



Vegpro Kenya Ltd & another v Wakungu alias Nanzala (Civil Appeal E085 of 2024) [2025] KEHC 335 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E085 OF 2024**

**RK LIMO, J
JANUARY 24, 2025**

BETWEEN

VEGPRO KENYA LTD & ANOR APPELLANT

AND

SARAH JEMUTAI WAKUNGU ALIAS NANZALA RESPONDENT

(Being an appeal arising from Kitale CMCC NO.E083/2024 and Kitale CMCC NO.E084/2024 Before HON.M.A.OCHIENG, PRINCIPAL MAGISTRATE)

RULING

1. The applicants herein have moved this court vide a Notice of Motion dated 3/2/2024 seeking the following reliefs namely;
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That this court invokes its supervisory jurisdiction over the proceedings in respect to Kitale CMCC No.84 of 2024 by calling for the said file in order to determine the application herein.
 - v. That this court be pleased to transfer Kitale CMCC Nos.83 and 84 of 2024 to another court of competent jurisdiction to handle them.
2. The applicants have listed several grounds in respect to the prayers sought in their application. This court will only highlight and consider the grounds in respect to prayer 4 and 5 because they are relevant and subject of this ruling.



3. The applicants contend they were sued by the respondent vide Kitale CMCC No.84/24 but claim that they were not served with summons and plaint. It is their position that the respondent proceeded to obtain judgment in default of appearance and proceeded to execute by attaching their Motor Vehicle Reg. No. KDM 167D.
4. They aver that it was only upon attachment that they came to learn of existence of a suit in court vide CMCC No.84/24 adding that as they pursued an application dated 18/11/24 to set aside exparte judgment, they learnt from the auctioneer that there existed a related matter to wit Kitale CMCC No.83/24.
5. The applicants aver that the two suits are related as they arose from the same cause of action, a road traffic accident involving applicants' motor vehicle Reg. No. KBL 829A and motor cycle Reg No. KMFT 287S.
6. The applicants have contested the respondent's claim that they were served with the summons and plaint in both cases and that issue is a subject of applications dated 18/11/24 in Kitale CMCC No.E084/24 and the other dated 27th November 2024 in Kitale CMCC No.E083/24.
7. The applicants have exhibited both applications in this application vide supporting affidavit by Frankline Zanda sworn on 3rd December, 2024.
8. The applicants through their learned counsel Mr. Wekhomba advocate, asked this court to call for the 2 lower court files with a view to satisfying itself on its correctness, regularity and fairness in the proceedings thereof.
9. Mr. Wekhomba submits that when they filed an application dated 18/11/24 in Kitale CMCC No.84/24, the trial court declined to grant temporary relief of stay of execution and instead gave them a date for inter parties hearing on 28/11/24 and when they appeared before the trial court on that day, the respondent informed the trial court that the attached motor vehicle had already been sold.
10. He avers that they had in the meantime filed another application dated 27/11/2024 in Kitale CMCC No.E083/24 also under certificate of urgency and that unlike the previous application dated 18/11/24 in Kitale CMCC No.84/24, this time the trial court granted temporary orders of stay of execution.
11. The applicants read mischief and inappropriety on the part of the trial court arguing that whereas there was no real danger in Kitale CMCC No.83/24 of imminent sale of their property, the trial court granted a stay of execution, but when the applicant earlier faced great risk of sale of attached motor vehicle in Kitale CMCC No.84/24, the trial court failed to grant a temporary stay to forestall the imminent sale.
12. They also fault the trial court for giving them a far off date in February 2025 for inter parties hearing stating there was no fairness.
13. They claim that it was not proper for the trial court to give different order over similar applications and have expressed apprehension that justice will not be served if the same court entertains their two applications to set aside exparte judgments.
14. They have therefore sought to have the two applications be heard and determined by a different court.
15. The respondent had opposed this application through a replying affidavit sworn on 17th December 2024.
16. The respondent insists that the applicants were properly served with summons to enter appearance and plaint in both cases in the lower court but failed to enter appearance.



17. She insists that the process of entry of judgment in default of appearance and defence and the execution process was proper and lawful.
18. She depones that the attached motor vehicle KDM 167F was sold on 26/11/24 as there was no order barring the sale in Kitale CMCC No.84/24.
19. The respondent faults the applicants for not appealing against the failure by the trial court to grant them a temporary relief.
20. The respondent through learned counsel Mr. Savatia submit that the 2 applications in the lower court in Kitale CMCC No.84/24 and 83/24 are pending and the trial court has not heard them. She faults the applicants for jumping the gun and urges them to await the outcome of the application before approaching this court adding that any aggrieved party has a right to appeal.
21. She further avers that the trial court cannot be faulted for exercising her discretion in dealing with the 2 applications differently.
22. This court has considered this application and the grounds advanced. I have considered the response made by the respondent. This court has also called for the lower court files Kitale CMCC No.83/24 and 84/24 and I have perused through the applications dated 27/11/24 in Kitale CMCC No.83/24 and 18/11/24 in Kitale CMCC No.84/24. This court has had a cursory look on the proceedings in the two files from the lower court and notes that in Kitale CMCC No.E084/24, the trial court on 19/11/2024 entertained an application dated 18/11/24 made by the applicants seeking inter alia a temporary stay of execution. The trial magistrate directed service to be effected and listed the application for inter partes hearing on 28/11/24. The trial court did not grant any stay on 19/11/24 despite evidence of attachment and the imminent sale of the attached applicants' motor vehicle by Eshikhoni Auctioneers.
23. The trial court however in Kitale CMCC No.E083/24, when moved by the applicants through a Notice of Motion dated 27/11/24, issued a temporary stay on 27/11/24 and listed the matter for inter partes on 23/1/25. I have gone through the Notice of Motion dated 27/11/24 and this court finds that contrary to the applicants' claim that there was no imminent danger of execution, there was danger of execution because the respondent had also applied for execution and the warrant of execution had been issued and proclamation done through the same auctioneers, Eshikhoni Auctioneers. The trial court exercised her discretion and granted temporary relief to the applicants which relief is still in force and the applicants should be glad to enjoy that temporary order pending the hearing and determination of their application dated 27/11/24. This court notes that the application was due for hearing before the lower court on 23/1/25 as I write this ruling.
24. It is however quite apparent looking at the two applications in the lower court i.e. in Case No.83/24 and 84/24 that the applications are similar in nature and contents. It is quite difficult to separate the two applications because the issues raised are quite similar. In both applications the applicants seek to set aside exparte judgment and all consequential orders citing non service. They also seek for stay of execution and the only distinction is that in 84/24, the applicants are in addition seeking release of the attached motor vehicle and lifting of attachment. In my considered view, the substantive prayer in both applications is to set aside the exparte judgment. The trial court in both occasions must have weighed its mind to the fact that execution had already taken place because in both matters the applicants exhibited warrants of attachments and proclamations carried out. It is therefore difficult to understand how the trial court exercised her discretion in two similar scenarios but made different finding in regard to a temporary stay of execution.
25. It is only on that basis that this court finds that the apprehension by the applicants is well grounded.



26. In the interest of justice and for justice to be seen to be done it is fair that both applications in the 2 cases be consolidated and be handled by a different court with competent jurisdiction. The respondent would suffer no prejudice in that event.

In the premises this court finds merit in the application dated 3/12/24 and is allowed in terms of prayer 5. The 2 applications dated 18/11/24 in Kitale CMCC No.E084/24 and 27/11/24 in Kitale CMCC No.E083/24, will be consolidated and mentioned before the duty court on 28/1/25 for further orders/directions. Costs of this application shall be in consolidated applications.

RULING DATED, SIGNED AND DELIVERED, AT KITALE THIS 24TH DAY OF JANUARY , 2025.

HON.JUSTICE R.K. LIMO

KITALE HIGH COURT

24/01/2024

Ruling delivered in open court in the presence of:

Wekhuyi holding brief for Savatia, Counsel for the Respondent.

Oduor holding brief for Wesonga, Counsel for the Applicants.

Chemosop/Duke – Court Assistants.

