



**Meru Nissan Operators Sacco v Odhiambo (Miscellaneous Application  
E004 of 2024) [2024] KEHC 3504 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS APPLICATION E004 OF 2024  
LM NJUGUNA, J  
APRIL 11, 2024**

**BETWEEN**

**MERU NISSAN OPERATORS SACCO ..... APPLICANT**

**AND**

**ISHMAEL DAVID ODHIAMBO ..... RESPONDENT**

**RULING**

1. For determination are 2 applications dated 25<sup>th</sup> January 2024 and 02<sup>nd</sup> February 2024. In the former application, the applicant has moved the court seeking the following orders:
  1. Spent;
  2. Pending hearing and determination of this application, this honourable court be pleased to issue an interim order for stay of execution of the judgment and decree arising from Runyenjes Magistrates Court Civil Suit no. 107 of 2022;
  3. That this honourable court be pleased to grant leave to the applicant to appeal out of time against the judgment of Hon. S. Ouko in Runyenjes Magistrates Court Civil Suit no. 107 of 2022 delivered on 25<sup>th</sup> November 2023;
  4. That this honourable court be pleased to set aside the irregular decree, irregular warrants of attachment and subsequent irregular notice of proclamation and stay execution of judgment and decree in Runyenjes Magistrates Court Civil Suit no. 107 of 2022 pending hearing and determination of the intended appeal herein;
  5. The honourable court allow the intended appellant/applicant to furnish the court with reasonable security in the form of a Bank Guarantee; and
  6. That the costs of this application abide the outcome of the intended appeal.



2. The application dated 25<sup>th</sup> January 2024 is premised on the grounds that following delivery of the impugned judgment, the respondents proceeded to obtain the decree without serving the applicant with a draft decree thus the same was illegally obtained. That the said illegally obtained decree has been used to commence execution for the decretal amount through threats to obtain warrants of attachment. It is the applicant's apprehension that if the respondent proceeds to execute, the appeal will be rendered nugatory.
3. That there is a delay in filing the application but the same is excusable as it was occasioned by unavailability of the judgment for purposes of appeal as the Advocate who was working on the case exited the law firm representing the applicant. That the mistakes of counsel should not be visited on the applicant and that he is willing to furnish a bank guarantee from his insurers as security for performance. That the respondent's financial status is unknown and if the decretal amount is paid to him, there is no guarantee that the same will be recovered if the appeal succeeds.
4. The application dated 25<sup>th</sup> January 2024 was opposed through the respondent's replying affidavit dated 22<sup>nd</sup> February 2024 wherein he deposed that the application is calculated at denying him the fruits of his judgment. That the application is an afterthought and was only filed after the auctioneers acquired warrants of attachment and notice of proclamation. That according to section 76G of the Civil Procedure Act, the applicant has not given sufficient reasons for the delay in appealing. Further, that the applicant has failed to demonstrate what detriment it will suffer if the orders are not granted. That a bank guarantee that is not specific to the decretal amount is not an option since it does not factor in interest and costs. That the appeal does not raise valid issues as the trial court already considered all the relevant factors before making the award of damages.
5. Through the application dated 02<sup>nd</sup> February 2024, the applicant seeks the following orders:
  1. Spent;
  2. Spent;
  3. That the respondent be ordered to unconditionally release the applicant's motor vehicle pending hearing and determination of this application and the application dated 25<sup>th</sup> January 2024;
  4. That the respondent's auctioneers, Vintage Auctioneers, be ordered to cease and desist from harassing the respondent until both applications dated 25<sup>th</sup> January 2024 and 02<sup>nd</sup> February 2024 are heard and determined;
  5. That the costs of this application be provided for.
  6. The application dated 02<sup>nd</sup> February 2024 is premised on the grounds that in the pendency of hearing and determination of the applications dated 25<sup>th</sup> January 2024 and 02<sup>nd</sup> February 2024, the respondent, through Vintage Auctioneers, has continually harassed and unlawfully seized 3 of the applicant's motor vehicles with the intention of selling them to recover the decretal amount. That if the orders sought are not granted and the seized motor vehicles are sold, the applicant will suffer irreparable loss.
  7. The application dated 02<sup>nd</sup> February 2024 was opposed through the Vintage Auctioneers Manager's replying affidavit dated 22<sup>nd</sup> February 2024 wherein he stated that his company was instructed by the respondent's advocates to commence execution following the judgment of the court in Runyenjes Magistrates Court Civil Suit no. 107 of 2022. That they issued a 7 days proclamation notice and seized motor vehicle registration number KCU 098X,



following which, the applicant settled the decretal amount but did not pay the auctioneer's fees. That the applicant's advocate was served with the auctioneer's fee note but the amount remained unpaid, necessitating the auctioneers to proceed to court for taxation of the fees. That auctioneer's fees was taxed at Kshs. 103,855/= and a certificate of taxation issued. That the motor vehicle can only be released once the auctioneers fees is paid and if the orders are granted, there is a big chance that the auctioneers will never recover their fees and they will be prejudiced.

8. As regards both applications, the court directed the parties to file their written submissions but none of them complied.
9. The issues for determination are as follows:
  1. Whether the application meets the threshold for issuance of orders for stay of execution pending appeal;
  2. Whether the applicant should be granted leave to appeal out of time;
  3. Whether the warrants of attachment and proclamation should be set aside; and
  4. Whether the orders sought through the application dated 02<sup>nd</sup> February 2024 should be granted.
10. In considering whether or not to grant stay of execution, the court is expected to look at the circumstances and test them against the provisions of the law before applying its discretion on the matter. On this prayer, I am guided by Order 42 Rule 6(2) of the [Civil Procedure Act](#) which provides:
  - (2) No order for stay of execution shall be made under subrule (1) unless—
    - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
11. It is the applicant's argument that if an order for stay of execution is not granted, it will suffer irreparable loss and the intended appeal will be rendered nugatory. The applicant's apprehension arises from the fact that the respondent has moved to execute for the decretal amount. Execution in itself is not an unlawful process and once judgment is entered in favour of a party, that party is at liberty to commence execution unless stay of execution orders are in place. This was the holding in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR.
12. The impugned judgment was delivered on 16<sup>th</sup> November 2023 and this application was filed on 26<sup>th</sup> January 2024, 70 days after the event. The applicant had 30 days within which to appeal and failed to do so, the respondent proceeded to execute and obtained warrants of attachment on 18<sup>th</sup> January 2024. I do not find it surprising that the respondent, being the decree holder, moved to recover the decretal amount as the same was well within his rights. It would seem that obtaining the warrants of attachment prompted the applicant to file the application dated 25<sup>th</sup> January 2024, otherwise, it would not have moved the court.
13. Indeed, there was a delay in filing the application and the applicant stated that the delay was occasioned by the exit of its advocate from the law firm it had instructed, and so the judgment was not traceable on time for purposes of the appeal. From the circumstances as discussed in my previous paragraphs, this does not particularly persuade the court that the delay is excusable. The applicant has offered to provide



security for performance in the form of a bank guarantee. This position has been opposed by the respondent, who stated in his affidavit that the bank guarantee will not suffice unless it provides for the specific decretal amount. The security envisioned in Order 42 Rule 6 (2)(b) of the Civil Procedure Rules is one that will be actually realized or will be ultimately binding. In the case of Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR, where the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

14. As to whether or not a bank guarantee passes as good security, the Court of Appeal in *Ndubiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal...For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...”

15. On the question of whether this court should grant stay of execution, it is in the interest of justice that the same be granted in light of my foregoing discussion. My thoughts herein will also guide determination of the question of whether the applicant should be granted leave to appeal out of time. Section 79G of the Civil Procedure Act as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

16. As stated earlier, the application was filed 70 days after the impugned judgment was delivered. The explanation for the delay as provided by the applicant is that the advocate who was handling the case left the law firm and so they did not access the judgment on time for purposes of appeal. I should point out that restructuring at the advocate’s office should not in any way disadvantage clients who have instructed the office. It is the duty of the advocate to make prior arrangements to represent his clients regardless of the changes occurring at his office.



17. In as much as the order for leave to appeal out of time should be granted on discretion, some factors should be considered. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014) eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

18. It is prudent to consider that in granting the order for leave to appeal out of time, the respondent’s right to enjoy the fruits of his judgment will be deferred until when the appeal is determined, while the applicant has a right to have its appeal heard. It is a balance that must be struck, in my view, the Constitution will guide sufficiently as provided in Articles 48 and 159(2) of therein. I am inclined to grant this order in the spirit of the “Oxygen” principle enshrined under sections 1A, 1B, 3A and 3B of the Civil Procedure Act in a bid to attain justice.

19. On the issue of whether the warrants of attachment should be set aside, I have already mentioned that this court thinks that it is those warrants that prompted the applicant to move the court. That the application seems like an afterthought and the same would never have been filed if the respondent had not taken radical action to execute. However, since this court has considered granting stay of execution pending appeal and leave to appeal out of time, it is also prudent that the warrants of attachment are set aside in order to enable smooth motion of the wheels of justice.

20. As to whether the orders sought through the application dated 02<sup>nd</sup> February 2024 should be granted, the applicant claimed that its motor vehicles were seized by the respondent’s auctioneers with a view to sell them for recovery of their fees. The replying affidavit to this application was deposed by the manager of Vintage Auctioneers who stated that the move to seize and sell the motor vehicles belonging to the applicant was in order to cause it and or its advocates to pay is Auctioneers fees taxed at Kshs. 103,855/=. The said application was seeking orders to last until the application dated 25<sup>th</sup> January 2024 is determined and the same has been determined through this ruling. In my view, the orders sought through the application dated 02<sup>nd</sup> February 2024 have been overtaken by events.

21. Therefore, in the interest of justice, I find that the application dated 25<sup>th</sup> January 2024 has merit and the following orders shall issue:

1. The applicant is hereby granted leave to appeal out of time against the judgment of the court in Runyenjes Magistrates Court Civil Suit no. 107 of 2022;
  2. The applicant to file and serve the appeal within 21 days of this ruling;
  3. Pending hearing and determination of the appeal, stay of execution of the judgment and decree in Runyenjes Magistrates Court Civil Suit no. 107 of 2022 is hereby granted, on condition that the applicant shall within 21 days of this ruling, furnish the court with security in the form of a Bank Guarantee as specified in the supporting affidavit to the application;
  4. The warrants of attachment dated 18<sup>th</sup> January 2024 and the notice of proclamation dated 22<sup>nd</sup> January 2024 are hereby cancelled;
  5. If the applicant fails to adhere to orders (2) & (3) hereinabove, the appeal shall stand dismissed;
- As regards the application dated 02<sup>nd</sup> February 2024, the following orders shall issue:



6. The respondent is hereby ordered to release the applicant's motor vehicle on condition that the Auctioneer's fees as taxed is deposited in court within 14 days from the date of this ruling pending hearing and determination of the appeal;
7. Prayer 4 of the application dated 02<sup>nd</sup> February 2024 stands resolved; and
8. Each party to bear their own costs in both applications.
  1. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**L. NJUGUNA**

**JUDGE**

.....**for the Applicant**

.....**for the Respondent**

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