



REPUBLIC OF KENYA



KENYA LAW
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Ndutumi Auctioneers v Kwale International Sugar Co Ltd (Environment & Land Case E001 of 2023) [2024] KEELC 3782 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E001 OF 2023**

AE DENA, J

APRIL 29, 2024

BETWEEN

NDUTUMI AUCTIONEERS APPELLANT

AND

KWALE INTERNATIONAL SUGAR CO LTD RESPONDENT

RULING

1. The Notice of Motion subject of this ruling is dated 24/8/23 seeks for the following prayers; -
 1. Spent
 2. Pending the hearing and determination of this application inter parties, this honourable court be pleased to stay execution of orders issued on 23rd August 2023 in Kwale Case No E136 of 2023 [Kwale International Sugar Co Ltd Vs Ndutumi Auctioneers.](#)
 3. Pending hearing and determination of this application interparties, this honourable court be pleased to stay execution of the orders issued on 14th July 2023 in Kwale Case No E136 of 2023 [Kwale International Sugar Co Ltd Vs Ndutumi Auctioneers.](#)
 4. Pending hearing and determination of this application interparties, this honourable court be pleased to stay proceedings in Kwale Case No E136 of 2023 [Kwale International Sugar Co Ltd Vs Ndutumi Auctioneers.](#)
 5. Pending hearing and determination of this application interparties, this honourable court be pleased to discharge and stay orders issued on 23rd August 2023 directing the Inspector General of police and/or any other police officer from arresting Leonard Joseph Mwangi and/or any proprietors of Ndutumi Auctioneers.
 6. Pending hearing and determination of this application interparties, this honourable court be pleased to discharge and stay orders issued on 23rd August 2023 directing Officer Commanding



Station Changamwe Police and/or any other police officers from tracing and delivering Motor Vehicles Registration Numbers KBZ 235B, KBZ 234B and KBZ 498J to Diani Police Station.

7. Pending the hearing and determination of this appeal, this honourable court be pleased to stay execution of the orders issued on 23rd August 2023 in Kwale Case No E136 of 2023 *Kwale International Sugar Co Ltd Vs Ndutumi Auctioneers.*
 8. Pending the hearing and determination of this appeal, this honourable court be pleased to stay execution of the orders issued on 14th July 2023 in Kwale Case No E136 of 2023 *Kwale International Sugar Co Ltd Vs Ndutumi Auctioneers.*
 9. Pending the hearing and determination of this appeal, this honourable court be pleased to stay court proceedings in Kwale Case No E136 of 2023 Kwale International Sugar Co Ltd Vs Ndutumi Auctioneers.
 10. Pending the hearing and determination of this appeal, this honourable court be pleased to discharge and stay its orders issued on 23rd August 2023 directing the inspector general of police and/or any other police officer from arresting Leonard Joseph Mwangi and/or any proprietors of Ndutumi Auctioneers.
 11. Pending hearing and determination of this Appeal, this honourable court be pleased to discharge and stay orders issued on 23rd August 2023 directing Officer Commanding Station Changamwe Police and/or any other police officers from tracing and delivering motor vehicles registration numbers KBZ 235B, KBZ 234B and KBZ 498J to Diani Police Station.
 12. Costs of this application be awarded to the Applicant.
2. The application is premised upon grounds on its face and the supporting affidavit of Leonard Mwangi and who stated that on 14/7/2023 the Respondent filed before the Resident Magistrate Kwale an application and plaint whose orders were granted on 23/8/2024 while at an interlocutory stage. The said orders were to lead to his arrest and are to date still in place. The deponent stated that prior to grant of the said orders, the Appellant had filed an application challenging the pecuniary jurisdiction of the Resident Magistrates Court but the same was never addressed by the court.
 3. According to the Applicant, the subject matter leading to filing of the lower court suit and from which the warrants of arrest arose, were issues before the High Court in ELC No 220 of 2011 and that issues pertaining execution of the said warrants should have been raised in the said suit. That the lower court ignored to consider the issue of its jurisdiction and proceeded with the matter notwithstanding. The Applicant maintains that the orders issued on 23/8/2023 were improper and that a notice to show cause had not even been issued. That previously, the Respondent herein had filed a similar application before Justice Kibunja in ELC No 220 of 2011 but which orders were declined. That a similar motion was also filed before Justice Matheka in the same ELC file at Mombasa but the orders were not granted as well. The Respondent yet again filed a similar motion before the court in Msambweni designated as Msambweni Misc. Civil Application No E006 of 2023 but the orders were denied. That it is clear that the Respondent was forum shopping. The Appellant states that under the circumstances it is fair and just that the orders sought do issue.

Response

4. In response to the application, the Respondent filed a replying affidavit sworn by Amos Suge its legal officer. It is stated that the orders issued by the lower court were and are still regular. That in the event that the Appellant had an issue with the same he should have filed a review. The Respondent averred that the Appellant had wilfully disobeyed the court orders issued on 14/7/2023 while the same were



clear and un-ambiguous. On the issue of jurisdiction, the Deponent states that the suit before the lower court was for an unliquidated claim in respect to the Appellant's illegal unlawful and improper actions which falls within the jurisdiction of the trial court. The issue of pecuniary jurisdiction is disputed and contested.

5. The Respondent states that according to the affidavit in support of the application sworn by Leonard Mwangi, the ELRC suit upon which the Appellant purports to attach the motor vehicles herein does not exist. That Mombasa ELC No 220 of 2011 is a distinct cause of action. That further the Appellant did not annexe any notification of sale of movable property as proof that indeed execution was due. At paragraph 25 it is stated that the subject motor vehicles have since been returned to the Respondents thus orders being sought have been overtaken by events. That according to the provisions of Article 159 of *the Constitution* the court is enjoined to render just, expeditious, proportionate and at affordable cost to parties. The court is urged not allow the stay orders. That it will be in the interest of justice for the court to dismiss the application herein with costs.

Further Affidavit

6. The Appellant filed a further affidavit sworn by Leonard Mwangi and filed before court on 4/10/2023. He avers that he is the registered proprietor of the Appellant. That in addition to the affidavit sworn on 24/8/2023 it was his view that he who comes to equity must do so with clean hands. That the Respondent had failed to inform the court that there was another pending motion before the ELC Court in Mombasa.
7. That the orders issued were not regular and the same were null and void ab initio. That he was not satisfied with the orders granted on 14/7/2023 and filed for an application to set the same aside. That the court violated the principles of natural justice by actively participating in the suit. At paragraph 20 of the affidavit, it is averred that the motion has not been overtaken by events, the warrants of arrest are still in place. The vehicles being released does not render the motion as having being overtaken by events as the court can discharge the same and order that the vehicles are handed back.

Submissions

8. The application was canvassed by way of written submissions. The Appellant's submissions are on record having been filed on 4/10/2023. The Respondent's submissions were filed before court on 1/11/2023. Parties also highlighted on the submissions orally on 29/11/23. The court has considered the submissions in its determination herein.

Determination

9. I have perused the orders issued by the court on 23rd August 2023. The same are in the following terms;
 1. That the Officer Commanding CHangamwe Police Station or any other police officer within the Republic of Kenya is authorised to trace the location of motor vehicles;
 - a. KBZ 235B;
 - b. KBZ 234 B; and
 - c. KBZ498 J

And upon such tracing take possession of the same and forthwith have been ferried by whatever means to the premises of Diani Police Station.



2. That a warrant of arrest is issued against the Directors/managers/proprietors of Ndutumi Auctioneers to be effected by Inspector General of police or any other police officer within the Republic of Kenya and have them presented before this court.
 3. That a warrant of arrest issued against Leonard Joseph Mwangi to be effected by the Inspector General of police or any other police within the Republic of Kenya and have him presented before this honourable court.
 4. That this matter shall be mentioned on 6/9/2003.
10. The Appellant seeks that the above orders which are similar to the orders issued on 14/7/2023 be stayed pending the hearing and determination of the instant appeal and further that the proceedings before the lower court in Kwale CMCC E136/2023 and which form the basis of this appeal be stayed too.
11. The principle of stay of execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 and were outlined in *Butt V Rent Restriction Tribunal* 1979 eKLR (Madan, Miller and Porter JJA) the court stated as follows when considering an application for stay of execution:
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- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 - iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
 - iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement".
12. The power of the court to issue the said orders is discretionary and the court while exercising the same ought to consider that the applicant will not suffer substantial loss in the event that the orders sought are not granted. It is also upon the Applicant to make a deposit of security for costs while seeking orders of this nature. However, this court is of the opinion that the main purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the litigating parties and the circumstances of the case. The Court of Appeal in *RWW vs. EKW* (2019) eKLR conveyed itself on this as hereunder: -
- "The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs".



13. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.
14. I have perused the contents of the affidavit in support of the application herein and the response to the application. The Respondent avers that the orders of stay sought have been overtaken by events. That the motor vehicles were already released as per the order granted by the lower court. The Appellant/Applicant on the other hand states that despite this, the court can revise the orders granted earlier and order for the motor vehicles to be handed back. In my view, the issue for handing back the motor vehicles is a substantive order that cannot be granted at an interlocutory stage. Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank* Nairobi (Milimani) HCCC No. 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.
15. The issue of the circumstances under which the motor vehicles herein were attached is highly contested. The court has reservations towards making further orders with regards to the said vehicles at this interlocutory stage. I say so because it will be difficult to make further orders without going into the merits of the appeal filed before this court. Nevertheless, parties should be informed that upon hearing of the appeal, the court will apply itself on the motor vehicles and issue the appropriate orders.
16. What about the order sought for stay against the order directing the Inspector General of police and/or any other police officer from arresting Leonard Joseph Mwangi and/or any proprietors of Ndutumi Auctioneers. The court opines that an appeal has been filed against the orders of Hon. Kiongo which included this order of arrest. Jurisdiction to issue the same has been questioned. This can only be determined after the appeal is heard. As it is the orders of Hon. Kiongo are still alive for purposes of the record and therefore the apprehension by the Applicant. Arrest of an individual goes to the very core of their constitutional right, it is no wonder the threshold for contempt of court is higher than that of a balance of probabilities. In my view the apprehension is genuine.
17. I am guided by the fact that the mission of every court is to render substantive justice and to ensure that no party will suffer any prejudice. This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, where it stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
18. On the prayer for stay of proceedings, the threshold for stay of proceedings was affirmed in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR where an excerpt from the Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, was quoted as follows;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not



be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue”.

19. In the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 the court persuasively stated thus;

“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”.

20. Guided by the law and above judicial decisions this court will therefore apply itself to whether the reasons or grounds advanced by the applicant in support of the application are sufficient, whether it would be in the interest of justice to grant such orders which will necessitate weighing the pros and cons of granting or denying the same. The circumstances of the case and its history would also be considered in this regard vis a vis the overriding objectives of the *Civil Procedure Act* and *Environment and Land Court Act*.

21. The Applicant states that first the lower court had no pecuniary jurisdiction to issue the disputed orders herein. Secondly, that the warrants in question emanated from another suit before the ELC Court in Mombasa and as such two courts could not be dealing with similar issues with one being the High Court and the other a court of lower status. The court being inclined to grant the orders for stay of the warrants of arrest herein, the court is also keen on having the issues as raised resolved once and for all. For that reason, it is in the interest of justice that the proceedings before the lower court be stayed pending the hearing of the appeal. I believe, the appeal once determined will put all these issues to rest.

22. The upshot of the foregoing is that the application dated 24/8/2023 is hereby allowed in the following terms; -

1. Pending the hearing and determination of this appeal, this honourable court be and is hereby pleased to stay court proceedings in Kwale Case No E136 of 2023 Kwale International Sugar Co Ltd Vs Ndutumi Auctioneers.
2. Pending the hearing and determination of this appeal, this honourable court be pleased and is hereby pleased to stay the orders issued on 23rd August 2023 directing the Inspector General of police and/or any other police officer from arresting Leonard Joseph Mwangi and/or any proprietors of Ndutumi Auctioneers.
3. Costs of the application be in the cause.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED THIS 29TH DAY OF APRIL 2024.

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A.E DENA



JUDGE

No appearance for the Applicant.

Ms. Maina Holding brief for Mr. Kulecho for the Appellant/ Respondent

Ms. Asmaa – Court Assistant

