



**Mutio & another (Suing as Representatives of the Estate of Francis Kyalo
Nganda (Deceased)) v Zarn Enterprises System Company Limited (Civil Appeal
E144 of 2023) [2024] KEHC 16217 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E144 OF 2023
FR OLEL, J
DECEMBER 17, 2024**

BETWEEN

MARY MUTIO 1ST APPELLANT

JACKLINE MWENDE MUTIO 2ND APPELLANT

**SUING AS REPRESENTATIVES OF THE ESTATE OF FRANCIS KYALO
NGANDA (DECEASED)**

AND

ZARN ENTERPRISES SYSTEM COMPANY LIMITED RESPONDENT

RULING

A. Introduction

1. The Respondent/ Applicant filed a Notice of Motion application dated 14th November 2024 seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.
 - e. That the Honourable court do issue a temporary injunction restraining the Respondents their servants, and/or agents from selling, charging, disposing off, and/or otherwise interfering with any property belonging to the Defendant/Applicant pending the hearing and determination of Civil Appeal No E144 of 2023 and Machakos Cmcc No 301 of 2022.



- f. That this Honorable court be pleased to Declare that the attachment and sale of motor vehicle registration Number KBR 164K model Hyundai track by the plaintiff/Respondent as null and void.
 - g. That the costs of this Application be borne by the Plaintiff/Respondent.
 - h. That this Honorable court be pleased to issue any further orders as may be necessary to give effect to the forgoing orders.
2. The Application is supported by the grounds on the face of the said Application and the supporting affidavit of the Respondent/applicant, director one Paul Matete Wathiru who contends that the Appellant obtained default judgment against them on 15th March 2023 and they had applied to have the same set-aside and obtained stay of execution orders on 07.06.2023, which were later extended on 22.06.2023.
 3. The Appellant being aggrieved by the said ruling filed this Appeal and obtained orders to stay proceedings in the primary suit, and thereafter illegally instructed M/S Milan Auctioneers to advertise the attached lorry suit lorry for sale via Public Auction to be carried out on 18th November 2023. The order of stay of proceedings orders did not invalidate the stay orders obtained in the primary matter and it was pertinently wrong for the Appellant/respondent to continue with the said execution proceedings, as it would have the effect of wiping off the substratum of the primary suit and this Appeal before it is determined.
 4. The Respondent/Applicant therefore urged the court to find that, the orders sought were merited and be pleased to grant the same.
 5. The Appellants opposed this application and filed their replying affidavit dated 12th November 2024, sworn by the 1st Appellant, where she averred that the respondents had hoodwinked the court and irregularly obtained and extended the stay of execution orders. Being aggrieved by the trial magistrate decision, they had filed this Appeal and obtained orders of stay of proceedings.
 6. The stay of execution orders obtained in the primary suit had lapsed, as the same was not extended, thus they were at liberty to execute to enforce the default Judgment, which the respondent had failed to satisfy despite having sufficient time to do so. This Application was therefore devoid of merit and they prayed that the same be dismissed.

B. Analysis & Determination

7. I have carefully considered the Application and Supporting Affidavit and submissions filed. The only issue that arises for determination is whether this court should grant orders of temporary injunction restraining the Appellant/Respondent their servants and/or their agents from selling, charging, disposing off, and/or otherwise interfering with any property belonging to the Respondent/applicant pending hearing and determination of the Appeal and the primary suit and secondly, if the court should declare the said attachment to be null and void.
8. Both parties confirm that the trial magistrate did grant the respondent/applicant orders of stay of execution on 07.06.2023 and extended the said orders again on 22.06.2023. The appellants being dissatisfied by the said decision to extend the interim orders, did move this court vide their application dated 30.06. 2023 and on 25.07.2023 was granted an order staying proceeding in the primary suit pending inter parties hearing of the said Application dated 30.07.2023.



9. As at the time the proceedings of the primary suit were stayed, the order of stay of execution issued by the trial Magistrate was still in force and it is in bad faith for the Appellant to then proceed to advertise the suit lorry for sale on 18th November 2023. The said action is undoubtedly illegal null and void abinitio and is set aside Exdibito Justicea.

C. Disposition

10. Considering all relevant factors, I do find that the Respondent/Applicant application dated 14th November 2023 has merit and allow the same in terms of prayer (5) and (6) thereof.
11. The costs of this Application will be in the cause.
12. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 17TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of December, 2024.

In the presence of: -

Mr. Mburu for Appellant

Ms. Oduk for Respondent

Susan/Sam - Court Assistants

