



REPUBLIC OF KENYA



KENYA LAW
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**Waithaka & another v Kiarie (Civil Appeal 5 of 2023)
[2024] KEHC 1574 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 5 OF 2023
FN MUCHEMI, J
FEBRUARY 15, 2024**

BETWEEN

JORAM WAITHAKA 1ST APPELLANT

DAVID WAITHIRA 2ND APPELLANT

AND

PHILIP NDUNGU KIARIE RESPONDENT

RULING

Brief Facts

1. This is the respondent's application dated 2nd October 2023 seeks for orders of setting aside the interim orders granted on 19/9/2023 and extended on 27/9/2023. The applications by the appellants dated 14/7/2020, 10/01/2023 and 13/09/2023 are related to the respondent's application dated 02/10/2023 and shall be dealt with in this ruling
2. The applicants'/Appellants' applications are three in number and all seek for stay of execution pending appeal. It is noted that the counsel for the parties were both present in court on 06/12/2023 when the date was taken before the Deputy Registrar. The applicants' counsel called into the courtroom late and did not respond to the substantive matters in the application dated 02/10/2023.

The Respondent

3. The respondent states that through an application dated 13/9/2023, the applicants obtained interim orders by concealing that they had filed a motion dated 16/2/2023 before the Chief Magistrates Court in Thika CMCC No. 1260 of 2015 seeking for orders for stay of execution and setting aside of warrants of attachment. The trial court dismissed the motion in its ruling delivered on 1/8/2023 and the respondent contends that the applicants have not appealed or sought review of the said ruling.



4. The respondent further states that the matter was scheduled for inter parties hearing on 25/9/2023 when the file was transferred to this court from Kiambu High Court. Further on 27/9/2023, the court extended the interim orders up to 16/11/2023.
5. The respondent argues that pursuant to the ruling of the trial court motor vehicle registration number KCC 126A has been advertised for sale through public auction on 6/10/2023. The applicant further contends that the said motor vehicle has been at the Valuers Yard Enterprises since 14/2/2023 and is at the risk of wasting away and depreciating in value if the sale is adjourned further.
6. The respondent argues that unless the interim orders are set aside he stands to suffer irreparable harm. The applicant further states that the respondents have been enjoying interim orders since February 2023 and rather than file an appeal after their application was dismissed, they chose to approach the current court with unclean hands.

The Law

Whether the applications have merit.

7. The court has discretion to set aside judgment or an order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake. *Shah vs Mbogo & Another* [1967] E.A. 116.
8. Similarly in *Patel vs E.A. Cargo Handling Services Ltd* [1974] E.A. 75 the court stated that:-

There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.
9. The record shows that the applicants filed an application dated 16th February 2023 in Thika CMCC No. 1260 of 2015 seeking for orders for stay of execution of the warrants of attachment dated 9th January 2023 and to set aside the warrants of attachment extracted by Vintage Auctioneers. The respondent herein opposed the application on the grounds that the trial court was not the proper forum to seek stay as the said orders were granted by the High Court in Kiambu and that the applicants had not complied with the conditional stay of depositing Kshs. 1,500,000/- by close of business on 10th August 2020 instead the applicants deposited the money on 28th August 2020. The trial court rendered its ruling on 1st August 2023 and held that the court lacked jurisdiction to grant an order of stay as stay of execution had been granted by the High Court in Kiambu on condition that the applicants do deposit Kshs. 1,500,000/- by close of business on 10th August 2020 yet the applicants failed to comply with the same. Thus, the court held that the application stood dismissed and there was nothing to be stayed.
10. The applicants then filed another application dated 13/9/2023 seeking to stay and set aside the advertisement and intended sale of motor vehicle registration number KCC 126A Mistubishi FH scheduled for sale on 19th September 2023 and stay of execution of the judgment in Thika CMCC No. 1260 of 2015 delivered on 17th June 2020. The applicants further sought that the court do consider the deposit of Kshs. 1,500,000/- made in court on 13th August 2020 and that the same be deemed as properly done and in compliance with the stay conditions orders issued on 17th July 2020 by Justice Meoli. The applicants failed to mention in their application dated 13/9/2023 as directed by the court that they had earlier filed a similar application dated 10th January 2023 seeking similar prayers had been filed earlier but the court declined to grant any orders ex parte and directed that the said application be fixed for hearing. Additionally, the applicants made no mention of yet a similar application for stay



they had filed in the trial court which was dismissed because the applicants failed to comply with the conditional stay as set out by the High Court in Kiambu.

11. It is evident that the applicants have concealed material facts as they have filed similar and multiple applications in different courts. Furthermore, the High Court in Kiambu in Civil Appeal No. 80 of 2020 granted stay of execution on condition that the applicants deposit Kshs. 1,500,000/- by close of business on 10th August 2020. The applicants deposited the said amount on 28th August 2020, which is 18 days after the date of depositing the security were given. Instead of the applicants seeking enlargement of time to comply with the conditions of stay, they filed numerous applications and argued that they satisfied the conditions of stay as they had already deposited the said sum of Ksh.1,500,000. Evidently, the applicants failed to comply with the orders of stay and as such, the said orders had lapsed. In that regard, the subsequent applications are an abuse of the court process and a waste of judicial time.
12. Regarding the orders made by Meoli, J on 17/07/2020 for stay pending hearing of the application dated 14/07/20 it is noted that the orders expired on 10/08/2020 for failure by the applicants to comply with the condition for deposit of the decretal amount. As such there were no orders to be extended after the 10th August 2020.
13. I have perused the file and noted that the respondents filed other applications seeking for orders for stay of execution dated 10/01/2023, 02/10/2023 and 13/09/2023. However, these applications were never prosecuted. The court record does not show any orders given in regard to those applications. On 16/11/2023 and on 06/12/2023 this matter was mentioned before the Deputy Registrar Thika which was soon after the file was transferred from Kiambu High Court. An oral application was made by the applicant's counsel to extend interim orders on 16/11/2023 but the Deputy Registrar declined to do so on grounds that he did not have the powers to make such an order.
14. The respondent filed a replying affidavit opposing the application dated 13/09/2023 by the applicants and also filed a preliminary objection asking the court to strike out the said application. During the hearing of the preliminary objection, the counsel for the applicants said he was not fully briefed of the matter for it was being handled by his colleague who was not available on that day. The court was told by the respondent's counsel that since there were no orders for stay in place, the vehicle that had been attached Reg. No. KCC 126 A had been sold.
15. Without belabouring on the numerous applications seeking for orders for stay pending appeal, I find that there are no orders on record capable of being set aside. The numerous applications were meant to hold the respondent at ransom not to execute against the applicants and to mislead the court that there were interim orders for stay pending the hearing of the said application inter parties.
16. It is also noted that the applicants failed to disclose material facts to this court as they filed their applications. The facts are that they had approached the Magistrate's Court in Thika CMCC No.1260 of 2015 seeking for orders for stay while one of their applications seeking the same prayers was still pending before this court. The Magistrate dismissed the application on 1st August 2023. It was later on that the applicants filed their second application dated 13/09/2023 seeking for orders for stay pending appeal.
17. I have already said that no interim orders existed in the court record since the ones issued by Meoli, J had expired on 10/08/2020, following failure by the applicants to comply with the conditions given by the judge at Kiambu. Although it is said that interim orders were issued on 19/09/2023 which the respondent seeks to set aside, I have not traced such orders on record. It is important to note that the applicants/appellants did not participate in this application dated 2/10/2023.



18. Consequently, I find the three applications dated 14/07/2020, 10/01/2023 and 13/09/2023 as having been overtaken by events since the motor vehicle has already been sold. As for the respondent's application dated 2nd of October, the court record has no orders made on 19/09/2023 and extended on 27/09/2023 as claimed. As such, I am of the considered view that the said application is misconceived.
19. Bearing in mind that the applicants filed these applications that have kept the court and the respondents busy doing work that the applicants knew would bear no meaningful results, it is my view that the applicants ought to be condemned to pay costs of the said applications.
20. As for the appeal, it is noted that the record of appeal has already been filed. The applicant is at liberty to pursue his appeal. The court registry will be accordingly directed to call for the lower court record.
21. In conclusion, the applications dated 14/07/2020, 10/01/2023 and 13/09/2023 are hereby struck out for having been overtaken by events and for want of prosecution. Similarly, the application of the respondent dated 2/10/2023 is hereby struck out for being misconceived. The respondent shall have the costs of the application dated 13/9/2023 to which he participated.
22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF FEBRUARY 2024.

F. MUCHEMI

JUDGE

