



REPUBLIC OF KENYA



KENYA LAW
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**Mose v Mungai (Civil Appeal E108 of 2024)
[2024] KEHC 9979 (KLR) (Civ) (1 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9979 (KLR)

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

CIVIL

CIVIL APPEAL E108 OF 2024

AN ONGERI, J

AUGUST 1, 2024

BETWEEN

JOHN OKWORO MOSE APPELLANT

AND

MILCAH MBUTU MUNGAI RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 20/2/2024 brought under Section 3A, 79G and 95 of the *Civil Procedure Act* (Cap21), Article 159 2(d) of *The Constitution* of Kenya 2010, Order 22 rule 22, Order 42 Rule 6, Order50 rule 6 and Order 51 Rules1 and 3 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the Law seeking the following orders;
 - i. That this application be certified as urgent and be heard ex parte in the first instance.
 - ii. That this honourable court be pleased order stay of execution of the judgement to enlarge time/order that the Memorandum of Appeal filed out of time together with the record of appeal/Appeal HCA. No. E108 of 2024 be deemed as properly filed and on record, warrants of attachment together with the notification of Sale of applicant's Motor vehicle be set aside and the illegally obtained warrants of attachment be unconditionally withdrawn and cancelled.
 - iii. That the Respondent's/Agent Clear Real Auctioneers be ordered to release the Appellant'/Applicant's motor vehicle registration number KBZ 211J and other moveable property attached as the warrants were irregularly obtained.
 - iv. That this honourable court be pleased to stay execution of the judgment/stay sale of motor vehicle KBZ 211J and/or decree dated 23rd May, 2023 as the appellant has complied with stay



condition/orders issue issued on 10/08/2024 by depositing in court Kshs.501,525/-pending the hearing and determination of the application and the appeal herein.

- v. That this Honourable Court be pleased to quash, cancel, lift the illegal and unlawful warrants of attachment, set aside the irregular Notification of sale of Motor Vehicle KBZ 211J, Warrants and Proclamation of attachment/ Possession/ distraint by Clear Real Auctioneers, recall back and cancel the warrants issued on 1st of February, 2024 for the decree of a Judgment dated 15/03/2023, pending the hearing and determination of this application and the appeal lodged Milimani HCA E108 of 2024 herein..
 - vi. That the costs of this Application abide the outcome of the intended Appeal.
2. The application is supported by the affidavit of John Okworo Mose of even date in which it is deponed that this court granted stay of execution in the judgment against the applicant on condition that the applicant deposits 50% of the decretal sum in court.
 3. Further that the applicant complied with the stay orders but the respondent proceeded to execute the judgment and irregularly attached a motor vehicle belonging to the applicant.
 4. Mr. Mahugu for the respondent filed a replying affidavit dated 22/2/2024.
 5. The parties filed written submissions which I have duly considered.
 6. The issues for determination in this application areas follows;
 - i. Whether the motor vehicle registration no. KBZ 211J should be released
 - ii. Whether the applicant should be granted enlargement of time to file the Memorandum of Appeal and Record of Appeal.
 - iii. Who pays the cots to this?
 7. On the issue as to whether the motor vehicle registration no. KBZ 211J should be released, I find that the same was irregularly attached since the applicant had complied with the conditions for stay of execution.
 8. The conditions for grant of stay of execution under Order 42 Rule 6 do not include filing of the memorandum of appeal or record of appeal within time.
 9. The fact that the memorandum or record of appeal were filed out of time does not entitle the respondent to attach the property of the applicant after stay of execution had been granted by the court.
 10. The respondent should have filed an application to strike out the said documents before proceeding to execute the judgment.
 11. I find that the respondent is in blatant disobedience of the order of this court.
 12. I direct that motor vehicle registration no. KBZ 211J be released forthwith and the respondent to meet the auctioneer's charges.
 13. On the issue as to whether the applicant should be granted extension of time for filing the memorandum of appeal, I find that the said issue has been overtaken by events since the appeal was admitted on 24/5/2024.
 14. The court has a discretion to allow filing of the memorandum and record of appeal out of time and the appellant's is granted leave and the said documents are deemed as properly filed.



15. The application dated 20/2/2024 be and is hereby allowed with costs to the applicant.

16. This court directs as follows;

i. That the motor vehicle registration KBZ 211J which was irregularly attached be released to the applicant forthwith.

ii. That the respondent to pay costs of this application and also the auctioneer's charges.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
1ST DAY OF AUGUST, 2024.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

