



REPUBLIC OF KENYA



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**Nzula v Mutuku (Civil Appeal 28 of 2019)
[2024] KEHC 1911 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL 28 OF 2019
RK LIMO, J
FEBRUARY 27, 2024**

BETWEEN

MIRRIAM NZULA APPELLANT

AND

COLLINS MUSYOKA MUTUKU RESPONDENT

JUDGMENT

1. This is an appeal preferred by Mirriam Nzula the appellant herein against the Ruling of Hon. S. Mbungi Chief Magistrate delivered on 30th April 2019 vide Kitui CM's Court Civil Case No 88A of 2017.
2. The background of the case at the trial court was based on a road traffic accident which occurred on 22nd September 2016 involving Motor vehicle Registration No KCH 269Z belonging to the Respondent and in which the appellant was traveling as a fare paying passenger. The appellant blamed the Respondent for negligence and the Respondent never disputed the claim. The trial court entered judgment against the Respondent on 19th December 2017 and awarded the appellant Kshs 4,969,780/=.
3. The Respondent filed an application dated 6th March 2018 seeking stay of execution and setting aside of the trial court judgment. The application was opposed by the Appellant vide a Replying Affidavit dated 8th March 2018. The Deputy Claims Manager, Direct Line Assurance Company Kevin Njure, also filed a Replying Affidavit sworn on 16th April 2018 supporting the Respondent's position on issuance of orders of stay of execution. The trial court considered the application and vide its ruling on 21st June 2018 it dismissed it on grounds that the affidavit in support of the application was sworn by the Claims Manager of Direct Line Assurance Company who was not party to the suit, basically, that the doctrine of subrogation had not crystalized.



4. After dismissal of the application dated 6th March 2018, the Respondent filed another application dated 13th July 2018 before this Court where he sought orders as follows, setting aside of the judgment delivered on 19th December 2017, leave to appeal out of time against the judgement of 19th December 2017 and the subsequent ruling of 21st June 2018 and stay of execution of the decree issued pursuant to the judgment of 19th December 2017. This Court considered the application and found as follows, that the Respondent had failed to give sufficient explanation of the seven months delay in filing of the application, this Court also found that the Respondent's appeal had a low chance of success and in the end, the High Court found that the application was devoid of merit and proceeded to dismiss it vide its ruling dated 13th November 2018.
5. The Respondent went back to the trial court after his application was dismissed by this Court and filed another application dated 25th January 2019 where he pleaded that his insurance company had paid the sum of Kshs 2,815,000/- leaving a balance of Kshs 2,693,089/- which the appellant herein was moving to recover by attaching his motor vehicle registration No KCH 296 C. The Respondent was therefore seeking orders of stay of execution and a further order allowing the Appellant (judgment debtor) to liquidate the balance of the decretal amount of Kshs 2,693,089/- in instalments of Kshs 50,000/- until payment in full. The Appellant opposed the application vide a Replying Affidavit dated 7th February 2019.
6. The trial court entertained the said application and through a ruling dated 30th April 2019, now impugned in this appeal, rendered itself as follows;
 - i. The applicant to pay Kshs 300,000/- being part of the decretal sum as assessed on 30th January 2019 (attached in the warrant of attachment dated 30/1/2019) to the Respondent within the next 7 days from the date of ruling.
 - ii. The balance of the decretal amount be paid in instalments of Kshs 50,000/- per month w.e.f 31/5/2019.
 - iii. The balance of the decretal amount shall cease to accrue interest from the date of this ruling
 - iv. That the applicant shall deposit the log book of the motor vehicle KCH 296C with the court to act as security for the balance of the decretal amount.
 - v. That upon compliance with Order 4 above, Base auctioneers to release the motor vehicle registration No KCH 296 C to the applicant.
 - vi. The Base auctioneer to file his bill of costs for assessment by the court.
 - vii. Each party to bear its costs.
7. The appellant felt dissatisfied with the above ruling and filed this appeal raising the following grounds namely;
 - i. The learned magistrate erred in law and in fact in allowing the respondent to liquidate the decretal sum in monthly instalments of Kshs 50,000/- per month which amount was unreasonably low, unjustified and not supported by any law or evidence of means.
 - ii. The learned magistrate erred in law and in fact in allowing the respondent to liquidate the decretal sum in monthly instalments of Kshs 50,000/- per month and which would unreasonably take long period to satisfy the decree thus occasioning injustice on part of the appellant.



- iii. The learned magistrate erred in law and fact in allowing the respondent to liquidate the decretal sum in instalments when he already has property which could be attached and had indeed been attached to satisfy the decretal sum and/or a substantial part of it.
 - iv. That the learned magistrate erred in law and fact by ordering that the interest shall cease to accrue on the balance of the decretal sum which order had no legal basis.
 - v. The learned magistrate erred in law and in fact in ordering that interest shall cease to accrue on the balance of the decretal sum which order amounted to sitting on his own appeal as the trial court.
 - vi. The learned magistrate improperly exercised his discretion improperly and unjustifiably by ordering that the attached motor vehicle be released when it had been legally attached in satisfaction of the court decree.
 - vii. The learned magistrate erred in law and in fact in stopping attachment and/or execution a legal process without any legal basis at all.
 - viii. The learned magistrate erred in law and fact in wholly rejecting submissions by the appellant and adopting the submissions by the respondent.
 - ix. The learned magistrate erred in law and in fact in entirely allowing the application dated 25/1/2019 when there was no valid grounds/and or reasons advanced in support of the same.
8. In her submissions made through counsel the appellant faults the trial court contending that the trial court entertained the matter when the issues raised in her view were *res judicata*. She avers that the Respondent never preferred any appeal against the judgment entered against him.
9. The appellant takes further issue with the trial court's decision and submits that the trial court awarded several orders which were not pleaded or prayed for being cessation of accrual of interest, deposit of the log book in court and release of motor vehicle.
10. The appellant submits that there was no material placed before the trial court to warrant by payment through instalments of Kshs 50,000/- and decries that she would have to wait for five years for the decretal amount to be paid in full. Counsel has cited the case of *Daniel Obata Osemo v Exon Investments Limited* (2021) Ltd eKLR where the ELRC court set aside a ruling of the trial court which allowed liquidation of decretal amount with consent. The ELRC Court on Appeal held as follows;

“In making an order for payment of a decretal sum by instalments, and especially where the decree-holder has not consented to liquidation of the decretal sum by instalments, a court must act on sufficient cause that the judgment debtor is obligated by the afore-cited law to show. It was held in the case of *Keshavji Jethbbhai & Bros Limited v Saleh Abdalla* [1959] EA 260 as follows:-

“...it is laid down that the mere fact that the debtor is heard pressed or unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily should be required to show his bonafides by urging prompt payments of a fair proportion of the debt.... prompt payment of a fair proportion of the debt is a condition precedent for the granting of the discretion of granting instalments. Each case has to be decided on its own merit, the predominant fact being of course the bonafides of a debtor.”



The Respondent did not, in asking the court to allow it to liquidate the decretal sum by instalments, disclose its financial status to the court, and did not demonstrate that it could not pay the entire decretal sum at once. Indeed, the Respondent did not discharge the obligation of establishing sufficient cause, which rested on it”.

11. The Respondent has not opposed this appeal but nevertheless this court finds it just to determine it on merits.
12. The Appeal relates to the trial court’s orders issued following dismissal of two application of stay before the trial court and the High Court. The trial court further ordered for liquidation of the decretal sum and payment of the same in monthly instalments of Kshs 50,000/- until payment in full, cessation of accrual of interest, deposit of log book in court and subsequent release of the respondent’s motor vehicle.
13. The issues for determination are;
 - i. Whether the Notice of Motion application dated 25th January 2019 is res-judicata
 - ii. Whether the trial court erred in allowing application dated 25th January 2019 and issuing orders therein.

(i) Whether the Notice of Motion dated 25.1.2019 was res judicata

14. It is evident that the application dated 25.1.2019 inter alia sought stay of execution but that was not the substantive prayer. The substantive prayer thereof was prayer 5 which was a prayer to be allowed to liquidate the decretal amount by monthly instalments of Kshs 50,000/= per month until payment was made in full. The other prayers for stay for release of attached motor vehicle were ancillary to the main prayer to pay by instalments. The trial court had not entertained an application to liquidate the decretal amount by monthly instalments. To that extent, the application dated 25.1.2019 could not strictly be termed *res judicata*.

(ii) Whether the trial court had basis to give or make the orders it made

15. This court has looked at the prayers sought in the application dated 25.1.2019 visa viz the reliefs/orders made by trial court. The trial court in my fell into error when it went ahead to give orders which were not sought. The order stopping accrual of interest was erroneous because apart from the fact that it was not sought, there was no legal basis for such an order, Interest accruing from a decree only ceases upon satisfaction of a decree.
16. The order to release the motor vehicle upon deposit of security was also not hinged on the prayers sought.
17. I also find that the trial court exercised its discretion injudiciously because ordering the decretal amount to be liquidated by monthly instalment of Kshs 50,000/= would take over 70 months to satisfy the decree which was a bit unjust to the appellant given the circumstances.
18. In the premises this court finds merit on this appeal. The ruling of the court dated 30.4.2019 is set aside. In its place this court given the prayers sought in this appeal makes the following orders:
 - (a) The Respondent shall liquidate the remaining decretal amount by monthly instalments of Kshs 100,000/= (One hundred thousand) per month payable from 10th March 2024 thereafter every 10th of succeeding month till payment in full. In default of any amount remaining the balance shall be payable in full and the appellant will be at liberty to execute accordingly. The



appellant shall also have costs of this appeal and interest of the remaining amount at court rates until payment is made in full.

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF FEBRUARY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

