



REPUBLIC OF KENYA



**Point 50 Capital Limited & another v Mumita & another (Civil Appeal E765 of 2021) [2024] KEHC 7836 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E765 OF 2021**

**DAS MAJANJA, J**

**JULY 2, 2024**

**BETWEEN**

**POINT 50 CAPITAL LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ERIC APOLLO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HUMPHREY NJOROGE MUMITA ..... 1<sup>ST</sup> RESPONDENT**

**SOPHIE MURAGE MUSASI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. L. Muboli, CM dated 9th November 2021 at the Magistrates Court at Milimani, Nairobi Civil Case No. 4459 of 2019)*

**JUDGMENT**

**Introduction and Background**

1. This an appeal against the ruling of the Subordinate Court dated 09.11.2021 (“the Ruling”) where it declined to allow the Appellants’ application dated 12.05.2021 that sought to stay execution of the proclamation of attachment and an injunction restraining the Respondents from threatening, harassing and intimidating them with the purported auction pending hearing and determination of the suit. The appeal is grounded in the memorandum of appeal dated 25.11.2021 and has been canvassed by way of written submissions which are on record.
2. In order to contextualize the appeal, a brief background of the events emerging from the Subordinate Court is apposite. On 21.06.2019, the Respondents filed suit claiming that sometime in 2017, the 2<sup>nd</sup> Appellant represented to the Respondents that the 1<sup>st</sup> Appellant was an investment company with the capacity of applying their funds towards several investment portfolios and that based on these representations and assurances, the parties entered into an investment agreement dated 17.10.2017 for



the investment of USD 3000. That based on the performance profile, which form part and parcel of the agreement, the Respondents' return on investment from the date of investment to the date of maturity was to range from 22% to 118% accruing on a monthly basis.

3. The Respondents claimed that it was a condition precedent that the Appellants would remit the principal sums together with the return on investments upon maturity of the tenor of the investment which had accrued to USD 18,383. The Respondents thus averred that the Appellants had failed and/or refused to remit the USD 18,383 and thus prayed for judgment of this sum together with interest compounded at 5% per month from 20.05.2019 until payment in full.
4. On 16.10.2019 and on the application by the Respondents, the Subordinate Court entered an interlocutory judgment in favour of the Respondents as the Appellants had neither entered appearance nor filed a defence. On 09.12.2019, the Appellants filed an application seeking to set aside the interlocutory judgment which on 10.12.2020 was allowed on condition that the Appellants pays the Respondents Kshs. 20,000.00 thrown away costs to be paid within 21 days from the date of that ruling and that the Appellants file a defence also within the said 21 days of the date of the ruling. The Subordinate Court further held that the Respondents were at liberty to proceed to execute in default of the failure to adhere to these conditions.
5. The Respondents stated that they had been served with the statement of defence but that the Appellants had failed to pay the thrown away costs and as such, they initiated the execution which had been reinstated due to the Appellants' failure to comply with the Ruling.
6. The Appellants proceeded to file the application dated 12.05.2021 to forestall further execution. The Subordinate Court held that the Appellants had not demonstrated that they had paid throw away costs within the 21 days as ordered and as such, it dismissed the application. It further held that the Appellants had not demonstrated the likelihood of suffering substantial loss and that there was undue delay on the part of the Appellants to present the application, which delay was unexplained. As stated, the Ruling is the subject of the present appeal whose analysis and determination I now turn to below.

### **Analysis and Determination**

7. The Appellants' appeal is in essence about determining the propriety of the subordinate court's decision disallowing the Appellants' application to stay the execution of the interlocutory judgment. Since, the Subordinate Court's decision was discretionary, this court will not interfere with that decision of the trial court unless it is satisfied that the said court in exercising its discretion has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).
8. The trial court refused the application because the Appellants had failed to comply with its orders of 10.12.2021 by not paying the thrown away costs and the application had been brought after undue and unexplained delay and that the Appellants had not demonstrated what loss they are likely to suffer.
9. Going through these reasons, I fail to find any misapplication or abuse of discretion that would warrant the intervention of this court. I say so for a number of reasons. First, in as much as the Appellants stated that it had paid the thrown away costs via cash and that the same was accepted by the Respondents, there is nothing on record to support this averment. I agree with the Respondents that even in their application dated 25.11.2021 to the court, the Appellants admit that they did not in fact pay this sum



but go on to blame their advocates for allegedly not remitting the same to the Respondents. The trial court came to the correct conclusion that the Appellants had failed to comply with its orders.

10. Second, in deciding whether to stay the execution, the Subordinate Court rightly applied the correct principles to be considered in an application for stay execution as set out in Order 42 Rule 6 of the Civil Procedure Rules. These include finding out whether the application has been brought without undue delay and whether substantial loss will result to the Appellants if stay is not granted. From the record, I find that the Subordinate Court rightly found that there was no evidence or demonstration of substantial loss that the Appellants were likely to suffer and that there was an undue and unexplained delay of 5 months. These reasons were sufficient for the Subordinate Court to shoot down the Appellants' application.
11. I hold that the logical consequence of non-compliance of the Subordinate Court's ruling of 10.12.2020 was the reversion and resumption of the interlocutory judgment and the natural consequence of the resumption of the judgment was execution. If at all the Appellants were not able to comply within the period as ordered or if at all they were facing difficulty remitting this sum, then they ought to have sought leave to extend time to enable them comply. The burden could not shift to the Respondents to not execute and wait for an unknown period of time for the Appellants to comply (see *Bubul Investment Company Limited v Kassam Hauliers Limited* [2021] eKLR).
12. Whereas the Appellants submit that their right to a fair hearing was curtailed, they should not forget that Court orders are sacrosanct and must be obeyed at all times without excuse. Courts cannot come to the aid of someone who has not complied with court orders (see *Hadkinson v Hadkison* [1952] 2All ER 567). The Appellants have only themselves to blame for what befell them. They are the authors of their own misfortune. On the whole, I am satisfied that the subordinate court properly exercised its discretion in dismissing the Appellants' application.

### **Disposition**

13. The appeal lacks merit. It is dismissed with costs to the Respondent assessed at Kshs. 20,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JULY 2024.**

**D. S. MAJANJA**

**JUDGE**

Bitala Kakinga and Company Advocates for the Appellant.

Mr Lutukai instructed by CSA Advocates LLP for the Respondent.

