



REPUBLIC OF KENYA



**Chepkwony v Chomba (Miscellaneous Application 74 of 2023)
[2024] KEHC 2747 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 74 OF 2023
LM NJUGUNA, J
MARCH 13, 2024**

BETWEEN

ROBERT KIPKORIR CHEPKWONY APPLICANT

AND

KELVIN KATHEE CHOMBA RESPONDENT

RULING

1. The applicant filed the notice of motion dated 20th December 2023, supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 1. Spent;
 2. Spent;
 3. Spent;
 4. That this honourable court be pleased to grant stay of funds transferred to the respondent through her advocate on 28th November 2023 pending hearing and determination of the intended appeal;
 5. Spent; and
 6. That the costs of this application be provided for.
2. Judgment was entered against the applicant in Embu CMCC No E056 of 2022 for the sum of Kshs 3,493,671/=. That he paid a sum of Kshs 3,000,000/= through the respondent's advocate in partial satisfaction of the decretal amount. That the applicant has since learned that the respondent was not involved in the accident and the information was communicated through a letter by the Base Commander, Embu, who confirmed that the injured person was Ramadhan Njoroge Mburia. That the respondent was also involved in an accident around the same time and was received at Embu Level 5



Hospital from Chuka Hospital with paraplegia due to spinal injury secondary to a road traffic accident. The applicant stated that if the orders are not granted, the respondent will utilize the funds, thus exposing the applicant to loss and extreme prejudice. That the amount should be deposited into a joint interest-earning account as security for due performance.

3. The respondent filed a replying affidavit stating that the court had granted 45 days stay of execution and the same has since lapsed. That the amount of Kshs 3,000,000/= was paid to the respondent on 28th November 2023, a period of 2 weeks after expiration of the stay period, and the money has since been utilized. That the allegations made in this application are baseless and that the amount was correctly paid to the respondent.
4. The applicant filed a further affidavit stating that as soon as the money was paid to the respondent's advocates, the applicant's advocate wrote a letter to the bank seeking reversal of the amount based on the developments in the matter. That the same was unsuccessful as the respondent's advocate had already utilized the money while well aware of the discrepancies in the case. That when the time is right, the respondent's advocate will have to provide a statement of account in the matter. The applicant's advocate annexed correspondences between herself, her bank and the respondent's advocate regarding the said transaction.
5. In this application, the court directed the parties to file their written submissions but only the applicant complied.
6. It was the applicant's argument that the appeal has high chances of success and therefore, this court ought to grant the orders sought to enable the applicant ventilate his appeal. Reliance was placed on the case of *Gitahi & another v Warugongo* [1988] eKLR. That in the event that the appeal succeeds, the respondent's ability to refund the amount is unknown and that the money is safer held in a joint account. He relied on the case of *Ilrad v Kinyua* [1990] KLR 403 as quoted in the case of *Kenneth Bundi Kubute & 2 others v Daniel Njagi David* [2007] eKLR. That the orders sought are discretionary as stated in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417.
7. The issue for determination is whether the orders sought by the applicant ought to be granted.
8. Through its judgment delivered on 28th September 2023, the trial court entered judgment against the applicant for the total sum of Kshs 3,493,671/=. On 28th November 2023, the applicant, through his advocate, paid the respondent's advocate the sum of Kshs 3,000,000/= being partial payment of the decretal amount. The applicant's advocate alleged that on 29th November 2023, she reached out to her bank to withhold the funds as she had come across information to the effect that the respondent is not the man that was injured through the accident. The applicant annexed a copy of a letter dated 11th December 2023 from the Embu Traffic Base, stating that the victim of the accident reported as OB No 57/1/6/2021 is known as Ramadhan Njoroge Mburia and not Kelvin Kathee Chomba.
9. The advocates for both parties exchanged correspondences about the money and the bank did not seem to be able to reverse the money back to the applicant's advocate's account. In her replying affidavit, the respondent's advocate termed the allegations made by the applicant as falsehoods and stated that judgment was rightly entered in favour of her client. She stated that the funds that had been received in partial fulfilment of the decretal amount have already been utilized. On 27th December 2023 when the application herein was placed before the duty Judge in Nyeri, he ordered temporary stay although the funds may have been utilized.
10. I have perused the memorandum of appeal and note that the same is based on the judgment as delivered between the same parties, challenging quantum. The issue of a different respondent in the matter has arisen through this application and even then, the only prayer sought at this point is stay of funds.



This court is unable to determine the truthfulness of the allegations herein as to do so would amount to taking evidence. According to section 65(1)(b) of the *Civil Procedure Act*, the High Court as an appellate court can only entertain matters of facts canvassed at trial and matters of law. In other words, no new facts can be heard at this stage unless by way of additional evidence upon the leave of the court having been sought and granted. At this juncture, the court can only rely on what is deposed in the affidavits.

11. The application herein is a precursor for the intended appeal, which will be filed out of time with the leave of court as already granted. The respondent's advocate averred that the funds paid have already been utilized and are no longer available. The applicant's advocate stated that the respondent's advocate has not demonstrated that the funds are unavailable and that she went on to utilize the money knowing that there were discrepancies as to the identity of her client. According to the court records, the temporary stay order was granted on 27th December 2023, long after the money had been paid. This means that there was nothing stopping the respondent's advocate from utilizing the money paid into her advocate's account on behalf of her client.
12. It is indeed unfortunate that the applicant has paid money to the "wrong" party, but this court will not engage in righting this wrong, if any, occasioned by the advocate.
13. As things stand, it would defeat purpose to grant prayer 4 as sought and so the same is hereby denied. The applicant had already been granted leave to appeal out of time through an order issued on 27th December 2023. He may choose to pursue that route if he so wishes.
14. Each party to bear their own costs of the application.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

