



Kalyan t/a Ferrari Tours v Ecobank Kenya Limited; Chador Auctioneers (Interested Party) (Civil Appeal E211 of 2022) [2024] KEHC 9306 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9306 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E211 OF 2022**

AB MWAMUYE, J

JULY 4, 2024

BETWEEN

RATTAN SINGH KALYAN T/A FERRARI TOURS APPELLANT

AND

ECOBANK KENYA LIMITED RESPONDENT

AND

CHADOR AUCTIONEERS INTERESTED PARTY

*([Being an Appeal against the Orders of the Hon. A.N. Makau (PM)
given on 5th April, 2022 in Milimani CMCC No. 2660 of 2016])*

JUDGMENT

1. The impugned Court Order in this appeal is fairly innocuous on its face. It reads in full as follows:

“This Matter coming up on 5th April 2022 for directions on the Notice of Motion dated 1/4/2022 before Honourable A.N. Makau PM. Upon hearing the Counsel for the Plaintiff/Applicant; it is hereby ordered:

- i. That the Application is considered.
- ii. That the Applicant to serve and be given a hearing date at the registry.
- iii. That the Applicant to serve upon the Respondent.

Given under my hand and seal of the Honourable Court this 5th day of April 2022.”

2. The Appellant’s Memorandum of Appeal dated 6th April, 2022 states six grounds of appeal; which I reproduce verbatim below:



- i. That the Learned Magistrate erred in law and fact by failing to consider the great prejudice to be suffered by the Applicant/Appellant in Nairobi Chief Magistrate Civil Suit 2660 of 2016 by allowing the Proclamation and execution to proceed.
 - ii. That the Learned Magistrate erred in law and fact by Ruling that Plaintiff/Respondent should execute without evaluating evidence on record.
 - iii. That the Learned Magistrate failed in law and fact by failing to consider that the matter was to proceed for hearing and not execution earlier judgment having been set aside by the Lower Court.
 - iv. That the Learned Magistrate erred in law and by fact by failing to consider the Supporting Affidavit by the Appellant as submitted on his behalf.
 - v. That the Learned Magistrate erred in law and by fact by not appreciating the evidence in record to execution herein.
 - vi. That the finding of the Trial Magistrate is totally against the weight of evidence on record.
3. The impugned Order stated that it was in reference to directions issued on the Notice of Motion Application dated 1st April, 2022. That Application is reproduced at Pages 177-187 of the Record of Appeal dated 23rd January, 2024. The Application was drawn and filed by the Appellant herein, and it sought the following orders:
 - i. That the Instant Application be certified urgent and heard ex parte in the first instance.
 - ii. That service of the Instant Application be dispensed with in the first instance.
 - iii. That the Honourable Court be pleased to stay execution of the Warrants of Attachment herein passed on 25th March, 2022 pending the hearing and determination of this Application.
 - iv. That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to stay Proclamation of Attachment Notice dated 29th March, 2022.
 - v. That costs of this Application be provided for.
4. The Appellant's Written Submissions dated 29th April, 2024 argue that the Trial Court erred by not granting the ex parte orders sought in the Notice of Motion Application dated 1st April, 2022 and instead directing that the Application be served and a date be taken at the Court's Registry. In doing so, the Appellant ties the Trial Court's impugned Orders dated 5th April, 2022 with a ruling dated 30th June, 2021. The Appellant contends that it was the duty of the Respondent herein to take a date at the registry since it was the Plaintiff, which it declined to do so that time would run out and it could proceed to execution. The Appellant's Written Submissions expressly state that the Appellant's former advocates advised that the duty to take a hearing date after the setting aside of an earlier interlocutory judgment lay with the Respondent herein who was the plaintiff before the lower court.
5. The Respondent's Written Submissions dated 11th June, 2024 at Paragraphs 15, 16, and 17 make the following arguments in opposition of the Appeal:
 - a. Paragraph 15 – The lower court exercised its discretion in choosing not to grant the interim orders sought ex parte and instead directing that the Appellant serve the Application upon the Respondent and take a hearing date at the registry.



- b. Paragraph 16 – Instead of setting down the Application for hearing, the Appellant resorted to appealing the directions issued by the lower court on 5th April 2022, which the lower court had issued in proper exercise of its discretion; which renders this Appeal as unnecessary and mischievous.
- c. Paragraph 17 – The suit was ‘automatically dismissed for want of prosecution’ by a self-executing order of the lower court issued on 30th June 202; and in the absence of an order extending time, the judgment in default reverted on 31st December, 2021.
6. The Ruling dated 30th June,2021 referred to by the Respondent at Paragraph 17 of its written submissions is contained at Pages 172-176 of the Record of Appeal. The last two sentences of that Ruling read as follows:
- “In the result the application dated 17th February 2021 is allowed on condition that this suit is set down for hearing and final disposal within six months from the date of this ruling and in default the ex parte judgement to revert all circumstances considered. Parties at liberty to apply.”
7. The Trial Court gave the Appellant ample opportunity to be heard and to defend himself. The Appellant could have easily avoided the circumstances that gave rise to the impugned Order by taking the initiative of setting the matter down for hearing. Afterall, it was the Appellant who had received a reprieve by having the interlocutory judgment conditionally set aside. Instead, the Appellant went back to sleep, a slumber which at this appellate stage he has blamed on his former advocates’ poor advice.
8. At this appellate stage, there must be a manifestly improper exercise of discretion by the Trial Court in issuing of directions on an application to warrant interference by the High Court. There is no such situation in the present case. The lower court cannot be faulted for not granting the ex parte orders sought by the Appellant, given the previous history of the matter as well as the unconvincing grounds set out in the Notice of Motion Application dated 1st April, 2022. For the grant of orders ex parte, an Applicant must lay a strong basis to warrant the grant of orders prejudicial to the other party without the opportunity for them to be heard before their issuance. The Appellant did not discharge that burden.
9. As I conclude, it would be remiss of me not to state that the Appellant is the author of his own misfortune. In a civil suit, a Defendant must be vigilant and proactive, something that the Appellant was not. When a trial court offers a defendant a reprieve by setting aside a default judgment, the defendant should not do what the Appellant did by resuming his former state of sleep; rather the defendant should be proactive and be guided by the knowledge that they are unlikely to receive a further reprieve from the court in future.
10. In light of the foregoing, I find that the Appeal herein lacks merit and I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF JULY, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Mr. Chege Counsel for the Appellant

Ms. Obiri Counsel for the Respondent



Ms Achieng, Court Assistant

