



**Ndinga v Kimeu & another (Civil Appeal E259 of 2023)  
[2024] KEHC 12362 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12362 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E259 OF 2023**

**FR OLEL, J**

**OCTOBER 16, 2024**

**BETWEEN**

**BENEDICT VALA NDINGA ..... APPLICANT**

**AND**

**PAUL MASILA KIMEU ..... 1<sup>ST</sup> RESPONDENT**

**CARNELIAN ENT AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant initially filed the Notice of motion Application dated 17<sup>th</sup> May 2024 and later with leave of court did amend the said application, which he refiled and is dated 17<sup>th</sup> May 2024. The said Amended notice of motion is brought pursuant to provisions of Section 3A & 79(g) of the *Civil Procedure Act*, Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules, Article 159 of *the constitution* of Kenya and all other enabling provision of law. The applicant seeks for several orders which are spent, and what remains for determination is whether this court should order the release of the attached motor vehicles and further whether this court should issue and order for stay execution of the judgment dated 26<sup>th</sup> September 2023 pending hearing and determination of the Appeal filed.
2. The application is supported by the ground on the face of the said application and the supporting affidavit of the applicant, while the same is strenuously opposed by the respondent, who filed his replying affidavit dated, 25<sup>th</sup> June 2024.

**B. Pleadings**

- 3.. The Appellant averred that judgment was entered in favour of the respondent in the sum of Kshs.5,000,000/= on 26<sup>th</sup> September 2023, and being aggrieved he did file his Appeal and sought for orders of stay of execution, which were granted by the trial magistrate on 6<sup>th</sup> December 2023.



As a condition of stay, he was directed to pay the respondent's advocate a sum of Kshs.400,000/= within 90 days and did so on 22<sup>nd</sup> March 2024 through Electronic funds transfer (ETF) from his bank account to the plaintiff's Advocate account No 2202067 ABSA Bank Kenya Ltd. Despite complying with the aforesaid orders, the respondent did not send the 2<sup>nd</sup> respondent- Auctioneers, who served him with proclamation notice, notification of sale of movable property and warrants of attachment and eventually on 17<sup>th</sup> May 2024 forcefully took his two motor vehicles' registration Number KCK 381P and KCM 239D.

4. The Appellant faulted the respondent's action, as he had complied with stay conditions and as at the time his motor vehicles were being attached, he had already deposited the decretal sum with the respondent's advocate. That there was imminent danger that the respondent would sell the motor vehicles attached and It was therefore in the interest of justice that the prayers sought be allowed, and his motor vehicles released back to him so as not to render the Appeal exercise to be rendered nugatory.
5. This application is opposed by the Respondent through his Replying Affidavit dated 25<sup>th</sup> June 2024. He maintained that he successfully prosecuted his suit before the trial court and after judgment was delivered in his favour, the appellant was granted conditional stay orders, but failed to comply with the timeline's issues. The trial court had ordered the applicant to deposit a sum of Kshs.400,000/= with the respondent's advocate within 90 days, and the said order had been made on 6<sup>th</sup> December 2023. That order lapsed on 7<sup>th</sup> March 2024, without the applicant complying and he finally did deposit the said amount on 25<sup>th</sup> March 2024, by which time the stay orders had lapsed and they were therefore right to execute to enforce the judgment issued in their clients favour.
6. The respondent therefore urged the court to find that the application before court was not merited and urged the court to dismiss the same.

### **Analysis & Determination**

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and both set of submissions filed by the parties. The applicant had filed for stay pending appeal before the trial court and vide an order issued on 6<sup>th</sup> December 2023, he was granted conditional stay order to deposit a sum of Kshs.400,000/= with the respondent's counsel within 90 days and in default the order of stay will automatically lapse. The Appellant did deposit the said sum but did so on 22<sup>nd</sup> March 2024, about two weeks late.
8. The Respondent thereafter did instruct the 2<sup>nd</sup> respondent to level execution, and he did attach two of the appellant's cars registration Number KCK 381P Toyota Premio and KCM 239D Toyota Harrier, which the applicant seeks to have released. Unfortunately for the Applicant, though he did comply with court orders as regards condition for stay of execution, he did so late and never sought to extend time to comply.
9. The applicant submitted that Order 50 rule 4 of the civil procedure rules, came to his aid, as it excludes the period between 21<sup>st</sup> December in any year to the thirteenth day of January in the next year in computation of time. This provision should be read together with Rule 2(2),(b) of the High court Practice and Procedure rules made pursuant to Section 10 of the *Judicature Act* which provides that " High court vacation period" shall commence on the 21<sup>st</sup> December and shall terminate on 13<sup>th</sup> of January the following year. These provisions are inapplicable to the applicant's case as the magistracy court's do not go on vacation. See High court Civil Appeal No 139 of 2019, Gitau (Suing through his guardian Ruth Muthoni ) Vrs Hussein Builders Ltd Nairobi & Another.



10. The respondents therefore cannot be faulted for instructing the 2<sup>nd</sup> respondent to enforce the trial court decree as the order of stay of execution lapsed on 7<sup>th</sup> March 2024 without the applicant complying with conditions granted for stay.
11. With regard to the orders of stay of execution, Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;
  1. No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  2. No order for stay of execution shall be made under subrule (1) unless –
    - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
12. The said provision, therefore allows this court to consider the merits of this application, even though the primary court had dealt with a similar application. Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* also provides that focus in administering justice should be on just, efficient and expeditious disposal of cases and bend towards substantive justice being achieved, rather than focusing on procedural technicalities.
13. In Nicholas Kiptoo Arap Korir Salat -Vs- Independent Electoral and Boundaries Commission & Others [2013] eKLR, the Court of Appeal stated with regard to the application of the overriding objective principle:

The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder... The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it... the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness.....
14. The trial court had already granted the applicant stay on condition that he deposits Kshs.400,000/= with the respondent’s counsel, which sum he has already deposited albeitly late. It would not be in the interest of justice to drive him away from the seat of justice. At this point the court appreciate the sentiments expressed by the High Court in John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”



## **Disposition**

15. Considering all relevant factors and in order not to render the intended appeal illusory and also considering the respondents corresponding right to have the Appeal disposed of expeditiously;
  - a. I do affirm the previous stay conditions as granted by the trial court, which orders the applicant has already complied with.
  - b. The applicant will pay Auctioneers cost for attachment levied before the 2<sup>nd</sup> suit motor vehicle KCM 239D Toyota Harrier can be released to him. The said Auctioneers costs to be agreed upon or to be taxed.
  - c. The Appellant is directed to file and serve his record of Appeal and written submissions within the next 45 days and upon service of the same the respondent is granted 30 days to file their submissions.
16. The costs of this Application will be in the cause.
17. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024.**

In the presence of: -

No appearance for Appellant

Ms B Thuku for Respondent

Susan Court Assistant

