



**Crown Bus Services Limited v Mukani (Suing as the administrator of the Estate of Moses Ong'ang'a Wafula - Deceased) & another (Civil Appeal E240 of 2023) [2024] KEHC 2287 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2287 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E240 OF 2023  
HM NYAGA, J  
MARCH 6, 2024**

**BETWEEN**

**CROWN BUS SERVICES LIMITED ..... APPELLANT**

**AND**

**JUDITH WERE MUKANI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MOSES ONG'ANG'A WAFULA - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**CRATER VIEW AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant has filed a notice of motion application dated 20<sup>th</sup> November, 2023 seeking for orders;
  - a. That this Application be certified urgent and service be dispensed with the first instance.
  - b. That pending the hearing and determination of this Application, this Honourable Court be pleased to grant leave to Judgment Debtor to pay/ liquidate the decretal sum by way of monthly installments of Kenya Shillings One Hundred Thousand (Kshs.100,000/=) until settlement in full on or before 10<sup>th</sup> of every successive month and until payment in full.
  - c. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the 1<sup>st</sup> Respondent to give a proper tabulation of the pending decretal amount.
  - d. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue orders restraining the Respondents either by themselves, servants, agents and/ or employees from repossessing, attaching, selling, auctioning or in any other way disposing of the Applicant's Motor Vehicles Registration number KBR 492 B Scania Bus and KBX 875



R Scania Bus and/or interfering with the Applicant's right to possession of the said motor vehicles.

- e. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the Respondents to immediately release Motor Vehicles Registration Number KBR 492 B Scania Bus and KBX 875 R Scania Bus to the Applicant.
  - f. That upon the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the Respondents to immediately release Motor Vehicle Registration Number KBR 492 B Scania Bus and KBX 875 R Scania Bus to the Applicant.
  - g. That costs of this Application be provided for.
2. The application is premised on the grounds on the face of the record and the Supporting Affidavit of Mohamed Ahmed the appellant's Operation manager in which he averred that on 24<sup>th</sup> August, 2023, Honourable Peter Aloyce Ndege delivered a Ruling in Civil Suit No. 89 of 2013 between the Applicant and the 1<sup>st</sup> Respondent herein dismissing the Applicant's application dated 18<sup>th</sup> August 2022 with costs.
  3. He deposed that the Applicant's Motor Vehicle Registration No. KAW 938 G was involved in an accident along Nakuru-Nairobi Highway and as such it was sued for recovery of damages under Law Reform Act and Fatal Accident Act, and upon hearing and determination of the matter, the court entered judgment against the Applicant for a sum of Kshs. Five million two hundred and sixty thousand three hundred and thirty two (Kshs.5, 262,332/=).
  4. He averred that the applicant's insurance company had paid a sum of Kshs. 3 million before the suit commenced in an effort to settle the matter out of court, and it is quiet unfortunate that the Applicant's Motor Vehicle KBR 492 B Scania Bus and KBX 875 R Scania Bus were proclaimed by the 2<sup>nd</sup> Respondent under the instruction of the 1<sup>st</sup> Respondent in a bid to satisfy the decree.
  5. He contended that due to Covid 19 constraints, the Applicant has not been able to satisfy the remainder of the decretal sum for the reasons that the transport industry was hardly hit by the pandemic and the Applicant is yet to get back to its feet in terms of finances and business but it is willing to defray the said amount if afforded a time frame for a restructured payment.
  6. The Advocate for the 1<sup>st</sup> respondent filed a Replying Affidavit dated 11<sup>th</sup> December, 2023 and averred that the correct position is that the Applicant's insurer paid the sum of Kshs.3 million leaving balance of Kshs. 3,924,430.20 after the conclusion of the appeal and which amount continues to accrue interest.
  7. In regards to the prayer for tabulation of the pending decretal sum, he averred that, that was done by the court administrator at the stage of drawing warrants of execution and if the applicant disputes the tabulation, it ought to give counter-arithmetic.
  8. With regard to the prayer for an order to compel the respondents to release the subject motor vehicle to the applicant, the counsel contended that the respondent is indebted to the applicant in the aforementioned sum plus interest which continues to accrue and therefore the respondent has all the legal rights to proceed with execution until the decretal sum is fully settled.
  9. It was his averment that the Applicant's appeal is frivolous for reasons that; no Memorandum of Appeal has been annexed; from the affidavits it appears the only contention is with regard to the tabulation of decretal sum which is a minor issue that cannot form the subject part of the appeal as such an issue can be completely be determined in the subordinate court by way of recalling the warrants and



issuing proper warrants; in the subordinate court, the applicant never provided any contrary arithmetic to the court's administrator tabulation of the decretal sum.

10. He asserted that respondent has been in the corridors of justice since the year 2013 and the numerous unsuccessful applications by the Applicant portray it as one who is not keen to have this matter concluded.
11. He drew this court's attention to the Applicant's application dated 23.3.2021 in which it acknowledged indebtedness in the sum of Kshs.5,260,332.20 and proposed to settle the same in monthly installment of Kshs.219,180 ,and which Hon. Limo B./ Benjamin allowed it in his ruling dated 24.2.2022 by ordering the Applicant to make a deposit of Kshs.2,630,115/= and liquidate the difference of Kshs.2,630,115/= in equal monthly installment of Kshs.219,180/= until payment in full failure to which execution to issue.
12. He averred that in light of the foregoing, it is apparent the applicant's intention is not to settle the decretal sum but to delay the settlement of the same.
13. He contended that the attribution of failure to settle decretal sum to Covid 19 Pandemic is a lame excuse since the year 2020 the situation in the country had normalized yet the applicant has not offered any explanation as to why no payment has been made since then.
14. He deponed that the respondent is entitled to enjoy the fruit of successful litigation and by unfairly delaying the payment the respondent's right are being infringed upon and justice delayed is justice denied.
15. The Application was canvassed through written submissions

### **Applicant's Submissions**

16. With regard to whether the threshold for the grant of interim orders has been met, the Applicant referred this court to the case *Giella v Cassman Brown and Co Ltd* [1973] EA 358 and *American Cyanamid Co. v Ethicon Limited* [1975] A AER 504 on the threshold for granting orders for stay of execution.
17. On whether there is a prima facie case with a probability of success or serious issue to be tried, the Applicant Relying on the definition of "prima facie case" in *Mrao Ltd. vs First American Bank of Kenya Limited & 2 Others* [2003], KLR 12 submitted that it is unfortunate that the respondents have attached the applicants Motor Vehicles for auction in order to satisfy the overdue decretal sum of Kshs.8,019,607.20 without taking cognizance that the said amount was reduced on an appeal to Kshs.6,924,430.24/= and that it had made a deposit of Kshs. 3,000,000/=.
18. The Applicant further submitted that the 2<sup>nd</sup> Respondent has undervalued the motor vehicles with an intention of selling them off at a throw away price under the instruction of the 1<sup>st</sup> respondent.
19. Owing to the above, the applicant submitted that its right to own and enjoy possession of property as stipulated under Article 40 of *the Constitution* will be infringed once its vehicles is disposed off by way of public auction.
20. The Applicant submitted that it is committed to settling the decretal sum via installment and referred this court to the case of *Hildegard Ndelut v Letkina Dairies Ltd & Another* [2005] eKLR where the Court held that the judgment debtor might genuinely be in a difficult position in paying the decretal amount at once but he has to show seriousness in paying the amount i.e. show his bona fides by arranging fair payment proposals to liquidate the amount.



21. The applicant thus posited that it has demonstrated a prima facie case given the above stated patent uncontroverted facts.
22. In regards to whether it has established that it will suffer irreparable harm which would not be adequately compensated by an award of damages, the applicant argued that an irreparable injury is that which could never be adequately remedied or atoned for by damages. The applicant relied on the case of American Cyanamid Co. vs Ethicon Limited for the proposition that the object of interlocutory injunction is to protect the applicant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial.
  23. The applicant submitted that it stands to suffer irreparable damage once its motor vehicles are disposed by way of public auction.
24. On a balance of convenience, the applicant submitted that the same without a doubt tilts in its favour. Reliance was placed on the case of Bryan Chebii Kipkoech vs Barnabas Tuitoek Bargarioria & another [2019] eKLR where the court held that The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed.
25. On the issue of costs, the applicant submitted that the present application meets the requisite threshold for grant of interlocutory injunction and prayed that the same be allowed with costs. In buttressing its submissions, reliance was placed on Section 27 of the *Civil Procedure Act*, Halsbury's Law of England, Vol 37. 4<sup>th</sup> edition at paragraph 552 which provides inter alia that costs follow the event ; and the case of Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others where the court held that:

“...it’s clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs in a matter in which the trial judge is given discretion...but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

### **1st Respondent’s submissions**

26. With respect to whether or not the attached subject motor vehicles should be released to the applicant, the respondent submitted that this prayer is an end in itself and if granted it would prejudice the respondent as it is unclear what becomes of it after conclusion of the Application considering this court has been asked to release the two subject motor vehicles pending the hearing and determination of the application.
27. On whether or not computation of the outstanding decretal sum should be done at this stage, the respondent contended that the gist of this appeal is the orders of Hon P. A. Ndege which was delivered on 24.8.2023 dismissing the appellant’s application which sought among others prayers computation of interest, and it follows that this issue if determined at this stage would amount to determining the appeal preliminarily.
28. On whether or not the applicant should be allowed to liquidate the outstanding decretal sum in monthly installment, the respondent submitted that Hon. Benjamin Limo in his ruling delivered on 24.2.2022 allowed the applicant’s application dated 23<sup>rd</sup> march 2021 in which it had sought similar



prayer by ordering that it deposits Kshs.2, 630,113/= and liquidate the difference of Kshs.2, 630,115 in equal monthly installment of Kshs.219, 180/= until payment in full and in default execution to issue ,however, to date the applicant has not made any payment and continues to enjoy interim orders that were issued pursuant to the numerous applications that have been filed.

29. Regarding whether or not an order restraining the respondent by herself, her agent and/or servant from levying execution of the Applicant's assets should issue, the respondent submitted that the applicant can only enjoy orders staying execution and not an injunction and that even if the court were to be inclined to considering an injunction, the application would still fail for reasons that; Memorandum of Appeal was not annexed to the supporting affidavit which omission is fatal as the court cannot be in position to determine whether there is any arguable appeal; considering the numerous applications and owing to the fact that the applicant is indebted to the respondent, the appeal is frivolous with no chances of succeeding; the decree complained of is for a liquidated sum of money hence there is no irreparable loss the applicant is bound to suffer in the event of dismissal of the application; and considering that the respondent has been in court since 2013, the balance of convenience would tilt in favour of dismissing the application more particularly because the applicant has not made any effort to make even a single payment.

### **Analysis & determination**

30. The sole issue for determination is whether the Applicant is entitled to the reliefs sought.
31. From the Application , it is patent the Applicant was aggrieved by the Ruling of Hon. Peter Aloyce Ndege delivered on 24<sup>th</sup> August,2023 dismissing its application dated 18<sup>th</sup> August,2022. In that Application the Applicant had sought inter alia for Orders: -
- a. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the 2<sup>nd</sup> Respondent to immediately return the possession of Motor Vehicles KBR 492 B Scania Bus and KBX 875 R Scania Bus to the Applicant.
  - b. That pending the hearing and determination of this Application, this Honourable Court be pleased to direct the proper computation of the outstanding decretal sum if any, upon taking credit of the advance decretal payment of Kshs.3, 000,000/= with interest to the plaintiff pursuant to consent judgement in HCCA 115 OF 2015- Crown Bus Services Ltd v Judith Were Mukani(Suing as the Administrator of the Estate of Moses Onga'ang'a Wafula- Deceased) dated 17<sup>th</sup> October, 2019.
  - c. That pending the hearing and determination of this Application, this Honourable Court be pleased to grant leave to the Defendant/Judgement Debtor to liquidate any outstanding decretal sum if any by way of monthly payments of Kshs.100,000/= until settlement in full on or before the 10<sup>th</sup> of every successive month until payment in full.
  - d. That without prejudice to the foregoing that the Plaintiff/Decree holder either by herself or her agents and/or servants be restrained from levying execution against any of the Defendants assets pending the hearing and determination of this Application.
  - e. That the costs of this Application be provided for.
32. After hearing the respective parties the said Magistrate delivered its ruling as follows:-

“ Before me is a Notice of Motion application dated 18.08.2022 by the Applicant/Judgement Debtor herein Crown Bus Services Limited;and pursuant to the known provision of Law cited at the heading of the Application, seeking various orders, all in the interim pending.



The hearing and determination this the application. Some of its interim the orders have already been granted and since the application proceeded by way of written submissions, I do not see or find any order that I can grant “pending the hearing of this Application”. In short, the hearing and determination of the application is no longer pending. I thus do hereby dismiss the Application in its entirety with costs to the Respondent.”

33. I also note in this application, similarly, most of the prayers as framed by the Applicant are in the interim, “pending the hearing and determination of the Application”. The application has already been dispensed with via submissions and consequently there is nothing pending for determination.
34. Accordingly, prayers no. 2 - 5 on the face of the Application cannot issue. This court would have considered the said prayers if the applicant had sought them pending the hearing and determination of the appeal, rather than the application.
35. I will therefore proceed to determine whether prayers no. 6 and 7 should be issued.
36. The Applicant has urged this court to compel the respondents to release the subject motor vehicles to it on ground that it has met the threshold for grant of interlocutory injunction. I have considered the Applicant’s submissions in that regard.
37. It is not in dispute that the lower court entered judgment in favour of the 1<sup>st</sup> Respondent for a sum of Kshs.5, 064,462 in the suit in the lower court. The respondent had sued the Applicant following the death of the deceased therein as a result of an accident involving motor vehicle registration number KBF 922 B which collided with the Appellant’s/Applicant’s Motor vehicle registration number KAW 938 F on 11<sup>th</sup> June, 2011. The Applicant subsequently appealed against the judgment before this court, and by a judgment delivered by my sister Hon. Rachael Ngetich on 13<sup>th</sup> June, 2019 the appeal partially succeeded in the following terms: -
  - i. The appeal on liability is allowed. Liability apportioned at 30:70 in favour of the plaintiff/Respondent.
  - ii. Appeal on award under loss of dependency is allowed. Multiplicand of 2/3 to apply. Loss of Dependency reassessed at Kshs. 9,657,043.20
  - iii. Judgment delivered on 8.9.2015 is set aside.
  - iv. Judgment entered for the plaintiff/respondent against the defendant for Kshs. 6,924,430.20
  - v. Each party to bear own costs of the Appeal
  - vi. Costs of trial court to the respondent/Plaintiff.
38. The 1<sup>st</sup> respondent has acknowledged that the Applicant has paid a sum of Kshs. 3 million. The 1<sup>st</sup> respondent demonstrated that the applicant vide an application 23.3.2021 sought inter alia to liquidate the decretal sum via installment and vide a ruling delivered by Hon. Limo B on 24.2.2022, the applicants were ordered to deposit Kshs. 2,630,115/= and liquidate the difference of Kshs.2, 630,115/= in equal monthly installment of Kshs. 219,180/- until payment in full failure to which execution to issue. The applicant did not comply with the above orders and on the strength of the said orders, the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent levied execution against it.
39. In this matter, the applicant has not disclosed why it did not comply with the lower court’s orders. It is trite law and a well-known principle of equity that court orders are not made and courts do not act in vain.



40. This is a court of equity and the decision whether or not to issue order no. 6 is at the discretion of this court. Equity demands that “he who comes to equity must come with clean hands”
41. In *Caliph Properties Limited v Barbel Sharma & Another* [2015] eKLR, the Court stated:
- “Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the 1st respondent in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The 1st respondent has not done that. Consequently, he has not done equity.”
42. The Applicant herein failed to comply with the court orders and have therefore approached this court with unclean hands. I do not find any justifiable ground to exercise my discretion in its favour.
43. Accordingly, I do not find merit in the application and I entirely dismiss it with costs to the respondent.
44. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 6TH DAY OF MARCH, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

**C/A Oleperon**

**Mr. Angiela for Okatch – Appellant/Applicant**

**Mr. Mukisu for Respondent**

