



**Chisutia v Nalukulu Development Group & another (Civil Appeal
E125 of 2023) [2024] KEHC 12570 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E125 OF 2023
S MBUNGI, J
OCTOBER 18, 2024**

BETWEEN

NANCY CHISUTIA APPELLANT

AND

NALUKULU DEVELOPMENT GROUP 1ST RESPONDENT

TIMPECH AUCTIONEERS 2ND RESPONDENT

*((Being an Appeal from the ruling of C.J Cheruiyot, Adjudicator/Resident Magistrate
delivered on 28/07/2023 in Kakamega Chief Magistrate's court Small Claim No. E161 of 2022))*

JUDGMENT

1. A claim was filed in the trial court by the 1st respondent herein against the appellant who had defaulted in payment of a loan of Kshs. 3000/- advanced to her by the 1st respondent, to be paid at an interest rate of Kshs. 450 per day for 14 days. The 1st respondent submitted that the appellant only paid interest twice, and had since defaulted, leading to a total accrued interest of Kshs. 7200/- plus the principal value of Kshs. 3000/- which led to the claim before the small claims court.
2. The 1st respondent proceeded to obtain a decree to execute the decreed amount by warrants of attachment of one cow and calf valued at Kshs. 16,000/-.
3. The appellant proceeded to file an application under Certificate of Urgency in the trial court on the 16.05.2023 seeking a stay in execution of the said warrant. Vide a replying affidavit dated 05.06.2023, the 2nd respondent stated that the said animals were already sold at the time the order for stay of execution was served upon them.
4. Upon hearing of the application, the trial magistrate struck out the matter noting that the same had been overtaken by events.



5. The appellant being dissatisfied with the said ruling filed the present appeal vide a memorandum of appeal dated 28th July 2023 on the following grounds: -
 - a. The learned magistrate erred in law and fact in relying on facts disputed by the appellants yet terming them as admitted.
 - b. the learned magistrate erred in law and fact in denying Audience to the appellant on breach of the agreement and issued orders based on speculation by the respondent.
 - c. the learned magistrate erred in law and fact in failing to consider or even analyze the evidence and submissions by the appellant.
 - d. the learned magistrate erred in law and fact in finding that the agreed period for payment had not elapsed.
 - e. The learned magistrate erred in law and facts by not finding that the respondents disobeyed court order staying the sale of A cow and Calf in execution of none existing judgement.
 - f. The learned magistrate erred in law and facts by allowing and issuing warrants executing the none existing judgment.
6. The appellant prayed that the appeal be allowed with costs and the orders issued in Kakamega Small Claim No. E161of 2022 on 28.07.2023 be set aside.
7. The appeal was admitted and this court directed that it be canvassed by way of written submissions.
8. The 1st and 2nd respondents did not file submissions.

Appellant's case.

9. Vide her submissions dated 27.11.2024, the appellant submitted that despite there being a handwritten consent that was produced in court, stating that the payment was to be made by 17.07.2023, the respondents obtained a decree dated 23.02.2023 and warrant of sale and attachments on 14.04.2023, proclamation was done and her cow and calf were taken so as to execute the decree.
10. The appellant further submitted that the period of agreement had not lapsed.
11. The appellant submitted that the respondents defied court orders despite being served, and sought that this court order the respondents to refund the appellant for wrongful execution, with costs.

Analysis and Determination.

12. On 16.05.2023, the appellant moved the trial court by a notice of motion seeking for orders that the lower court order the 2nd respondent Timpech Auctioneers to release her one cow and one calf taken from her. The other order was for the OCS Bungoma police station to enforce the orders. The lower court gave the orders and inter partes hearing fixed for 29.05.2023. On 29.05.2023, the hearing did not proceed for the respondent had not filed a response. The matter was fixed for mention on 06.06.2023. on 06.06.2023, Timpech Auctioneers told the court that the cow was sold and made a recovery of Kshs. 28,000/-. The court fixed a date for ruling on 29.06.2023.
13. In her ruling, the magistrate said that since the cow had already been sold the matter had been overtaken by events. She struck out the application, with no orders as to costs.



14. I have looked at the record. I have seen the replying affidavit of one Timothy Wanjala Wekesa t/a Timpech Auctioneers sworn on 05.06.2023. On Paragraph 8, he deponed that by the time he was served with the stay orders, on 17.05.2023 he had already sold the cow on 16.05.2023.
15. Therefore, I find that the magistrate was correct to hold that the application had been overtaken by events. There was nothing remaining for her consideration for even the appellant had not sought to set aside the decree in the application whose ruling is the subject of this appeal.
16. Though the respondents did not respond to the appeal, I find the appeal as presented has no merit. I therefore dismiss it. No orders as to costs, for the respondents did not respond.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of:

Appellant – present in person

Respondents – absent

Court Assistant – Elizabeth Angong'a

