



Benjo (K) Limited v Mutuku; Wanderi & 2 others (Interested Parties) (Civil Appeal E244 of 2022) [2024] KEHC 9714 (KLR) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9714 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E244 OF 2022
BM MUSYOKI, J
JULY 22, 2024**

BETWEEN

BENJO (K) LIMITED APPELLANT

AND

ISAAC NDANGA MUTUKU RESPONDENT

AND

SAMUEL GAKOMO WANDERI INTERESTED PARTY

PETER MWANGI NDUNGU INTERESTED PARTY

NATIONAL TRANSPORT SAFETY AUTHORITY INTERESTED PARTY

RULING

1. On October 31, 2022, the appellant approached this court with an application to have the appeal admitted out of time and for order of stay of execution of the lower court decree pending hearing and determination of the application and the appeal. The then trial Judge, granted among others an order for stay of execution on condition that the appellant deposited the decretal sum in court. The orders for stay were to take effect from the time of deposit of the decretal sum would be made.
2. It appears from the proceedings that the appellant did not deposit the decretal sum until the respondent moved in to execute the lower court decree by attaching two motor vehicles belonging to the appellant. The attachment was on 25-11-2022. On 30-11-2025, the appellant moved and filed another application dated 29-11-2022 which was also praying for stay of execution. The Judge before whom the application was placed declined to issue the orders prayed because the appellant had not deposited the entire decretal sum and the application and the supporting affidavit were not properly executed. The appellant later on 2-02-2023 withdrew the latter application.



3. The attached motor vehicles were sold on 6-12-2022. On 15-12-2022, the appellant once again filed an application dated 13-12-2022 which sought to have the sale of the attached motor vehicles reversed. When this application was placed before the Honourable Lady Justice Ngetich, she directed that the same be served upon the respondent and dates thereof be fixed at the registry. The appellant did not act on this application but proceeded to file another application dated 2-02-2023 which has a total of 17 prayers.
4. I have given the above history in order to get the record straight at a glance and make it possible for this appeal to progress to the next stage once this ruling is delivered. It appears now that the applications the appellant is interested in prosecuting are the ones dated 27-10-2022 and 2-02-2023. In the circumstances the application dated 13-12-2022 is hereby dismissed with no orders as to costs. It is not clear to me whether the two pending applications were ever consolidated. I will however give a single ruling for both.
5. I will start with the application dated 27-10-2022 which has 8 prayers but basically asks for the appeal to be admitted out of time and an order for stay of execution pending hearing and determination of the appeal.
6. It is not disputed that the judgment of the subordinate court was delivered in absence of the appellant. The respondent in his replying affidavit and submissions has not opposed the prayer for this appeal to be admitted out of time. The judgment of the lower court was delivered on 5-09-2022 which means that the statutory time allowed for filing appeal lapsed on 4-10-2022. The appellant states that its advocates received a copy of the judgement one month later. It is not specific on the date when it became aware of the judgement. There is no good explanation for the delay in filing the appeal. However, for the interest of justice coupled with the fact that the respondent has not opposed the prayer and that there is no dispute that the judgment was delivered in absence of the appellant, I am minded to exercise my discretion in favour of the appellant. This appeal is therefore admitted out of time. It is deemed to have been properly filed.
7. I turn to the prayer for stay of execution pending hearing and determination of the appeal. Order 42 Rule 6 of the Civil Procedure Rules gives three conditions the court should consider in considering whether or not to allow a prayer of this nature. I need not belabour the settled law on this issue. Having looked at the applications, the replying affidavit and the proceedings taken before the judges who have handled this matter, I am convinced that the appellant has satisfied only one condition which is that, it filed the application without undue delay. Although the appellant has not stated the exact date it became aware of the lower court judgment, it is evident to me that it acted expeditiously.
8. The appellant has filed three supporting affidavits in respect of the two applications. There is one in support of the application dated 27-10-2022, the supplementary affidavit sworn on 2nd February 2023 and the affidavit in support of the application dated 2-02-2023. I have gone through these affidavits inclusive of their annexures and I have seen nothing to demonstrate that the applicant is likely to suffer substantial loss if the applications are not allowed. The onus of demonstrating possibility of substantial loss is on the applicant. It is my view that the applicant has failed to demonstrate substantial loss it is likely to suffer unless the application for stay of execution is granted.
9. The other condition the applicant is required to satisfy is provision of security for due performance of the decree. The nature of the security to be given is in the discretion of the court. When this matter was placed before the Honourable Lady Justice Mary Kasango on 31-10-2022, she ordered that there shall be stay of execution of the decree on condition that the applicant deposited the whole of decretal sum in court. The order of stay was to take effect upon the deposit. The applicant did not comply with the order. It took action after the respondent moved in to execute. The appellant deposited a



sum of 1,226,520.00 in court and filed another application dated 29-11-2022. In considering the latter application, the Judge stated that;

‘The appellant it would seem deposited Kshs 1,226,520.00 on 28-11-2022. Since that sum was deposited after the attachment and it would seem not to be the entire decretal sum, I decline to grant exparte orders to the application dated 29-11-2022’.

10. The above holding meant and the appellant should have understood that the court had in effect stated that security as ordered had not been deposited. Even after the court issued this order, the appellant did not attempt to make any further deposit to cover the balance of the decretal sum. I have stated this to clear my mind that the appellant was not willing to deposit security for due performance of the decree as ordered by the court.
11. Although the appellant has not deposited the security as ordered by the court, I note that the respondent has acknowledged having received a sum of Kshs 1,487,700.00 from the proceeds of sale of the motor vehicles attached and sold by the auctioneers in execution of the lower court decree. In his own words, the respondent states that 70% of the decretal sum has been satisfied by the proceeds of the sale. Only 30% of the decretal sum is pending. Further, a sum of Kshs 1,226,520.00 has been deposited in court as security. This deposit should be enough to cater for the balance of the decretal sum. I therefore find and hold that although the appellant had shown unwillingness to deposit security, there is enough for purposes of securing payment of the balance of the decretal sum. I therefore order that the sum of Kshs 1,226,520,00 so far deposited in court shall remain with the court until hearing and final determination of this appeal. In meantime, there will be an order for stay of further execution of the lower court’s decree.
12. The above substantively deals with the application dated 27-10-2022. Of the 17 prayers in the application dated 2-02-2024, prayers 1, 2, 3 and 4 are spent. Prayers 5, 7 and 10 have been overtaken by events since the motor vehicles have been sold and transferred to the interested parties. Prayers Prayer 4 has not been comprehensively covered as the intended interested parties have never been served and there have been no orders of joining them and there is nothing turning on this prayer.
13. Prayer 8, 13 and 14 of the application dated 2-02-2023 asks that the sale of motor vehicles registration numbers KBT 518G and KCB 188P (hereinafter referred to as ‘the vehicles’) be reversed. What the appellant is asking for is that the vehicles be restituted to it. This can only be done where the lower court’s decree is set aside or varied. That is what section 95 of the *Civil Procedure Act* provides. The lower court’s decree is yet to be set aside. It still remains a valid court decree until this appeal overturns it or its otherwise varied.
14. According to the appellants, the procedure applied by the respondents to attach and dispose the vehicles was null and void. I am not satisfied that there was any irregularity in the manner the decree was executed. Even if there were any irregularities, the sale cannot be reversed in the manner the appellant wants this court to do. Order 22 Rule 65 of the Civil Procedure Rules provides that;

‘No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining injury by reason of such irregularity at the hand of any other person may institute suit against him for compensation, or (if such person is the purchaser) for recovery of the specific property and for compensation in default of such recovery’
15. Order 22 Rule 74 of the Civil Procedure Rules provides for setting aside of sale in execution of a court decree. However, it is clear that the said Rule applies to immovable property. The subject matters in this application are motor vehicles which cannot fall under the definition of immovable properties.



16. Owing to the above provisions, the appellant's application in prayer 8 is not sustainable in this appeal. Even if were wrong on this position, it would still be inappropriate to allow the application for voiding of the sale because there is, in my view no sufficient evidence of the alleged irregularity. The respondent was executing a lawful decree of the subordinate court. The appellant was granted an order of stay of execution on 30-10-2022. It did not deposit the decretal sum as ordered by the court. The motor vehicles were attached on 25-11-2022 at which time the appellant had not deposited the decretal sum. The appellant deposited part of the decretal sum on 28-11-2022 after the motor vehicles were attached. Even then, the stay did not come into force as the decretal sum was not deposited in full. The court made this observation on 29-11-2022 at which time the motor vehicles had not been sold. If the appellant had topped up the balance of the decretal sum after the attachment, the respondent would have been bound not to sale the motor vehicle. The sale was conducted on 6-12-2022. Going by averments of the appellant in its application dated 29-11-2022, it was aware of the date of the intended sale. I have not seen any correspondence or evidence of service of the order upon the respondents after the part of the decretal sum was deposited. In view of these circumstances, the sale cannot be said to have been unlawful or irregular. An execution of a valid court decree cannot be termed as unlawful unless there is evidence to show that it was done in violation of court orders or statutory procedure. I find and hold that there were no valid court orders of stay of execution as at 6-12-2022 when the vehicles were sold.
17. Prayer 9 of the application seeks that the auctioneer provides accounts. It also seeks production of a report on how the valuation of the vehicles was reached. The appellant has pleaded that the auctioneer did not account for the proceeds of sale. In his replying affidavit dated 3-03-2023, the respondent has exhibited a letter dated 9-12-2022 which forwarded three cheques to his advocates. The letter is marked as annexure 'JN4'. In the said letter, the auctioneer states that she has deducted her fees. If the appellant is contesting the auctioneer's fees or charges, it should do so through the right forum. The appellant can challenge the auctioneer's costs by pushing for taxation of her costs. This court is not the correct forum for that exercise. In any event, the liability in respect of any excess money charged would not lie against the respondent but the auctioneers. On the valuation of the vehicles, I am not aware of any provision of the law which requires that auctioneers carry out valuation of the attached assets before the same are sold in execution of a court decree.
18. The property in the vehicles has already passed to the buyers who are described in the application as 1st and 2nd interested parties. The appellant seeks to have the ownership reversed on allegations that the process of transfer was unlawful. This is an appeal against the judgment of the lower court and I can only deal with issues arising from the said judgement or in this appeal. I have already held that there was no valid court order staying execution of the lower court decree. Since the execution of the said decree was done in accordance with the law, this court cannot go into details of how the transfers to the buyers were effected. That is an issue for a fresh cause of action. I agree with the holding of the court in authority of *Nyambane v Ndege & Others* [2022] KECH 12159 in respect of this issue as cited by the respondent in his submissions.
19. The appellant in its own affidavit states that the interested parties were bound to file a miscellaneous application for vesting of the property in the vehicles to the 1st and 2nd interested parties. That is an acknowledgment that the process of transfer is an issue for another matter and not in this appeal. This court therefore cannot deal with such issues. The appellant has the liberty to pursue its rights against the auctioneers and the interested parties in a fresh suit. Reversing the sale would mean that the respondent should refund the moneys paid by the buyers. That process is not tenable in this appeal. The same position would hold for the prayers that seek for compensation.



20. The last part of the application dated 2-02-2023 is prayers 11 and 12 that are asking the court to cite the respondent for contempt of court. I think I have said enough on the issue of the validity of the court order for stay. I however add that the appellant has not demonstrated that the court orders were extracted and served upon the respondent and the auctioneers. The interested parties were not made aware of the court orders. The applicant had the duty to serve the court orders upon the respondents. It cannot turn back and blame the respondent for failing to obey a court order he was not properly served with. Not even a letter of protest was sent to the auctioneers to inform them of the existence of the court order. The appellant has in its submissions stated that the auctioneer became aware of the court orders on 28-11-2022 vide annexure 'JNM-8'. However, in my record, that annexure is a bank deposit slip dated 28-11-2022. There is no evidence that the said deposit was served upon the respondent or the auctioneers and even if it were, it does not bespeak of any orders of stay. The appellant sat pretty and kept the court busy with applications. I say with respect, that the appellant concentrated on filing applications instead of executing the orders so far given by the court in its favour.
21. In conclusion, I find no merits in the applications dated 27-10-2022 and 2-02-2023 save for the balancing act of securing both parties' interests and proceed to make the following orders;
- a. This appeal is admitted out of time and deemed to have been properly and timely filed.
 - b. The application dated 2-02-2023 is dismissed in its entirety.
 - c. There shall be further stay of execution of the decree in Thika Cmcc number 886 of 2018 until hearing and disposal of this appeal.
 - d. The Kshs 1,226,520.00 deposited in court on 28-11-2022 shall remain so deposited until hearing and disposal of this appeal.
 - e. The costs of both applications shall abide the outcome of the appeal.
 - f. The appellant shall prepare and file the record of appeal within sixty (60) days from the date of delivery of this ruling failure to which this appeal shall be deemed dismissed with costs for want of prosecution without any further reference to court.
 - g. This matter shall be mentioned before the Deputy Registrar of the High Court Kiambu on a date to be fixed after delivery of this ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

