



REPUBLIC OF KENYA



**KENYA LAW**  
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**Luseno v Odongo (Civil Appeal E048 of 2024)  
[2024] KEHC 12215 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E048 OF 2024  
DO CHEPKWONY, J  
OCTOBER 4, 2024**

**BETWEEN**

**JOANNE MUKALANI LUSENO ..... APPELLANT**

**AND**

**COLLINS MBANDA ODONGO ..... RESPONDENT**

**RULING**

1. This ruling determines is the Notice of Motion application dated 25<sup>th</sup> March, 2024 filed pursuant to Article 159(2)(d) of *the Constitution* of Kenya, Sections 1A, 1B, 3A and 38 all of the *Civil procedure Act* and Order 42 rule 6 and Order 22 Rule 34 both of the *Civil Procedure Rules*. It seeks the following orders:
  - a. Spent.
  - b. Spent.
  - c. That there be stay of the orders of Warrant of Arrest made by the Honourable Magistrate pending the hearing and determination of the Applicant’s Memorandum of Appeal dated 20th March, 2024.
  - d. That the costs of this Application be provided for.
2. The Application is based on the Supporting Affidavit of Joan Mukalani Luseno sworn on even date and the following grounds as set out on its face:-
  - a. That unless this Application is heard and determined the Appellant/Applicant is likely to lose his right to liberty and movement by execution of the Order of the Warrant of Arrest.
  - b. The Appellant/Applicant has an arguable appeal with good prospects of success for the reasons inter alia.



- i. The learned Magistrate erred in law and in fact by Issuing warrants of Arrest against the Appellant/Applicant prior to the hearing of the Notice to Show Cause dated 3<sup>rd</sup> August, 2024.
    - ii. The learned Magistrate erred in law and in fact by issuing warrants of Arrest on a date slated for mention to confirm filing of a response.
    - iii. The learned Magistrate erred in law and in fact by not setting down the Notice to Show cause for hearing.
    - iv. The Learned Magistrate erred in law and in fact by issuing final orders on a Mention date.
  - c. This Appeal will be rendered nugatory if the stay is not granted as prayed for.
  - d. The balance of convenience clearly may be in favour of the Applicant.
3. The Application is opposed through the Replying Affidavit of Collins Mbanda Odongo, the Respondent herein, sworn on 28<sup>th</sup> March, 2024. The Respondent has averred that the applicant has not fulfilled the conditions for stay pending appeal as she has not provided any security or shown that she has not shown what substantial loss, if any, she is likely to suffer.
4. According to the Respondent, on 14<sup>th</sup> July, 2017, he obtained an exparte judgment in the primary suit for decretal sum of Kshs 99,000/= plus costs and interest of the suit. That having failed to trace the assets of the applicant he filed a Notice to show cause on 5<sup>th</sup> September, 2019 which was served upon the applicant. The Respondent holds that the Applicant filed an application to set aside the exparte judgment which the court allowed on 15<sup>th</sup> February, 2023 on condition that the applicant deposits the entire decretal amount of Kshs 144,685.00 in a joint interest earning account of both counsel for the parties within 30 days failure to which, execution would proceed.
5. The Respondent avers that the applicant failed to comply with the said terms and he filed a Notice to show cause application against the Applicant which was slated for hearing on 30<sup>th</sup> August, 2023 but was rescheduled to 20<sup>th</sup> September, 2023. On this date, the Applicant sought time to file her response and the matter was adjourned to 25<sup>th</sup> October, 2023. When the court reconvened, the Applicant again sought for more time and the matter was adjourned to 31<sup>st</sup> January, 2024. The court did not sit on the 31<sup>st</sup> January, 2024 and the matter was again scheduled for 20<sup>th</sup> March, 2024. On this date, the Applicant was yet to file his response.
6. On this 20<sup>th</sup> March, 2024, the court took noted the several adjournments that had been granted for the benefit of the Applicant and allowed the application in the terms presented hence issuance of the warrants of arrest. The Respondent thus views the present application as an afterthought and an abuse of court process given that the Applicant has not disputed the existence of the Judgment of 2017 which remains unhonoured. The Respondent is also aggrieved that the Applicant has not given any proposal on payment of the decretal amount.
7. According to the Respondent, the Applicant was allowed an opportunity to defend himself when the exparte Judgment was set aside. However, having failed to comply with the conditions imposed, the Applicant is now estopped from introducing the merits and demerits of her defence in the primary suit as the Appeal herein is not against the primary suit but the Judgment.
8. The Respondent avers that the persistent failure to respond to the Notice to Show Cause shows previously issued is a clear indication that the Applicant is now attempting to delay him from enjoying



the fruits of a successful Judgment. He then seeks the court to dismiss the application with costs in the interest of justice.

9. By consent of the parties, the application was canvassed by way of written submissions. The Applicant filed her submissions dated 9<sup>th</sup> April, 2024 while the Respondent's submissions are dated 16<sup>th</sup> April, 2024.

### **Analysis and Determination**

10. In considering the application, the court has read through and considered the arguments in the respective submissions by the parties and finds the main issue for determination being whether the court should stay the orders of warrant of arrest issued against the Applicant.
11. The Applicant contends that the orders were issued even before hearing of the Notice to Show Cause. She adds that the application meets the conditions established in *Giella v Cassman Brown* 1979 EA, since she has established a prima facie case given that her right to be heard in respect of the Notice to show Cause was denied. She maintains that the Notice to Show Cause was determined on a date set for mention instead of fixing a hearing date for the same, hence she is likely to suffer irreparable damage if arrested as her right to liberty and movement will be taken away. The Applicant further avers that she has repaid a sum of Kshs 50,000/= against the sum of Kshs 100,000= advanced to her hence and the exparte Judgment of Kshs 100,980/= offends the principle of in-duplum rule and principles of natural justice. For those reasons, the Applicant argues that the balance of convenience lies in her favour and urges the court to grant her the orders as prayed.
12. The court has as well considered the Respondent's submissions that the Applicant has not established a prima facie case in view of her failure to challenge the primary suit Judgment delivered on 14<sup>th</sup> July, 2017 and failure to comply with the previous court orders leading to Judgment being reinstated. That her failure to respond to the Notice to show Cause despite several indulgence by the court led to the issuance of the orders for her arrest.
13. The Respondent further submitted that the Applicant has not substantiated the irreparable loss she is likely to suffer and that the balance of convenience lies in his favour given that he has the right to enjoy the fruits of his Judgment which have been kept away from him since 14<sup>th</sup> July, 2017 due to the actions of the Appellant. The Respondent has thus craved for the court to dismiss the application with costs for not only being frivolous but also being an abuse of the judicial process.
14. The court has considered the circumstances of the case and the conduct of the parties in view of the above submissions and the reflection of events from the court record. The Judgment of the primary suit was delivered in July of 2017. The Applicant applied to set it aside and the request was allowed on condition that the decretal sum be deposited in a joint interest earning account. The Applicant failed to comply with the conditions hence the Judgment was reinstated. The record also shows that the Applicant was well aware of the Notice to Show Cause and she previously sought time to file a response. The court proceeded to allow the same and the orders of arrest was issued.
15. In view of the chronology of events herein, it is evident that the Applicant has not been vigilant and keen in asserting her rights in the matter and in this court's view, it is too late in time to raise issues of in-duplum rule since this issue touches on the merit of the Judgment in the primary suit where the avenue for challenging is not through an application filed in response to the execution of the said Judgment. The Judgment can either be challenged through an application for review or by exploring the option of lodging an appeal before a superior court.



16. Be that as it may, execution by committal to civil jail is a lawful and legitimate enforcement mechanism under the Kenyan law and does not violate the Applicant's civil rights provided that the correct mechanism is followed. Therefore, the court finds that the Applicant has not fulfilled the conditions required to stay the Warrants of arrest issued. The Applicant has merely argued that she stands to suffer substantial loss if her right to liberty is lost as a result of arrest in execution of the Judgment, but has not offered to furnish security to the court for the performance of the decree issued in favour of the Respondent which is essential and a precondition to the grant of orders of stay of execution. The court is not persuaded that the application is merited and in its view, the same is only meant to further delay the Respondent from enjoying the fruits of his Judgment.
17. In view of the foregoing, this Court proceeds to dismiss the application dated 25<sup>th</sup> March, 2024 with costs to the Respondent. The stay of warrants of arrest issued against the Appellant previously are this lifted and vacated.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF OCTOBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Atsieno counsel for Appellant

M/S Bolima counsel for Respondent

Court Assistant - Martin

