



REPUBLIC OF KENYA



**Mataara Travellers Sacco v Mageto (Civil Appeal E108 of 2021)
[2023] KEHC 2140 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E108 OF 2021
MM KASANGO, J
MARCH 17, 2023**

BETWEEN

MATAARA TRAVELLERS SACCO APPELLANT

AND

CYRUS OGETO MAGETO RESPONDENT

(Being an application for stay of execution pending the hearing and determination of this appeal from the judgment of the Senior Principal Magistrate's Court at Ruiru (P. Nyotah, RM) in Civil Case No. 429 of 2020 dated 10th March, 2021)

RULING

1. Cyrus Ogeto Mageto (hereinafter Mageto) filed a suit in Ruiru Magistrate's Court against Mataara Travellers Sacco (hereinafter Mataara) seeking judgment for injuries suffered from an accident involving Mataara's motor vehicle. Interlocutory judgment was entered in favour of Mageto on January 25, 2021 in default of appearance and defence. Mageto formally proved his case on February 17, 2021 and by a judgment delivered on March 10, 2021 the trial court awarded Mageto special and general damages of Kshs 1,107,050/=.
2. It is important to note that Mataara filed a defence before the trial court on February 1, 2021. That defence was filed out of time and without leave of the court contrary to Order 10 Rule 11 of the Civil Procedure Rules (hereinafter the Rules). That aforesaid Rule required Mataara to seek the court's order to set aside the interlocutory judgment.
3. What seemed to have awoken Mataara from its slumber was execution process by which its motor vehicle was attached by auctioneers in satisfaction of the trial court's judgment. Mataara filed before the trial court an application by way of notice of motion dated June 5, 2021. Mataara by that application sought the setting aside of the *ex parte* judgment. The trial court on *ex parte* consideration of that application ordered the application be served on Mageto and fixed the same for directions to be issued on July



22, 2021. Matara did not attend the trial court for direction and the court after being informed by Mageto's advocate of the existence of this appeal recorded the application dated June 5, 2021 as spent and closed its file.

4. Following the above account of the process of the action before the trial court it becomes clear that there did not exist a specific order which aggrieved Matara to lead it to file the present appeal. Matara by its memorandum of appeal filed in this appeal indicated that it was appealing against the trial court's "order delivered by Hon. Senior Resident Magistrate C.K. Kisiangani on June 10, 2021."
5. I have perused the trial court's proceedings and there was no order that was made on June 10, 2021. On June 9, 2021 Hon. C.K. Kisiangani directed that Matara's application be served and directions to be issued on July 22, 2021.
6. If this Court can assume that the order which is the subject of this present appeal is the one issued on June 9, 2021 then this appeal is hopelessly misconceived. It is misconceived because if Matara was dissatisfied with the order that directions would be issued on July 22, 2021 what Matara should then have done was to seek an earlier date. The solution was not to file this appeal. This appeal without a doubt is without foundation. This finding brings to mind the often quoted case of *Macfoy V. United Africa Co. Ltd* (1961) 3ALL E.R. 1169 where Lord Denning at 1172(1) stated:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

7. It follows that having made a finding that the appeal is incompetent and misconceived there would be no basis for this Court to consider the application dated June 15, 2021, filed in this appeal seeking stay of execution of the trial court's judgment. That application alongside this appeal will be struck out with costs. It follows that interim stay of execution shall be vacated.

Disposition

8. Following the above determination, I make the following orders: -
 - a. This appeal and the notice of motion dated June 15, 2021 are hereby struck out with costs to the respondent at Kshs 70,000/=.
 - b. The interim stay of execution issued by this Court on June 16, 2021 is hereby vacated and set aside.
 - c. Consequently, this file is hereby ordered to be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF MARCH, 2023

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice/Julie

Instructed by Kimondo Gachoka Advocates for appellant: - Mr. Njuguna

Instructed by A.N. Oeri & Co. Advocates for the Respondent:- Mrs. Omorara



RULING delivered virtually.

MARY KASANGO

JUDGE

