

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEALS DIVISION**

**APPEAL NO. E1296 OF 2024**

**MARS LOGISTICS LIMITED .....**

**APPELLANT**

**VERSUS**

**PHILIP MUEMA .....**

**RESPONDENT**

***(Being an appeal from the directions and orders of the Hon. Becky Cheloti (CM) issued on 30<sup>th</sup> October 2024 and 5<sup>th</sup> November 2024 in Nairobi CMCC No. 6181 of 2016)***

**JUDGMENT**

**Background**

1. The dispute before the trial court originated from a road traffic accident alleged to have occurred on or about 8th August 2013, involving motor vehicle registration number KAR 353Q and motorcycle registration number KMCW 503D.
2. The Respondent, who was the Plaintiff before the trial court contended that the Appellant, through its servant or agent, negligently caused the accident. The Respondent's claim was for material damage of Kshs. 182,016 in respect to his motor vehicle registration number KAR 353Q

following the said accident. Summons were served on 11th November 2016 and judgment in default of appearance entered on 3rd August 2017. Subsequent steps towards execution were undertaken, including issuance of notices and extraction of a decree.

3. The Respondent's attempts to execute the decree were however halted by the Appellant who filed an application dated 28<sup>th</sup> October 2024 seeking orders to, inter alia, stay the execution and set aside the judgment on the grounds that it did not have knowledge of the the suit until execution proceedings commenced in October 2024. The Appellant stated that it was never served with summons or pleadings and that it was not the owner or in possession of the motorcycle registration number KMCW 503D at the time of the accident, having allegedly sold it on 1st July 2012. It challenged the execution proceedings arguing that they were initiated several years after judgment.

4. The trial court however declined to issue ex- parte orders for stay of execution but instead directed that the application be heard inter-partes on 25<sup>th</sup> November 2024 thereby precipitating the filing of this appeal in which the Appellant listed the following grounds of appeal: -

- a) ***The learned magistrate erred in law and in fact by failing to certify the Appellant's Notice of Motion dated 28th October, 2024 urgent despite clear evidence that the Appellants***

**goods had been proclaimed on 22nd October, 2024 and attachment thereof is imminent.**

- b) The learned magistrate erred in law and in fact by failing to issue interim orders for Stay of execution on the Appellant's Notice of Motion Application dated 28th October, 2024 and Certificate of Urgency dated 4th November, 2024 despite evidence of pending execution against it.**
- c) The learned magistrate erred in law and in fact by failing to appreciate that the Appellant has a good defence which raises substantial triable issues for the Honourable court's determination and that allowing execution against the Appellant is extremely prejudicial against it and contrary to natural justice.**
- d) The learned magistrate erred in law and in fact by failing to consider that the Appellant denies the ownership of or possession of motorcycle registration number KMCW 503D on the date of the alleged accident on 8th August, 2013.**
- e) The learned magistrate erred in law and in fact by failing to consider that the Appellant denies service upon it of Summons to enter appearance or plaint and that it had no knowledge of the trial against it.**
- f) The learned magistrate erred in law and in fact by failing to consider that the Respondent's execution proceedings against the Appellant are time barred and therefore illegal.**
- g) That the learned magistrate failed to issue stay of execution orders restraining Betabase Auctioneers from attaching the Appellant's goods through its Warrants of Attachment and Sale in execution of the Judgment and decree of the Honourable Court passed on or about**

**3rd August, 2017 for the recovery of Kshs. 412,249.60 plus auctioneers charges of Kshs. 140,820.88.**

5. The Appellant seeks orders that: -

- a) THAT the directions and orders of the lower court issued on or about 30th October, 2024 and 5th November, 2024 be set aside or varied and that interim orders staying the execution of the judgment and decree of the lower court dated 3rd August, 2017 be granted forthwith.**
- b) THAT Betabase Auctioneers be barred from attaching or selling the Appellant's goods through its Warrants of Attachment and Sale in execution of the Judgment and decree of the Honourable trial Court delivered on or about 3rd August, 2017 for the recovery of Kshs. 412,249.60 plus auctioneers charges of Kshs. 140,820.88 or any other sum whatsoever.**
- c) That the costs of this Appeal be granted to the Appellant in any event.**

6. The Appeal was canvassed by way of written submissions which I have considered.

### **The Appellant's case**

7. The Appellant submitted that the suit was filed outside the statutory limitation period under Section 4 of the Limitation of Actions Act (Cap 22). It was argued that the cause of action arose in August 2013, while the suit was filed more than three years later.

8. The Appellant also contended that execution proceedings were commenced more than seven years after judgment (2017-2024), allegedly contrary to statutory provisions.
9. The Appellant denied being served with summons to enter appearance and asserted that it only became aware of the matter upon being served with proclamation notices by auctioneers.
10. The Appellant denied ownership or possession of motorcycle KMCW 503D at the material time and maintained that the motorcycle had been sold prior to the accident and therefore no liability attached to it.

### **The Respondent's Case**

11. The Respondent opposed the appeal and submitted that the suit was properly filed following the accident and that summons to enter appearance were duly served upon the Appellant as shown in the affidavits of service and annexures that they relied upon as proof.
12. It was the Respondent's case that judgment was regularly entered after the Appellant failed to appear or defend the suit after which the Respondent proceeded lawfully to execution.
13. The Respondent asserted that he duly communicated the judgment to the Appellant before taking steps to enforce the decree including requests for notice to show cause and eventual execution.

## **Analysis and Determination**

14. This being a first appeal, this Court is obligated to re-evaluate and re-analyze the material that was before the trial court and arrive at its own independent conclusion. In (See ***Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123***).
15. In the present appeal, however, the Court is not dealing with contested evidence but with the exercise of judicial discretion, and therefore the scope of interference is limited.
16. The issues arising for determination are:
  - a) Whether the trial court was justified in declining to grant ex parte orders for stay of execution;***
  - b) Whether the Appellant satisfied the threshold for grant of stay of execution;***
  - c) Whether this Court should interfere with the discretion exercised by the trial court.***
17. The principles governing stay of execution are set out under Order 42 Rule 6(2) of the Civil Procedure Rules, which provides that:

**“No order for stay of execution shall be made... unless—**

  - (a) the court is satisfied that substantial loss may result...**
  - (b) the application has been made without**

**unreasonable delay; and  
(c) such security... has been given...”**

18. It is trite that the grant of stay is discretionary. In ***Butt vs. Rent Restriction Tribunal* [1982] KLR 417**, the Court held:

***“The power of the court to grant or refuse an application for stay of execution is discretionary...”***

19. In ***Kenya Shell Ltd vs. Kibiru & Another* [1986] KLR 410**, the Court emphasized that substantial loss in its various forms is the cornerstone for granting stay.

20. The Appellant contended that the trial court erred in failing to grant ex parte stay orders despite the imminent attachment of its goods. It is however noteworthy that the trial court did not dismiss the application but instead directed that it be heard inter partes.

21. The question is therefore whether the refusal to grant ex parte stay orders amounted to an improper exercise of discretion.

22. Courts are generally cautious in granting ex parte orders that have the effect of halting execution of a lawful decree. Such orders are exceptional and must be justified by clear and compelling circumstances. In ***RWW vs. EKW* [2019] eKLR**, the Court stated:

***“The purpose of an application for stay of execution... is to preserve the subject matter... However, the court must balance this with the right of the successful litigant to enjoy the fruits of judgment.”***

23. My finding is that by directing an inter partes hearing, the trial court ensured that both parties would be heard and that the Respondent’s rights were not curtailed without a hearing as the application would be determined substantively.

24. I note that there is no indication that the trial court ignored relevant factors or applied wrong principles.

25. The Appellant alleged imminent execution, lack of service, existence of a good defence and illegality of execution. My finding is that while these issues may raise arguable grounds, they required evaluation through evidence, which could only properly be done at an inter partes hearing.

**26.** The Appellant did not demonstrate that irreparable or exceptional harm would occur before the inter partes hearing or that the situation was so urgent as to warrant bypassing the Respondent.

27. The principles guiding interference with discretion were stated in ***Mbogo vs. Shah [1968] EA 93*** where the court held that an appellate court will not interfere with

the trial court's exercise of discretion unless it is satisfied that the judge misdirected himself or that his decision is clearly wrong.

28. In this case I find that the trial court acted within the law, exercised caution and preserved both parties' rights. I further find that there is therefore no basis for this Court to interfere with the trial court's discretion.

29. Upon re-evaluating the record and the applicable law, this Court finds that the trial court properly exercised its discretion and that the refusal to grant ex parte stay orders was justified. The direction for inter partes hearing was appropriate.

30. In conclusion, I find that the instant appeal is not merited and I therefore dismiss it with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**HON W. A. OKWANY**  
**JUDGE**

**In the presence of**  
**Ombati for Appellant**  
**No Appearance for Respondent**  
**Abdirzak - Court Assistant**