be heard, allowed the application vide ruling issued on 1st November 2023 but the orders were on



condition that the applicant pay throw away costs of Kshs. 20,000/- and file her defence within 7 days failure to which the default automatically reverts.

13. The respondent states that the applicant again without any reason refused or failed to pay the throw away costs and file her defence, and to date no defense has ever been filed by the applicant. As such, the respondent argues that he executed his warrants of arrest and the applicant was arrested, arraigned and the court ordered for the payment of the decretal sum in installments with the first installment of Kshs. 100,000/- to be paid on the said date and the balance to be paid at the sum of Kshs. 20,000/- per month till payment in full.
14. The respondent contends that the applicant is not keen either in prosecuting the matter or paying his loan which she has been holding for over 3 years and it is unfair that she keeps using the court to defeat his interests. The respondent argues that litigation must come to an end and that it is unfair since it is nearly a year back since the matter was instituted and yet the matter ought to have been concluded within 60 days. Further, the respondent contends that since July 2023 the court has given the applicant all the opportunities for her to defend herself but she has blatantly refused to do so and therefore she cannot claim her right to liberty has been infringed.
15. The respondent argues that by allowing the application, the court shall be reversing the duly issued orders of the small claims court which can only be done through an appeal or if the applicant satisfies the court that the orders were issued irregularly and without following the due process.
16. The respondent further states that arrest and detention of a judgment debtor who has failed or refused to satisfy a decree is a legal and proper mode of execution available to a decree holder and he is within his rights to exercise this option and it cannot be interpreted as an infringement of a right unless the judgment is irregular.
17. The respondent contends that the reasons given by the applicant as to why she never complied with the said orders are unsubstantiated noting that no evidence was presented to the lower court supporting her claims that she was in the process of getting funds from the Sacco and/or she was invigilating exams and the same was never communicated by her advocates. Additionally, no reason was ever given as to why she failed to file her defence within the time given.
18. The respondent states that the applicant was arrested nearly three weeks from the date the orders of the court lapsed and the applicant's excuses cannot hold water noting that she had a whole month to comply before taking action against her. Moreover, the respondent argues that if any detriment or suffering will befall the applicant, the same is all her doing and it is against the respondent's right and to his greatest prejudice that the applicant continues to enjoy her freedom despite refusing to pay the decretal sum as ordered.

Whether the application has merit.

19. The suit in the small claims court being SCCCOMM NO. E223 OF 2023 was instituted by the respondent claiming for a sum of Kenya Shillings Two Hundred and Forty Thousand (Kshs. 240,000/-) following a soft loan agreement entered into by the parties. The respondent served the pleadings to the applicant and filed an Affidavit of Service dated 31st March 2023 as proof of service. On 13th April 2023, the court found that service was not proper and the respondent served the applicant again and filed his affidavit of service dated 25th April 2023 as proof of service. The respondent thereafter prayed for judgment to be entered as the applicant did not enter appearance or file a defence. The trial court entered default judgment on 2nd May 2023 and in efforts to execute the same, the respondent filed a Notice to Show Cause why warrants of arrest should not issue against the applicant.



20. On 31st July 2023, when the Notice to Show Cause was coming up for hearing, the applicant's counsel sought the court's indulgence as he was not properly on record for the applicant and requested for time to file a Notice of Appointment and a response to the Notice to Show Cause. The court indulged counsel for the applicant and scheduled the hearing date to 17th August 2023. On the said date, both the applicant and her counsel were present in court and sought for more time to file in a response to the Notice to Show Cause. The court noted that the applicant had ample time to file the response but failed to do so. As such, the court went ahead and issued warrants of arrest against the applicant.
21. The following day, the applicant filed an application seeking to lift the warrants of arrest as well as setting aside of default judgment and for leave to defend her claim. The trial court, on 1st November 2023, found that default judgment entered was properly entered. The court in a bid not to lock out the applicant from ventilating her claim and based on the consideration that the applicant's defence raised triable issues, it was ordered that the applicant to pay throw away costs of Kshs. 20,000/- within 7 days from the date of the court ruling failure to which, the default judgment would automatically be reinstated.
22. The applicant failed to comply with the said orders and she was arrested on 24th November 2023. On 27th November 2023, parties deliberated on how to liquidate the decretal sum of Kshs. 295,584/- with the applicant proposing to pay by monthly installments of Kshs. 10,000/- whereas the respondent proposed that a lumpsum of Kshs. 100,000/- be paid and the balance be paid by monthly installments of Kshs. 20,000/- till payment in full. The trial court ordered that the applicant pay a lumpsum of Kshs. 100,000/- on the said date and liquidate the balance in monthly installments of Kshs. 20,000/- failure to which she would be committed to civil jail for a period of thirty days.
23. Notably, the applicant the filed this application seeking for the indulgence of this court to make orders that she be given time to comply with the orders of the small claims court dated 1st November 2023. This move is essentially meant to have this court set aside the orders given by the small claims court on 27th November 2023. The law gives a court that has made orders the discretion to set aside such orders to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake. *Shah v Mbogo & Another* [1967] EA 116. In the instant case, the applicant herein has been given numerous chances to file her defence and comply with the orders of paying throw away costs but has failed to do so. Instead she sought refuge of the trial court vide her application dated 18th August 2023. The applicant was served with the pleadings on the onset of the claim and failed to put in her defence as required by the law. Default judgment entered against her was found to be properly and lawfully done. It is trite law that a court will not issue orders in vain and there is no doubt that the applicant is being indolent. Thus, the court can only exercise its discretion to set aside the orders dated 27th November 2023 only to avoid injustice being visited upon the applicant. In this case, it is the respondent who is likely to suffer injustice should the orders sought granted. Judgment was given in his favour nearly eight months ago. Cases in the small claims court ought to be determined in 60 days. To date, this matter is still dragging due to the actions of the applicant of filing application after application and moving from the right forum to this court to try her luck.
24. A cursory look of this application, the applicant seems to be asking this court to sit on appeal on the Notably orders of the magistrate before the case is ripe for such an appeal. The law is that the Small Claims Court has the requisite jurisdiction to set aside its own orders. It is absurd to approach this court to set aside the orders of the lower court which is possessed with the jurisdiction to do so. The applicant's motive herein is to buy time and waste precious judicial time. Such action should not be entertained and ought to be condemned with payment of costs.



Conclusion

25. I find that the application dated 27th November 2023 lacks merit and is hereby dismissed with costs to the respondent.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 8TH DAY OF FEBRUARY 2024.

F. MUCHEMI

JUDGE

