



REPUBLIC OF KENYA



Bundi v Kiome (Civil Appeal 50 of 2022) [2024] KEHC 15481 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 50 OF 2022
EM MURIITHI, J
DECEMBER 5, 2024**

BETWEEN

JAMES BUNDI APPELLANT

AND

PAUL KIOGORA KIOME RESPONDENT

RULING

The 1st Application

1. By a Notice of Motion under certificate of urgency dated 17/7/2023 pursuant to Article 50 of *the Constitution*, sections 1A and 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the Applicant seeks that:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. The Honorable court be pleased to grant a stay of execution on Meru CMCC No. E365 of 2021 pending hearing and determination of the appeal against the Ruling made by the Hon. E. A Mbicha on the 23rd of March 2022.
 - e. Pending hearing and determination of this Appeal, the Honorable court be pleased to issue an Order directing the Respondent to deposit with the OCS Kariene Police Station in merchantable and roadworthy condition, motor vehicle Reg No KCK 029 F Isuzu FSR Lorry.
 - f. The Honorable court be pleased to Order the Appellant to file and serve a Record of Appeal within 30 days from the date of this application being allowed.
 - g. The Honorable court be pleased to order suit no. E365/2021 start de novo.



- h. The costs of this application be provided for.
 - i. Any other reliefs that meets the ends of justice.
2. The application is premised on the grounds on the face of it and supporting affidavit of James Bundi Mwiti, the Applicant herein sworn on even date. He avers that he intends to appeal against the impugned ruling of 23/3/2022 where he was mandated to transfer his lorry Reg. No. KCK 029 F ISUZU FSR to the Respondent to enable him charge it with a financier of his choice and thereafter pay him the balance. He abandoned his application for review before the trial court and opted to lodge the appeal herein. The appeal was unable to proceed as the entire suit papers in E365/2021 disappeared forcing his then advocate to write a complaint on 21/11/2022 to the Chief Magistrate. The matter was then mentioned when the court ordered them to refile their original copies in court so that the suit and the appeal could proceed. The Respondent took advantage of the order and took possession of the lorry on 25/3/2022 and he has shown no interest of paying him any money to date. He is informed by his advocates that the Respondent is likely to execute the order at any time forcing him to transfer his vehicle unless the court grants stay of execution. He is counseled by his advocate that his appeal has reasonable chance of success, and unless E365/2021 is heard de novo, he will lose the money due to him as a result of breach of the agreement herein.
3. The Respondent did not file a response to this application.

The 2nd Application

4. By a Notice of Motion under certificate of urgency dated 23/10/2023 pursuant to Order 51 Rules 3 and 15, Order 40 Rule 7 and Order 42 Rule 35 of the Civil Procedure Rules and all other enabling provisions of the law, the Respondent seeks that:
- a. Spent
 - b. The Honorable court be pleased to discharge and all together set aside and/or vary orders made on 25/7/2023 and/or any other subsequent orders emanating thereon.
 - c. This Honorable court be pleased to dismiss the appellant's appeal filed in court on 27/4/2023 for want of service and prosecution.
 - d. The Honorable court be pleased to issue any further orders it deems fit to grant in the circumstances.
5. The application is premised on the grounds on the face of it and supporting affidavit of Paul Kiogora Kiome, the Respondent herein sworn on even date. He accuses the Applicant of lying to the court that the ruling to transfer the motor vehicle to him was made on 23/3/2022 and there had been no delay in bringing the application. The Applicant misled the court and thereby obtained orders on record through fraudulent means and tricks. The memorandum of appeal was filed on 20/4/2022 and the application for stay was filed on 19/7/2023 which is approximately 1½ years, and the Applicant stands to suffer no prejudice at all if the subject exparte orders are discharged. The said orders are final in nature therefore prejudicial to him because the Applicant was granted orders not sought on the face of the application of 17/7/2023. The ruling and/or orders of 23/3/2022 were overtaken by the orders of 25/5/2022 and therefore there is nothing to stay. On 29/3/2022, he deposited Ksh. 200,000 in compliance with the court orders issued in Meru CMCC No. E365/2021 whereof the Applicant's former advocate acknowledged the said bankers cheque in favour of the Applicant. When he realized that the Applicant was not ready to comply with the orders of 23/3/2022, he filed an application dated 25/5/2022 seeking release of the original logbook, duly signed transfer forms and



pin number, and the court vide its ruling of 25/5/2022 ordered the subject motor vehicle to be released to him. On 29/3/2022, the DCI Kariene police station released the subject vehicle to him with full knowledge of the Applicant. The Applicant has not taken any steps to prosecute the appeal which he filed on 20/4/2022, and it appears he is not interested in prosecuting it. The Applicant has not sought extension of time to file the record of appeal after expiry of 6 months. His right to enjoy the fruits of his judgment shall be unduly delayed unless the appeal is dismissed for want of service and prosecution.

6. The Applicant swore a replying affidavit on 4/10/2023 in opposition to the application. He avers that on 25/7/2023, the court ruled on the application dated 17/7/2023 which was duly served upon the Respondent. The application was as a result of the ruling of 23/3/2023 by the trial court in CMCC No. E365/21. He swiftly instructed his then advocates to set aside the said ruling but to their consternation on attending court to have the said application heard on 20/4/2022, the file could not be traced, forcing his advocate to file the memorandum of appeal on the said date. When all efforts to trace the said file became futile, they were ordered to refile all the original documents in their possession so that the same could be reconstructed to enable the appeal to proceed. He refutes the payment of Ksh.200,000 to his former advocate M/S Muchomba Law and puts the Respondent to strict proof thereof. He could not file the Record of Appeal without the court proceedings as the same could not be issued because the file had disappeared. The application is an afterthought, an abuse of the court and he prays for its dismissal.

Submissions

7. The Applicant urges that he will suffer irreparable loss if the orders are set aside, because he was not given a proper opportunity to advance his case in the lower court, which is a breach of the fundamental principle of natural justice as was held in *Wachira Kareni v Bildad Wachira* (2016) eKLR and *Shah v Mbogo* (1969) EA 166. He further relies on *R v Speaker City County Assembly & Another ex parte* (2017) eKLR, where it was held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.
8. The Respondent urges that the decree has already been implemented and the motor vehicle transferred to him, and therefore the prayer for stay of execution is superfluous and totally misplaced. He urges that the final decision was made 1 year 3 months ago and there is now too much water under the bridge. He prays for the dismissal of the appeal together with the application with costs.

Analysis and Determination

9. The two applications are the 2 sides of a coin and the singular issue for determination is whether the appeal ought to be dismissed for want of prosecution.
10. The impugned ruling was made on 23/3/2022 where the trial court decreed that:

“The log book which indicates the same was issued to the plaintiff on 1st September, 2021. Thus, as at 18th July, 2021 the plaintiff had not procured and registered the log book to be in his name away from the said Bank Cooperative Bank, and thus not having a Log book, in his name, he could not have handed over a logbook to the defendant and thus he the plaintiff was the one in breach of clause 4 of the said agreement. The defendant is also thus susceptible to lose the amount of Kshs. 2,100,000 he has already paid. Under the foregoing circumstances and in the interest of justice, I make the following orders:-

- a. That the Defendant shall pay the plaintiff an amount of Kshs. 200,000/= being a further purchase amount of the subject Lorry herein Registration KCK 029



F Isuzu Lorry either by cheque or other form of money transfer within a period of seven (7) days from the date of this ruling.

- b. That upon the payment of Ksh. 200,000/= as encapsulated in (a) herein above the subject motor vehicle Registration KCK 029 F Isuzu Lorry shall forthwith be returned/Released to the defendant herein.
- c. That upon the release of the subject lorry herein Registration KCK 029 F Isuzu Lorry as encapsulated in (b) herein above the plaintiff shall within a period of fifteen (15) days of the release of the said motor vehicle to the defendant, release the original logbook, transfer forms duly signed by him, his identity card and pin and other documentation as currently required by the NTSA to ensure the defendant is registered as the owner of the subject lorry within the said period of (15) days from the date of release of the said chattel as captured in (b) herein above.
- d. That upon being registered as the owner of the subject chattel as encapsulated in (c) herein above and now being able to perhaps muscle up and secure a loan under security of the subject lorry. The defendant shall within a period of thirty (30) days from the date of his registration as the owner of the subject lorry Reg KCK 029 F Isuzu Lorry/Truck pay the balance purchase price which would then be Kshs. 1,300,000/= (less the Kshs. 200,000/= which would have already been paid).
- e. That in default of (d) hereinabove, the plaintiff would be and would be at liberty to apply to court for Summary Judgment of default amount and/or order of repossession and/or any other order to ensure succinct compliance by the defendant.
- f. That upon compliance of (a)-(e) herein-above, parties would be at liberty to take a mention for purposes of thrashing out the issue of cost of the suit.
- g. That parties are at liberty to apply.
- h. That the parties herein be and are hereby granted leave to appeal if need arises.
- i. That there shall be no orders as to cost of the Application dated 14th September, 2021 and 12th October, 2021 respectively.”

11. The trial court was duly moved vide an application dated 25/5/2022 where it ruled on even date that:

“I have considered the application dated 25th May, 2021 and the orders of court issued on 25th March, 2022. The orders of the court of 25th March, 2022. The orders of the court of 25th March, 2022 were succinct and clear. The plaintiff appears not to have complied with the same. There is nothing to trash out and argue for interpartes. If the said application is served where one party appears to not to have abided by the court orders. I thus find the Application dated 25th May, 2022 to be meritorious and allow the same. On terms of prayers 1, 2 and 3. The NTSA to be served within said order.

Order: Prayer 3 herein shall be complied with within fourteen (14) days upon the registration of the defendant as the new owner as envisaged in order/prayer 2.”



12. The court countenances that the orders of 23/3/2022 cannot be stayed as they were overtaken by those of 25/5/2022.
13. The Applicant/Appellant hoodwinked the court into granting the orders of 25/7/2022 by failing to disclose the existence of the trial court's orders of 25/5/2022, and thus those orders must as of right be vacated and/or discharged.
14. The considerations to be made in determining whether or not to dismiss matters for want of prosecution were set out in *Ivita v Kyumbu*, Civil Suit No. 340 of 1971 (1984) KLR 441, 449, where Chesoni J. held as follows:

“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court...The defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced...”
15. The Applicant filed his memorandum of appeal on 27/4/2022 against the decision of 23/3/2022 while the instant application for stay was belatedly filed on 19/7/2023. The admitted unreasonable and inordinate delay has been attributed to the Applicant's inability to file the record of appeal owing to the disappearance of the trial court's file as evidenced by the complaint dated 21/11/2022. The court accepts that although the delay in prosecuting the appeal was manifestly prolonged, the explanation is satisfactory and plausible.
16. It is urged that the decree herein has already been implemented and the Respondent cannot be said to have been unnecessarily kept away from the fruits of his lawful judgment by the delayed prosecution of the appeal. Besides, any such prejudice in the delayed hearing and conclusion of the appeal may properly and adequately be compensated by an award of costs in accordance with the proviso to Order 50 Rule 6 of the Civil Procedure Rules.
17. The Applicant has intimated his willingness exercise his undoubted right to appeal by expeditiously prosecuting it. The court, in the words of Chesoni J in *Ivita v Kyumbu* (Supra), finds that “justice can still be done to the parties, the prolonged and inexcusable delay notwithstanding.”
18. In the spirit of Article 159 (2) (d) of *the Constitution* and the overriding objectives under Sections 1A and 1B of the *Civil Procedure Act*, the court will afford the Appellant an opportunity to prosecute his appeal on strict terms to be set out hereinbelow.

Orders

19. Accordingly, for the reasons set out above, this court makes the following orders:
 - a. The stay of execution granted on 25/7/2023 is hereby vacated.
 - b. The logbook for Motor Vehicle Registration No. KCK 029 F shall remain in the custody of the court as earlier ordered on 25/7/2023.
 - c. The Record of Appeal together with written submissions thereon to be filed within 30 days from the date hereof, in default of which the appeal shall stand as dismissed.



- d. The Respondent shall file, as necessary, written submissions on the appeal within 14 days of service.
- e. The costs of the applications shall be paid by the Appellant/Applicant to the Respondent in terms of Order 50 Rule 6 of the Civil Procedure Rules.

Order accordingly.

DATED AND DELIVERED ON THIS 5TH DAY OF DECEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Winnie Ngigi for the Applicant

Ms. Kiogora Mugambi for the Respondent

