



**Al-Husnain Motors Limited & another v Kiprono (Civil Appeal  
18 of 2023) [2024] KEHC 1624 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1624 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CIVIL APPEAL 18 OF 2023  
JRA WANANDA, J  
FEBRUARY 23, 2024**

**BETWEEN**

**AL-HUSNAIN MOTORS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JAKACHA AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ISAAC KIPKEMOI KIPRONO ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 13/2/2023 filed through Messrs Manani, Lilan, Mwetich & Co., the Respondent seeks the following orders;
  - i. That the Memorandum of Appeal dated 6/12/2022, be hereby struck out for non-compliance with this Court's order of 29/12/2022.
  - ii. That costs of this Application and Appeal to the Respondent/Applicant.
2. The Application is expressed to be brought under Order 39(6)(1), Section 42(6)(2) and 7(1) of the Civil Procedure Rules, Section 1A, 1B, 3A and 65(1) of the *Civil Procedure Act*, Cap. 21 and "all other enabling provisions". The Application is premised on the grounds appearing on the face thereof and is supported by the Affidavit sworn by the Respondent's Counsel, Mr. R.R. Mwetich.
3. In his said Affidavit, Mr. Mwetich, Advocate deponed that the Appellants sought an order for stay of execution of the Judgment delivered in Iten PMCC No. 3 of 2018 pending hearing of an Application seeking leave to file this Appeal out of time, that the Court granted the order with the condition that the Appellants deposit in Court a sum of Kshs1,400,000/- within 2 days from 21/4/2022 being security for the subject motor vehicle, that the Appellants have failed to deposit the security despite having the orders extended on 29/12/2022, that the Appellants have completely disregarded the orders and filed this Appeal without furnishing the security, that the Appellants communicated to them in no



uncertain terms that the amount would not be deposited and that despite reminders to the Appellants to comply, the requests has fallen onto deaf ears.

4. He contended that the Appellants have resorted to cause more harm to the Respondent by not furnishing the security or releasing the purchased motor vehicle to his custody, that the Appellants have decided to frustrate the Respondent by holding onto the motor vehicle for which he has fully paid but has not been granted possession by the Appellants since 2018, that the Respondent is not even assured that he will recover his purchase price of Kshs.1,400,000/= which amount had it been deposited he would have been sure of receive as a refund, that it is apparent that the Appellants have no interest in complying with the order of 22/4/2022 and in turn have denied the Respondent his right to enjoy the fruits of the Judgement, that the Appellants should therefore be denied a chance to Appeal when it seems that it is a ploy to hold the Respondent at ransom, the Appeal should forthwith be struck out for non-compliance with the Court order and allow the Respondent enjoy the Judgement of the lower Court. He added that the orders sought are necessary in the interest of justice as the Respondent stands to suffer irreparable loss and damage should the Appeal not be struck out since he cannot claim for general damages or for loss of user which has already been denied since 2018.

### **Response**

5. In opposing the Application, the Appellants relied on the undated Replying Affidavit filed in Court on 17/07/2023 through Messrs Kitiwa & Partners Advocates and sworn by one Kashif Riaz who described himself as the 1<sup>st</sup> Appellant's Branch Manager. He deponed that the Application, has been made in bad faith and with concealment of material facts, that the 1<sup>st</sup> Appellant is a local company with known assets and registered offices in Kenya, that in considering an Application for security for costs, the Court is required to consider the place of residence of an Applicant and its ability to pay costs, that the Respondent has not presented reasonable grounds to justify his apprehension that the Appellants may not be in a position to pay its costs should the Appeal be unsuccessful, that the Appellant's right to a fair hearing as enshrined in *the Constitution* of Kenya under Article 50 will be trampled upon in the event they are not allowed to prosecute the Appeal to conclusion, that the Respondent is acting in bad faith and does not deserve the orders sought, and that the Respondent will not be prejudiced in any way if the Appeal is to continue on merits. He added that the Appellants will be greatly prejudiced if the Application is granted since their right to access justice will be derogated due to a technicality, and that on his part, the Respondent will not be prejudiced since he can be reimbursed by way of costs.

### **Hearing of the Application**

6. The parties were then given liberty to file written Submissions. The Appellant's Counsel, Ms. Chemutai however notified the Court that she will not be filing any Submissions and that she would rely on the Replying Affidavit. On her part, Ms. Jeruto, acting for the Respondent, filed her Submissions on 16/8/2023

### **Respondent's Submissions**

7. On whether the Memorandum of Appeal can be struck out for non-compliance with this Court's order of 22/04/2022, Counsel for the Respondent submitted that the Appellants have failed to deposit the decretal sum which amounts to abuse of the Court process, that despite the Court extending the orders by its Ruling of 29/11/2022, the Appellants have failed to comply hence being in contempt of the same. On the purpose of stay of execution order pending appeal, Counsel cited the case of RWW vs. EKW (2019) eKLR, the case of Republic v Kenya Urban Roads Authority & 3 others Ex-parte Cytonn Investments Management Limited [2018] eKLR and the case of Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others (2014) eKLR.



8. Counsel argued that the stay order was conditional and as such the appeal should be struck out for non-compliance, that the Appellants have no interest in complying with the orders and in turn have denied the Respondent the right to enjoy the fruits of the Judgment and that they should therefore be denied a chance to Appeal since it seems that the Appeal is a ploy to hold the Respondent at ransom. She contended that the Appellants have infringed on the Respondent's rights in that he cannot have the suit motor vehicle released to him and the sum of Kshs.1,400,000/= proven to have been paid is all with the Appellant since 2018, that the money and/or the motor vehicle would have been utilized by the Respondent since 2018 but the Appellants hold the same and seek justice on appeal which justice is laced with injustice on his part, that the maxim of equity states that "one who seeks equity must do equity", that the Appellant cannot therefore hold the Respondent's motor vehicle and also the security for the same, that the security was for the motor vehicle and not for costs and as such should be deposited in Court as ordered, and anything else is contempt of Court. In conclusion, Counsel submitted that striking out of the appeal for non-compliance with the Court orders would be an equitable remedy and as such the Court should allow the Respondent to continue with execution of the decree of the Court.

### **Analysis and Determination**

9. Only upon perusing the exhibits attached to the Supporting Affidavit did I realize that the orders referred to herein - given on 29/12/2022 – were in fact issued in the separate Eldoret High Court Miscellaneous Civil Application No. 80 of 2022 by Ogola J and which Cause was filed for purposes of hearing of the Application for leave to appeal out of time. The orders were therefore not issued in this Appeal. Regrettably, the body of the Application does not bring out this important aspect at all.
10. In the circumstances, upon examination of the Record, including the Affidavits and Submissions presented, I find the issue that arises for determination in this matter to be "whether this Appeal should be struck out for non-compliance with the Court's order given on 29/12/2022 in Eldoret High Court Miscellaneous Civil Application No. 80 of 2022".
11. It is therefore important to first reproduce the order which I do as follows:
- "Order of stay of execution in Iten PMCC number 3 of 2018 Isaac Kipkemboi Kiprono vs. Al Husnan Motors Limited and Jakacha Auctioneers be and is hereby issued pending the hearing of this Application inter partes on CONDITION that the Applicant deposits in Court Kshs 1,400,000/= within 2 days from todate being security for the Motor vehicle subject matter."
12. It will therefore be apparent that the said order was given solely as a condition for grant of stay of execution. It was therefore only aimed at stopping execution of the Decree while the Appeal was pending in Court. The order was never a condition for survival or retention of the Appeal in Court. The effect of failure to deposit the security would therefore be to only give the Respondent liberty to execute, not collapse of the Appeal. There is nowhere in the order where it is indicated that the Appeal will become invalid should the Appellant fail to deposit the security. The pendency, competency or arguability of the Appeal was therefore never a subject of the order. The Appeal cannot therefore lapse simply because the Appellant has failed to deposit security.
13. As argued by the Appellant's Counsel, the right to a fair hearing is a constitutional right as stipulated under Article 50 of *the Constitution*. As such, a party's right to appeal cannot be curtailed without valid or justifiable reasons. If the Appellant has failed to deposit the security, then there is nothing preventing the Respondent from proceeding with execution of the Decree. According to the order,



the Respondent's remedy, in the event of non-compliance with the order, lies in executing the Decree, not in striking out of the Appeal.

14. In the circumstances, there are clearly no grounds to warrant the striking out of this Appeal.

**Final Orders**

15. Accordingly, the Respondent's Application dated 13/2/2023 fails and is hereby dismissed but with no order on costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024**

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**WANANDA J.R. ANURO**

**JUDGE**

