



Samson Tuwei Kiprotich alias Japhan Kipkoech Kosegei alias Andrew Kipkemei Sawe & 2 others v Sigei (Civil Appeal 183 of 2022) [2023] KEHC 17987 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 17987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 183 OF 2022
RN NYAKUNDI, J
JUNE 2, 2023**

BETWEEN

**SAMSON TUWEI KIPROTICH ALIAS JAPHAN KIPKOECH KOSEGEI ALIAS
ANDREW KIPKEMEI SAWE 1ST APPELLANT**

EDWARD KIPYEGON KITUR 2ND APPELLANT

MATHEW KIPKOSGEI ALIAS HILLARY KIBET' 3RD APPELLANT

AND

PHILIP SIGEI RESPONDENT

RULING

Coram: Hon. Justice R. Nyakundi

M/S Simiyu Wafula & Co. Advocates for the Applicant

M/S SMS & Co. Advocates for the Respondent

1. The applicants approached this court vide a Notice of Motion under certificate of urgency dated December 1, 2022 seeking the following orders;
 1. Spent
 2. Spent
 3. That at the inter-parties hearing prayer 2 above be confirmed and attachment herein be lifted and/or set aside.
 4. That costs of this application be borne by the respondent.
2. The application is premised on the grounds set out therein and the contents of the annexed affidavit of Edward Kipyegon Kitur.



Applicant's Case

3. The applicant's case is that there was a judgment in default of appearance and failing to file defence in Eldoret CMCC No E577 of 2021. On August 8, 2022, the applicants filed an application seeking to set aside the *ex-parte* judgment and all the consequential orders and leave to file defence among other prayers. On June 3, 2022 the court allowed the application.
4. The respondent proceeded to take out other warrants of attachment on the judgment that was set aside, the same was marked and annexed as EKK2a, b. This was following an order made on July 20, 2022 reverting the judgment for failure of attendance. The applicants submitted that they were aware that the defence was filed on November 16, 2021. They contended that no mention notice was served upon them for the said date and they made an application for stay of execution pending inter partes hearing on November 25, 2022 but the court declined to grant stay of execution.
5. The appellants have preferred an appeal against the said order and further, their defence raises triable issues as appreciated by the ruling of the court. If the orders sought are not granted the appellants contend that they will suffer irreparable loss.

Respondent's case

6. There are no submissions or responses to the application by the respondent.

Analysis and determination

7. Upon considering the pleadings and the annexures thereto, it is evident that the applicants are seeking stay of execution. Further, the trial court issued a ruling allowing the stay of execution and setting aside the *ex parte* judgment that had been issued in default of filing a defence.
8. The applicant has not produced the order he claims that reverted the judgment for failure of attendance on July 20, 2022. The court does not have the trial court file in its custody and therefore it cannot establish whether there indeed exists such an order. The applicant has attached the warrants of attachment that the respondent took out dated October 24, 2022 and it is evident that they arise from the orders passed on September 9, 2021. From the ruling setting aside the *ex parte* orders, it is not clear what date the *ex parte* judgment and orders were issued thereby making it difficult to establish whether the warrants arose from the judgment on that date. The annexure marked EKK-1 does not have the last page therefore making it a mammoth task to determine whether it is a legitimate ruling and when it was delivered. Further, this is compounded by the grounds given by the applicant for the application, to wit, that the judgment in default of appearance and filing of defence was reverted on July 20, 2022. It is not clear what this means with regard to the setting aside of the *ex parte* judgment as a court cannot revert on its judgment without an application for review.
9. In the premises, I find that the application is unmerited as it lacks specificity with regards to whether the *ex parte* judgment was set aside and which orders the warrants of attachment arise from. The date the *ex parte* judgment the warrants arise from was issued as the applicants merely state that there existed judgment in default of appearance. The applicant has failed to establish the nexus between the warrants of attachment and the *ex parte* orders that were set aside.
10. In the premises the application is dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA E-MAIL ON THIS 2ND DAY OF JUNE 2023



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R. NYAKUNDI

JUDGE

