



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwero v Jessat & another (Civil Appeal E164 of 2023)  
[2024] KEHC 16933 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 16933 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E164 OF 2023  
F WANGARI, J  
MARCH 1, 2024**

**BETWEEN**

**DICKY CHIKOZA MWERO ..... APPELLANT**

**AND**

**HEINZ PETER JESSAT ..... 1<sup>ST</sup> RESPONDENT**

**EVANS MAABI T/A MURPHY AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant through the Notice of Motion dated 18/7/2023 sought the following orders;
  - a. Spent
  - b. That there be issued an interim stay of execution of the entire Ruling and Orders by the Hon. Kiongo Kagenyo (Resident Magistrate) delivered on 5/7/2023 in Magistrates Court Civil Suit No. E130 of 2023 (Kwale) pending the herein and determination of this application and in prayer no. (3), stay be granted pending the hearing and determination of this appeal.
  - c. That cost be borne by the Respondent.
2. The Respondents opposed the application by filing their Replying Affidavit dated 26/7/2023. It was deponed that through an application filed before the trial court, and dated 3/7/2023 seeking to have the 2<sup>nd</sup> Respondent enjoined in the suit, and to have the motor vehicle subject to this application, registration no. KAS xxxx be released to the 2<sup>nd</sup> Respondent, the said application was allowed as it was unopposed.
3. Further, the Respondents deponed that the Appellant in this case had filed before the trial court an application dated 15/6/2023 seeking to stop the 2<sup>nd</sup> Respondent from attaching and selling the vehicle, but the said application was dismissed. The orders of the court are now subject to this appeal.



4. The Respondent further deponed that by the time this application was filed, the motor vehicle had already been released to the 2<sup>nd</sup> Respondent, and sold to a 3<sup>rd</sup> Party following the court orders. The vehicle was therefore not available to the Appellant.
5. The Appellant further filed a Notice of Motion dated 27/9/2023 seeking to have the 2<sup>nd</sup> Respondent cited for contempt of court for selling the subject motor vehicle despite there being stay of execution orders dated 21/7/2023, granted by this court.
6. In response to the application, the Respondents filed an Amended Notice of Preliminary Objection dated 9/11/2023, stating that the application is incurably defective as it offends the provisions of Section 5 (1) of the *Judicature Act* and Rule 81.4 of the *English Civil Procedure Rules*, hence the threshold on contempt of court has not been met.
7. This court directed that both the applications and the PO be disposed of by way of written submissions. I have perused through the documents filed in the e-filing platform. The parties herein restricted themselves to the submissions on the application dated 27/9/2023 and the PO dated 9/11/2023. No submissions were filed in respect to the application dated 18/7/2023.

### **Analysis and Determination**

8. I have considered the parties' pleadings, the preliminary objection, the submissions together with the authorities relied upon. Before dealing with the application dated 27/9/2023, I shall deal with the application dated 18/7/2023 whose orders forms the basis of the application for contempt of court. In my view, the issues for determination are;
  - a. Whether the application is merited
  - b. If the above is positive, whether the Applicant's Notice of Motion dated 27/9/2023 has merits.
  - c. Who bears the costs?
9. On the first issue, the Appellant sought for stay of execution of the orders dated 5/7/2023 by Hon. Kiongo. Interim orders for stay of execution of the ruling were issued on 21/7/2023. The orders were served upon the Respondents and a Replying Affidavit dated 26/7/2023 filed. It was deponed that by the time the orders were served, the Respondent had already executed the orders dated 5/7/2023 and the vehicle had been released to the 2<sup>nd</sup> Respondent and thereafter sold to a 3<sup>rd</sup> party.
10. By the time this court was issuing the interim orders, it had not been brought to its attention that the orders which the Appellant was seeking to stay had already been executed. The substratum for issuance of stay orders was not available as at the time the application was filed and subsequent orders issued. I find that the application dated 18/7/2023 has already been overtaken by events.
11. From the above, the application for contempt dated 27/9/2023 is therefore overtaken by events. I shall not dwell into its merits. The Application is therefore struck out.
12. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The court exercises this discretion and award no costs.
13. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The Notices of Motion dated 18/7/2023 and 27/9/2023 are hereby struck out.



b. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OF MARCH, 2024.**

**F. WANGARI**

**JUDGE**

In the presence of;

Omar Advocate h/b for Mwawasaa Advocate for the Appellant

Kibathi Advocate for the Respondent

Barile, Court Assistant

