



REPUBLIC OF KENYA



**Kuria v Nyamokami (Miscellaneous Civil Application 31 of 2023)  
[2023] KEHC 22412 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22412 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS CIVIL APPLICATION 31 OF 2023  
JK SERGON, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**ANN MUTHONI KURIA ..... APPLICANT**

**AND**

**LINET NYAMOKAMI ..... RESPONDENT**

**RULING**

1. The application for this court's determination is a notice of motion dated July 7, 2023 seeking the following orders;
  - i. Spent
  - ii. That this honourable court be pleased to grant an order of stay of execution of the *ex parte* judgment entered against the applicant *vide* Kericho CMCC No 446 of 2019 on October 27, 2021 pending hearing and determination of this application interpartes.
  - iii. That pending the hearing and determination of this application there be a stay of sale and/or auction of the defendant's/applicant's motor vehicle registration No KBM 360 R as itemized in the proclamation notice dated June 20, 2023 and notification of sale dated July 6, 2023.
  - iv. That pending hearing and determination of this application the honourable court be pleased to order the release of the defendants/applicants motor vehicle registration No KBM 360 R on a running attachment.
  - v. That this honourable court be pleased to grant leave to the applicant to appeal out of time against the ruling of the Hon B.R Kipyegon Principal Magistrate delivered on April 19, 2023 *vide* Kericho CMCC 446 of 2019.



- vi. That upon prayer 5 above being granted, the honourable court be pleased to order that the applicant provided security for the decretal sums of Kshs 689, 103/= in the form of a bank guarantee pending hearing and determination of the intended appeal.
  - vii. That this honourable court be pleased to quash the illegal proclamation and attachment of the applicants moveable properties and restitute the same to her.
  - viii. That the execution and proceedings to enforce judgment and decree entered on October 27, 2021 be declared a nullity.
  - ix. That this honourable court be pleased to cancel, set aside, recall and lift the proclamations and warrants of attachment herein for cancellation for having been issued irregularly.
  - x. That upon prayers 7,8,9 above respondent be ordered to release the defendant's/applicants motor vehicle registration No KBM 360 R unconditionally.
  - xi. That the costs of this application abide in the outcome of the intended appeal
2. The application is supported by grounds on the face of it and the supporting affidavit of George Nyambane an advocate practicing as such in the firm of Kimondo Gachoka and Company Advocates who are the advocates on record for the applicant herein with the authority to swear this affidavit.
  3. He avers that the applicant herein filed an application dated September 30, 2022 seeking to set aside the *ex parte* judgment entered against the applicant *vide* Kericho CMCC No 446 of 2019 on October 27, 2021 for the sum of Kshs 590, 364/= annexed herewith and marked GM1 is a copy of the said notice of motion dated September 30, 2023.
  4. He avers that the court delivered a hand written ruling on April 19, 2023 without notice to the applicant and/or her counsel and in the absence of both parties dismissing the applicant's application dated September 30, 2023.
  5. He avers that the applicant only became aware of the said ruling upon being served with a notification of sale and repossession of her motor vehicle registration No KBM 360 R annexed herewith and marked GM2 is a copy of the said notification of sale dated July 6, 2023.
  6. He avers that the respondent herein has instructed the Hegeons Auctioneers who have taken out warrants of attachment and proceeded to attach the applicants motor vehicle registration No KBM 360 R by issuing a notification of sale, annexed herewith and marked GM3 is a copy of the said warrants of attachment and sale dated June 16, 2023 and further that the applicants motor vehicle is scheduled for sale anytime thus exposing her to irreparable loss and damage as she would have been condemned unheard to pay an *ex parte* judgment.
  7. He avers that the respondent nor the court served the applicant with a ruling notice and thus were not aware of when the ruling was delivered in order to take the relevant steps to safeguard her interests and further that the applicant being aggrieved with the trial's court ruling delivered on April 19, 2023 instructed the firm of Kimondo Gachoka to seek leave to appeal out of time.
  8. He avers that the applicant was not served with warrants of attachment thus rendering the execution proceedings a nullity.
  9. He avers that the instant application was timely and made without any unnecessary delay.



10. He avers that the applicant and her insurer are ready, able and willing to offer security in form of a bank guarantee for the decretal sum of Kshs 689, 103/= annexed herewith and marked GM4 is a copy of the said bank guarantee.
11. He avers that the applicant stands to suffer substantial and irreparable loss and damage as there is a likelihood that the applicant will be unable to recover the decretal sum awarded herein from the respondent should the respondent be allowed to sell the applicants motor vehicle and thereafter the intended appeal succeeds.
12. He avers that unless the instant application is allowed, the applicant's intended appeal will be rendered nugatory.
13. He avers that the applicant has a good and arguable appeal which has high chances of success, annexed herewith and marked GM5 is a copy of the draft memorandum of appeal.
14. He avers that the respondent will not suffer any prejudice or any damages that cannot be compensated by way of costs if this application is allowed.
15. He avers that the judgment having been substantial and ex parte, it is only fair and just that the applicant be allowed to appeal before being condemned to settle the amount.
16. He finally urged the court to grant leave to the applicant herein to appeal out of time against the judgment of the honourable trial magistrate and that this court extends time for filing the intended appeal.
17. Linet Nyamokami the respondent herein filed a replying affidavit opposing the instant application.
18. The respondent avers that the instant application was frivolous, vexatious, incompetent and otherwise an abuse of court process.
19. The respondent avers that she was involved in a road traffic accident on April 1, 2018 while traveling on motor vehicle registration No KBK 646 F which rolled occasioning her serious bodily injuries annexed herewith and marked LN1 are copies of the medical report, treatment notes and police abstract.
20. The respondent avers that on November 28, 2019 she filed a civil suit being Kericho CMCC No 446 of 2019 seeking compensation for the pain and suffering as a result of the injuries she had sustained, annexed herewith and marked LN2 is a copy of the plaint.
21. The respondent avers that a notice of institution of suit was served upon the applicant's insurance in accordance with the law, annexed herewith and marked LN3 is a copy of the said notice, covering letter and certificate of postage and further that following the said notice the applicant's insurers responded on December 16, 2019, annexed herewith and marked LN4 is a copy of their response.
22. The respondent avers that on January 29, 2020 an amended plaint was filed and summons to enter appearance was served on the 2nd defendant, annexed herewith and marked LN5a is a copy of the amended plaint and LN5b is a copy of the affidavit of service and further that no appearance or defence was filed by the applicant hence interlocutory judgment was entered against her and a date of formal proof hearing fixed for December 9, 2020.
23. The respondent avers that a hearing notice was duly served upon the applicant and her insurers, Directline Assurance Company Limited and further that the applicant and her insurers did not attend court or do anything.



24. The respondent avers that on February 26, 2021 the applicant's insurers were notified of the judgment date after she had testified and that judgment was subsequently delivered on October 27, 2021 since courts were closed on April 7, 2021 due to covid.
25. The respondent avers that notice of judgment was duly issued to the applicant on November 18, 2021 and a demand letter was sent to the applicant's insurers on November 24, 2021 to indemnify the applicant.
26. The respondent avers that the applicant filed an application dated August 30, 2022 under a certificate of urgency seeking stay of execution and setting aside of the judgment delivered on October 27, 2021 annexed herewith and marked LN10 is a copy of the application and supporting affidavit. The said application was set for hearing on September 6, 2022 and was served upon her advocates and that on September 6, 2022 the applicant and her advocate did not attend court and therefore her application dated August 30, 2022 was dismissed by the court.
27. The respondent avers that on January 23, 2023 the applicant came to the court with an application dated January 19, 2023 seeking to set aside the dismissal orders that had been given on September 6, 2022 with the applicant's full knowledge of it on the same date, the applicant served her advocates on January 26, 2023 with an indication that the said application was to heard on February 1, 2020.
28. The respondent avers that she filed a replying affidavit to the said application on January 31, 2023 and served the applicant's counsel on the same date, the applicant's counsel urged the court to allow the applicant's application dated January 19, 2023 and the same was allowed, annexed herewith and marked LN14 is a copy of her replying affidavit and email for service of the same upon the counsel.
29. The respondent further avers that the application dated August 30, 2022 listed for hearing on March 22, 2023 and a ruling date on April 19, 2023 given, the applicant did not attend and argue the said application.
30. The respondent was adamant that the applicant was out to frustrate and hinder the wheels of justice to delay the enjoyment of the fruits of judgment in her favour.
31. The respondent faulted the applicant for failing to give any explanation as to why she did not attend court for ruling on April 19, 2023 and that given the history and conduct of the applicant it was clear that she was only out to obstruct and delay justice.
32. The respondent maintained that she had a regular judgment and there was no reason why the said judgment ought to be disturbed.
33. The respondent argued that the applicant has not demonstrated that she has an arguable appeal and further that the said appeal is against dismissal orders given April 19, 2023 whereas prayers for stay of execution of her judgment delivered on October 27, 2021 are included when there is no appeal against the said judgment and therefore the same ought not to be granted.
34. The respondent maintained that attachment of the applicant's motor vehicle KBM 360 R was done in accordance with the law and the same needs not be interrupted.
35. The respondent was opposed to the applicant's proposal to provide a bank guarantee and reiterated that this court has powers to order appropriate conditions and therefore proposed that if the court were to allow the instant application, the entire decretal sum should be deposited in a joint account in the names of the advocates on record. The respondent maintained that she would suffer a lot of prejudice if the orders sought in the application are granted.



36. The matter came up in court for inter partes hearing on July 18, 2023 and the parties canvassed the instant application via oral submissions.
37. The learned counsel for the applicant maintained that they were seeking for orders sought in the notice of motion dated July 10, 2023 and further that the impugned ruling delivered on April 19, 2023 subject of the intended appeal was delivered without notice and in the absence of the parties. The learned counsel for the applicant contended that the period of the delay in filing the appeal was reasonable and in any event he had given a plausible explanation for the delay.
38. The learned counsel for applicant reiterated that they were willing to provide security for due performance of the decree.
39. The learned counsel for the respondent maintained the instant application was opposed and that the respondent would be relying on the averments in the replying affidavit. The learned counsel for the respondent contended that the application seeking to set aside the *ex parte* judgment filed before the trial court was dismissed, that the subject motor vehicle was attached carefully and further that the reasons given for the delay in filing the appeal were not sufficient.
40. I have considered the application, the replying affidavit opposing the application and the oral submissions by the parties and I find fault in the manner in which the applicant's counsel conducted the matter in the trial court, resulting in an *ex parte* judgment, however, at the same time the applicant's motor vehicle is scheduled for sale anytime thereby exposing her to irreparable loss and damage as she would have been condemned unheard to pay an *ex parte* judgment. It is therefore in the interests of justice that the applicant be allowed to appeal before being condemned to settle the decretal amount.
41. I have taken cognizance of the fact that the applicant is willing to furnish security in the form of a bank guarantee as set out in order 42 rule 6 of the [Civil Procedure Rules](#). In [Focin Motorcycle Co. Limited v Ann Wambui Wangui & another](#) [2018] eKLR Gitari J. observed as follows; "where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay."
42. Accordingly, I find that the application dated July 7, 2023 is merited giving rise to issuance of the following:-
  - i. There be a stay of execution of the *ex parte* judgment entered against the applicant *vide* Kericho CMCC No 446 of 2019 on October 27, 2021 pending hearing and determination of the intended appeal on condition that the applicant should deposit the entire decretal amount Kshs 689, 103/= in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this matter within 45 days from the date hereof.
  - ii. The applicant is hereby granted leave to appeal out of time against the ruling of the Hon B.R Kipyegon Principal Magistrate delivered on April 19, 2023 *vide* Kericho CMCC 446 of 2019 within 10 days from the date hereof.
  - iii. That pending the hearing and determination of the intended appeal there be a stay of sale and/or auction of the defendant's/applicant's motor vehicle registration No KBM 360 R as itemized in the proclamation notice dated June 20, 2023 and notification of sale dated July 6, 2023.



- iv. That pending hearing and determination of the intended appeal the defendants/applicants motor vehicle registration No KBM 360 R be released on a running attachment; and
- v. That the costs of this application to abide the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2023.**

.....

**J.K. SERGON**

**JUDGE**

**In the presence of:**

C/Assistant – Rutoh

Nyambane for the Applicant

Miss Kirui for the Respondent

