



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO E178 OF 2021

THREE BROTHERS VEHICLES & SPARES KENYA LTD.....APPLICANT

VERSUS

MARGARET MONGINA KWABA.....RESPONDENT

RULING

1. By its Miscellaneous Application dated 4th October 2021, the Applicant seeks an order of stay of execution of the orders and decree dated 1st October 2021 arising from *Milimani CMEL No E1009 of 2020: Margaret Mongina Kwaba vs Three Brothers Vehicles and Spares Kenya Limited*.
2. The Applicant further seeks an order setting aside the default judgment issued in *Milimani CMEL No E1009 of 2020: Margaret Mongina Kwaba v Three Brothers Vehicles and Spares Kenya Limited* and re-opening of the case, with leave to the Applicant to file its defence, list of documents and witness statements.
3. In addition, the Applicant asks that the matter be placed before another Magistrate for determination.
4. The Application is supported by an affidavit sworn by the Applicant's Counsel, Kagimu Evans Clapton and is based on the following grounds:
 - a) The Applicant is under imminent danger of execution as a result of denial of the right to be heard by the Trial Magistrate, who issued an *ex parte* order of execution on 1st October 2021, despite the fact that the Applicant had filed an application under Certificate of Urgency;
 - b) The impugned order dated 1st October 2021 was issued directing the Commanding Officer, Industrial Area Police Station, to authorise officers to provide security to the Auctioneer to break in and remove spares to recover a decretal sum of Kshs. 374,146.01 from the Applicant;
 - c) Prior to the order dated 1st October 2021, the Applicant had, on 15th September 2021, been served with an order dated 1st September 2021, to pay Kshs. 374,146.01;
 - d) As a result of that order and decree, Icon Auctioneers served the Applicant with Warrants of Attachment of Moveable Property, in execution of Decree for Money, on 15th September 2021, to be executed at the expiry of fifteen (15) days;
 - e) The Applicant filed an application under Certificate of Urgency dated 23rd September 2021, vide the e-filing system, seeking *inter alia*, setting aside the orders, decree and judgment plus stay of execution pending the determination of the Application;
 - f) Despite the urgent and complete e-filing of the above application, it was ignored and/or not attended to by the Trial Court. No orders or directions were issued by the Court;
 - g) The Applicant made numerous attempts to have the application placed before the Trial Magistrate for orders, but all of them failed. The Applicant, through its Advocates on record, sent email communication, seeking that the file be placed before the Court for urgent direction, but the communication went unanswered. Phone conversation revealed that the file was missing but guaranteed that since the application was in the system, it would be accorded priority;

h) On 30th September 2021, the Respondent filed an application in the same e-filing system, which was attended to urgently and orders granted the next day by the Trial Magistrate, despite the fact that the file was missing;

i) All this was done disregarding the urgent applications on record for 5 days, which were followed by daily phone calls and emails;

j) It is a generally accepted principle of equity, that first in time-first in law. Therefore, there was no way the Respondent's application could take prominence over the Applicant's application, which was filed on 23rd September 2021;

k) The orders issued on 1st October 2021 were in total disregard of the Applicant's right to be heard;

l) An order issued in violation of the Applicant's right to be heard is null and void;

m) Unless the orders issued by **Hon. Muholi, PM** on 1st October 2021 are stayed, there is an imminent danger of execution, without affording the Applicant an opportunity to be heard;

n) It is in the interest of justice that, the orders issued by **Hon. Muholi, PM** dated 1st October 2021, be stayed;

o) Unless the orders issued by **Hon. Muholi, PM** on 1st October 2021 are stayed, the Applicant's right to be heard will be grossly and irredeemably violated without any opportunity to defend.

5. The Respondent filed a replying affidavit on 1st November 2021. He terms the present application as incompetent, misconceived, bad in law and an abuse of the court process.

6. The Respondent counters the Applicant's assertion that it had filed an application at the lower court to set aside the judgment. He states that he was not served with an application dated 23rd September 2021.

7. The Respondent dismisses the Applicant's assertion that it was denied the right to be heard by the Trial Magistrate, as mere allegations.

8. The Respondent accuses the Applicant of sleeping on its right to be heard by failing to enter appearance and defend the claim after having been served with summons and pleadings with respect to *Cause No E1009 of 2020*. The Trial Court therefore issued directions on 7th April 2021 that the matter proceeds as an undefended claim.

9. The Respondent states that his application for execution was made and allowed on merit.

10. In dealing with matters arising from the Magistrates' Courts, this Court exercises appellate jurisdiction. There is no appeal before the Court. Instead, the Applicant seeks substantive orders sought in his application filed before the Trial Court, which it claims was not considered.

11. There is no legal basis for this Court to take over and determine a substantive matter that is pending before the Magistrate's Court. Moreover, the accusations that the Trial Court ignored the Applicant's application were not supported by any evidence.

12. *Prima facie*, the application before this Court is incompetent in law and the only thing to do is to strike it out with costs to the Respondent.

13. The interim orders granted on 5th October 2021 are vacated.

14. It is so ordered.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER 2021

LINNET NDOLO

JUDGE

Appearance:

Miss Lupoye h/b Mr. Clapton for the Applicant

Mr. Kimani for the Respondent