



**Mutio & another (Suing as Representatives of the Estate of Francis Kyalo  
Nganda (Deceased)) v Zarrn Enterprises System Company Limited (Civil Appeal  
E144 of 2023) [2024] KEHC 16215 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16215 (KLR)

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

**BETWEEN**

**JACKLINE MWENDE MUTIO ..... 1<sup>ST</sup> APPELLANT**

**MARU MUTIO ..... 2<sup>ND</sup> APPELLANT**

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

**AND**

**ZARRN ENTERPRISES SYSTEM COMPANY LIMITED ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The court is called upon to determine the Notice of Motion Applications dated 30<sup>th</sup> June 2023, brought pursuant to Section 1A, 1B, 3A, and 95 of the *Civil Procedure Act*, Order 42 rules 4 & 6, Order 50 rule 6, Order 51 of the Civil Procedure Rules, Article 159(d) of *the Constitution* of Kenya and all other enabling provisions of law. The Appellant/Applicant seeks for orders that;
  - a. Spent
  - b. Spent
  - c. Spent.
  - d. That granting the prayers above, this Honourable court be pleased to declare as null and void and set aside the orders of the trial court issued on 07.06.2023 and 22.06.2023 and order a stay of all proceedings before the trial Magistrate in Machakos Cmcc No. 301 of 2019 pending the hearing and final determination of the Appeal subject to the instant Application.



- e. That costs of this Application be provided for and be paid by the respondents.
2. The application is supported by the ground on the face of the said application and the supporting affidavit dated 15<sup>th</sup> November 2023, sworn by the 1<sup>st</sup> Appellant Jackline Mwendu Mutio, who deponed that they filed the primary suit and obtained judgment against the respondent company, who had refused to settle the decretal Sum awarded, and which inaction forced their hand to initiate execution proceedings to enforce the decree. The respondent sort and obtained Ex-parte orders staying execution on 02.06.2023, failed to serve the said order as directed by the court, and had the same orders irregularly extended from 07.06.2023 to 22.06.2023.
  3. On the said date, when the matter came up for inter-parties hearing despite their strenuous objection, the trial magistrate wrongly extended the said orders to their detriment. The said orders were made without due regard to the objection raised and the same amounted to a miscarriage of justice, which ought to be rectified, hence this Appeal.
  4. Despite serious misgivings raised, the trial court was hell-bent on proceeding with the primary matter and had directed parties to file their submissions. It was therefore prudent to have the said proceedings stayed until this Appeal was heard and determined to avoid any prejudice and irreparable harm which would be suffered by the Appellant.
  5. The respondents on their part opposed this application and filed their response, through the Replying Affidavit of Paul Matete Wathiru, who deponed that he was one of the respondent's directors. He deponed that on or before 26<sup>th</sup> June 2020, they entered into a motor vehicle sale agreement with a company known as J&V Investments Company Limited, who purchased the suit motor vehicle from them, took out an insurance policy, and exclusive possession of the said motor vehicle. As at the time the accident occurred, on 22<sup>nd</sup> March 2021, they did not have possession of the said motor vehicle as it had been sold one year earlier, and therefore they could not be held vicariously liable for the accident which occurred.
  6. Secondly the police abstract obtained after the accident blamed a different motor vehicle KCL 280L for being on the wrong and causing the said accident, and in the said police abstract, the deceased herein was listed as the driver of the said motor vehicle. The said motor vehicle KCL 280L had faulty brakes and started to move on its own, hurtling towards the immobile motor vehicle KBC 889G (the respondent's motor vehicle). The deceased, who was the driver of the said motor vehicle tried to stop his motor vehicle, but was unfortunately sandwiched between the two-accident motor vehicle and later succumbed to his injuries.
  7. This was a material fact, that the Appellant had failed to disclose at the ex parte stage and proceeded to obtain ex-parte orders fraudulently against the Respondent company. They therefore had a right to challenge the judgment entered against them, as it was clear that they were not vicariously liable for the accident, that occurred. Section 3A of the *Civil Procedure Act* and Article 50(2) of *the Constitution* also afforded them a right to be heard and not to be condemned unheard and therefore the trial court could not be faulted for granting the orders sought to prevent abuse of the process of the court, bearing in mind that substantial justice dictated that illegalities perpetuated by the Appellants had to be remedied.

## **B. Analysis & Determination**

8. I have carefully considered, the Application filed and its Supporting Affidavit, and the Respondent's Replying Affidavit. I have also considered the submissions filed by the respective parties. The only issue that arises for determination is whether this court should declare as null and void and set aside the proceedings and all consequential orders dated 07.06.2023 and 22.06.2023. Further, the Applicant



seeks an order staying all proceedings pending in Machakos Cmcc No 301 of 2019 pending the hearing and determination of the Appeal filed.

9. The Appellant invites the court to set aside the interlocutory orders made by the trial court dated 07.06.2023 and 22.06. 2023. To do so would amount to conclusively determining a substantive issue at an interlocutory stage in violation of sound legal principles, which dictates that such orders can only be issued after the substantive Appeal has been heard and determined. See *Vivo Energy Kenya Limited vs Maloba Petrol Station & 3 others* (2015) eKLR and *Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola* (2009) eKLR, where it was stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.

10. I am also persuaded by the holding in the case of *Oliver Mwhaki Mugenda and Others v Okiya Omtataokoiti & 4 Others* [2016] eKLR: Where it was stated that;

“We have analyzed the ruling of the trial court delivered on 18<sup>th</sup> December 2015 and evaluated the same against the criteria in the persuasive dicta in the Indian decisions. Nowhere in the ruling does the trial judge give reasons for granting final orders at the interlocutory stage; no special circumstances have been explained to warrant the grant of final orders and the balance of convenience and question of irreparable injury have not been addressed. In our view, then, the ruling of 18<sup>th</sup> December 2015 does not pass the persuasive Indian threshold and criteria for granting final orders at the interlocutory stage.”

11. The second prayer sought is for a stay of proceedings in Machakos Cmcc No 301 of 2019 pending the hearing and final determination of this Appeal. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate’s Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6<sup>th</sup> Ed. Vol. 1 p. 750),

“grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.”

12. In short, a stay of proceedings is a radical remedy that is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000), the learned Judge (As he was then) held that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously (emphasis added).”



13. It is not in the interest of justice to stay the proceedings in the primary suit as the respondent's Application dated 30.05.2023 has not been heard and determined on merit. The appellants still have a chance to present their case before the trial magistrate for consideration on merit and if aggrieved by the trial court ruling on merit, can still Approach this court for reconsideration. No grave injustice will otherwise result if the orders sought are denied. Finally, it is my considered opinion that to stay proceedings will unnecessarily prolong litigation, which will be detrimental to all the parties herein and shall not promote the expeditious disposal of the primary suit pending before the trial court.

### **C. Disposition**

14. Considering all relevant facts herein, I do find that the Appellants Application dated 30<sup>th</sup> June 2023 lacks merit and dismiss the same with no orders as to costs.

15. It is so ordered.

**READ, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 17<sup>th</sup> day of December, 2024.

In the presence of: -

Mr. Mburu for Appellant

Ms. Oduk for Respondent

Susan/Sam - Court Assistants

