



**Darson Trading Limited v Oketch (Civil Appeal E004 of 2023)
[2024] KEHC 5572 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E004 OF 2023**

WM MUSYOKA, J

MAY 8, 2024

BETWEEN

DARSON TRADING LIMITED APPELLANT

AND

DANIEL ONYANGO OKETCH RESPONDENT

(An appeal arising from orders made in the ruling of Hon. PA Olengo, Chief Magistrate, CM, delivered on 17th February 2023, in Busia CMCCC No. E352 of 2021)

JUDGMENT

1. The application, that I am called upon to determine, is dated October 9, 2023. It seeks stay of execution of the orders made in the ruling delivered in Busia CMCCC No. E352 of 2021, on August 9, 2023, pending hearing and determination of the instant application. Secondly, it seeks the setting aside of the said orders of August 9, 2023. Finally, it is sought that the decretal amount be deposited in a joint interest earning account or in court.
2. The background, based on the grounds on the face of the said application, and the affidavit sworn in support of it, is that an interlocutory judgement was entered in the matter before the trial court on August 30, 2022. Auctioneers proclaimed goods worth Kshs. 12,500,000.00, despite the decree being for Kshs. 2,100,000.00. A condition al order to defend was made on February 17, 2023, which the appellant thought was onerous. Its attempts to have it reviewed were unfruitful, for its application was dismissed on June 30, 2023. The appellant would like to deposit the decretal amount in an interest earning account or in court.
3. The respondent filed grounds of opposition, dated October 14, 2023, arguing that the application was a misadventure, which was devoid of merit; the orders made in the ruling of August 9, 2023, sought to be stayed, was a negative order, which dismissed an application for stay; the application was overtaken by events, as execution had already been levied; and the application was an abuse of court process.



4. Directions, on the disposal of the application, were given on February 16, 2024, for canvassing by way of written submissions. Both sides have complied, and I have read through their written submissions, and I have noted the arguments that they have made.
5. The appellant seeks 3 principal orders: stay of execution of the orders made on August 9, 2023, pending hearing and determination of the application; setting aside of the orders made in the ruling delivered on August 9, 2023; and an order that the decretal amount be deposited in court or in an interest earning account.
6. On the first prayer, for stay of execution of the orders made in the ruling of August 9, 2023, I note that the trial court was determining 2 applications, one sought review of previous orders for setting aside of the impugned judgement and deposit of moneys in court, and the other was for making a garnishee *nisi order* absolute. The application for review of the previous orders was dismissed, and that for making the garnishee *nisi order* absolute was allowed. It is not clear which of these orders is sought to be stayed, the dismissal of the review application, or the making of the garnishee *nisi order* absolute. The dismissal order cannot be stayed, for it required no action or obedience, and, therefore, there was nothing to be stayed. The order making the garnishee *nisi order* absolute can be stayed, to prevent action being taken on the basis of the absolute order.
7. Should that stay order be granted? I do not think I should grant it. Why do I say so? Because granting the prayer for stay, as framed, that is pending hearing and determination of the instant application, would serve no purpose. This ruling determines the instant application, and once I deliver the ruling, the application would cease to exist or to pend. That prayer, and the order it seeks, would only be necessary at the interim stage, that is where stay is sought pending hearing and determination of the application. It would be too late, to grant stay pending hearing and determination of the application, at this stage. It does not seek stay pending appeal. As it is, that prayer is spent, and no order should be granted on the basis of it. Parties are bound by their pleadings and filings. A court should not find implied meaning in the applications and pleadings filed by the parties, beyond what the filings themselves express.
8. For avoidance of doubt, that prayer reads as follows:

“That this Honourable Court does issue a stay of execution of the orders issued from the Ruling delivered by Hon. PA Olengo on the 9th day of August 2023 pending the hearing and determination of this application.”
9. The second prayer is for the setting aside of the orders made in that ruling. As indicated above, the said ruling addressed 2 applications: for review of earlier orders, which had set aside the impugned judgement, on certain conditions; and the second application was for making the garnishee *nisi order* absolute. The review application was dismissed, and the application on the garnishee order was allowed. Would there be basis for me to set aside those orders of the trial court?
10. The impugned judgement was delivered on August 30, 2022. An application, dated January 12, 2023, sought review of that judgement. A ruling was delivered on February 17, 2023, setting aside that judgement, subject to the decretal amount being deposited in court, within 7 days. The review application, dated June 3, 2023, sought the review of the orders made in the ruling of February 17, 2023. It is this application of June 30, 2023 that was dismissed in the ruling of August 9, 2023.
11. Was there good ground for its dismissal? I believe there was. Firstly, the appeal herein is from the orders made in the ruling that was delivered on February 17, 2023. The memorandum of appeal, originating this appeal, was lodged herein on February 22, 2023. So, the review application was challenging orders



that were already the subject of the appeal. The appellant was litigating the same point before 2 different courts. That is what abuse of court process defines. The trial court could not entertain that issue when the same was actively before the appellate court. Secondly, the application dated June 30, 2023 was lodged in court on July 3, 2023, after I delivered a ruling on June 30, 2023, where I declined to grant stay of execution of the judgement of August 30, 2022, on grounds that the appellant had gotten orders to set aside the judgement in question, but chose not to comply with the conditions imposed by the court. The review application, therefore, was something of an afterthought, after the appellant failed to obtain favourable orders at the High Court.

12. Was the garnishee order making the *nisi order* absolute properly made? I believe it was. Orders had been made, setting aside the judgement of August 30, 2022, on February 17, 2023, subject to the appellant depositing the decretal amount in court, less a bit of it, and filing the relevant pleadings, both actions within 7 days. That was never done. There was no compliance within the 7 days given in the order. In default of that, the respondent became entitled to go ahead with the execution, and he chose the garnishee proceedings route. No cause was shown why the garnishee *order nisi* could not be made absolute, hence the orders of August 9, 2023. There was no stay order in force. So, there would be no basis upon which I should order the setting aside of that order of the trial court. In any case, I would have no jurisdiction to set aside that order, in the absence of an appeal filed before me challenging it. I cannot set it aside on an interlocutory application.
13. On the third prayer, for deposit of the decretal amount in court or in a joint interest earning account, I note that that was the same order that the trial court had made on February 17, 2023. The appellant has not provided any explanation as to why it did not comply with the order. If it felt that it needed more time to comply, it has not been explained why it did not approach the trial court to obtain leave for extension of time. An order of the court is not a proposition or a suggestion. It ought to be complied with, even where there is a sense that it is onerous. If the argument was that it was onerous, there is no evidence that the trial court was approached, with a view to have the order reviewed, to make it more palatable. The appellant is inviting this court to make an order that the trial court had already made, and which the appellant chose not to comply with. That amounts to taking the courts around in circles, which, again, amounts to abuse of court process.
14. Discretion is exercised in favour of a party where that party comes to court with clean hands, and on the basis of pleadings or applications that are clear and precise. I am not persuaded that the orders sought in the instant application are available for granting. Consequently, I decline to grant the prayers sought, and I hereby dismiss the application, dated October 9, 2023. Costs shall abide the outcome of the appeal.
15. To speed up disposal of the appeal, I shall give directions on its disposal, seeing that the record of appeal has been filed, and the original trial court records have been availed. The said appeal shall be canvassed by way of written submissions, to be filed and exchanged, within 21 days. The matter shall be mentioned on 30th May 2024, for receipt of the written submissions, and allocation of a date for judgement.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 8TH DAY OF MAY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates



Mr. Osoro, instructed by Osoro Juma & Company, Advocates for the appellant.

Mr. Okutta, instructed by Ouma Okutta & Company, Advocates for the respondent.

