



REPUBLIC OF KENYA



National Environment Management Authority v Kinuthia (Civil Appeal E002 of 2024) [2024] KEHC 4847 (KLR) (Civ) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E002 OF 2024**

**AN ONGERI, J
APRIL 26, 2024**

**BETWEEN
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY APPELLANT
AND
RUMBA KINUTHIA RESPONDENT**

RULING

1. The application coming for consideration is the one dated 2/1/2024 brought under Order 51 Rules 1, 15, Order 22 Rules 22, Order 10 Rule 11, Order 42 rule 6, 7, 8 and 9 of the [Civil Procedure Rules](#) 2010, Section 3A [Civil Procedure Act](#), Cap 21 Laws of Kenya and all enabling provisions of law seeking the following orders;
 - i. Spent.
 - ii. That pending the inter-partes hearing of this application, this honourable court be pleased to give an injunction and stay execution of the ruling against the appellant delivered by the lower court on the 19th December 2023 and stay any execution proceedings thereof.
 - iii. That pending the hearing and determination of this application, this honourable court be pleased to give an injunction and stay execution of the ruling against the 1st defendant delivered on 19th December 2023 and stay any execution proceedings thereof.
 - iv. That this honourable court be pleased to set aside the ex parte orders entered on 19th December 2023 and the final ruling and order delivered on the 19th December 2023 against the appellant/ applicant in the court below and all consequential orders and effects thereto.



- v. That further without prejudice to the foregoing, the warrants and attachment of moveable property of the appellant be deemed as irregular and void ab initio and the same set aside with costs.
 - vi. That further and without prejudice to the foregoing, the entire execution proceedings by the 1st respondent be set aside pending the hearing and determination of this appeal.
 - vii. That the costs of this application be provided for.
2. The application is based on the following grounds;
- i. The Decree in Milimani CMCC 2365 of 2017 was fully fulfilled and paid up during appeal proceedings in Milimani High Court E058 of 2021 as consolidated with Misc Application 749B of 2019 between the very parties herein and the Ruling of the High Court dated 17th December 2021 certified as such. The 1st respondent has made a desperate under the belt and abuse of court process in attempting to re-execute a spent Decree.
 - ii. The Applicant was never served with mention Notices and in the court below and where the same was done, it was not done properly done and/or deliberately communicated misleading information. The Applicant reserves its right to challenge the Notice issued as evidenced by the appearance of its counsel before the lower court on 18th December 2023.
 - iii. The Trial Court issued an ex parte order against the appellant on 19th December 2023 in undeserving circumstances, a fact that only came to the appellant's knowledge on 21st December 2023 when it was served with Proclamation of Attachment of its moveable property by Anfield Auctioneers under the instruction of the Plaintiff, dated 21st December 2023, indicating that the appellant's/1st DefendantApplicant's property would be removed to the Auctioneer's premises and sold by public Auction at the expiry of 7 days from the date of the proclamation.
 - iv. The Appellant subsequently learnt that on the 19th December 2023, the trial Court issued a final order against it in favour of the Plaintiff in the sum of Kshs.2,826,942.29/= being the ridiculous sum accruing as interest on an alleged balance/ amount of Ksh.364776.05 from the decretal amount of Ksh 5 millions All which were long settled.
 - v. That this was notwithstanding the fact that the trial court had mentioned this case a day earlier on the 18th December 2023 in the presence of the appellant's counsel and in the absence of the plaintiff whereas the Court set this matter for interpartes mention on the 31st January 2024 but owing to the absence of the plaintiff and directed that the matter be nonetheless mentioned on the following date of 19th December for purposes only of alerting the plaintiff of the 31st January 2024 dates
 - vi. That the appellant did therefore not find it compelling to attend the 19th December 2023 especially when it faced internet connectivity issues. The date was only to confirm the future 31st January 2024 date.
 - vii. That the appellant was thus shocked to receive a notification later on that day that the status of the matter had been updated to Ruling delivered on that 19th December 2023.
 - viii. That indeed the Appellant/Applicant, who had already expressed her desire to be heard, hence seeking the date of 31st January 2024, was condemned unheard on the subject Application.



- ix. That however and without prejudice to the foregoing, the alleged outstanding decretal amount was settled in full before the appeal in High Court Appeal No, E058 of 2021 as consolidated with High Court Misc Application 749B of 2019 between the same parties, NEMA v Rumba Kinuthia (appeal against lower court case from which the decretal sums arose). For avoidance of doubt the Appellant/Applicant deposited with the High Court on 26th February 2021 the full decretal sum of Kenya Shillings Five Million (KES.5,000,000/=) as well as Kenya Shillings Three Hundred and Sixty Four Thousand and Seven Hundred and Seventy Six and Fifty Five Cents Only (KES.364,776.55/=) being the further decretal amount with costs deposited on 20th April 2021 pursuant to the Court Order made on 12th April 2021.
- x. There is imminent danger of execution proceedings against the appellant in what is seen as mischief cooking and without granting the appellant a chance to be heard in the Application as the Plaintiff has threatened execution by serving the appellant with Proclamation of Attachment of its moveable property by Anfield Auctioneers under the instruction of the Plaintiff dated 21st December 2023.
- xi. That the actions by the plaintiff are illegal and tantamount to unjust enrichment and this Court ought to have heard the applicant first before allowing such an affront on public monies and assets.
- xii. That a similar application for stay of execution under Order 42 of the *Civil Procedure Rules* had been made to the trial Court on the 27th December 2023 and a distant date for directions on appeal will have been rendered otiose and nugatory.
- xiii. The appellant was initially served with a Notice to Show Cause why Execution should not Issue dated 24th November 2023 on 30th November 2023 by the Plaintiff indicating that the same was slated for 14th December 2023.
- xiv. That concerned with the subject of the intended execution proceedings, the appellant sent its legal clerk to the court registry to peruse the file in preparation of the case mention but the clerk was informed that the court file could not be traced and hence could not proceed.
- xv. That a complaint letter was done from the Applicant's office to the Court Executive Officer to have the file traced on 6th December 2023. The Applicant is yet to receive any response on the letter.
- xvi. That even though there has never been a response to our letter on whether the file was traced, the Plaintiff obtained a new date ex parte, where the matter was fixed for mention on 19th December 2023. This was only known informally upon a telephone conversation between the appellant's counsel on record and the court assistant to the trial Court No. 2.
- xvii. That on 15th December 2023 at 4.06PM, the Plaintiff served the Applicant's Counsel via email with a Notice dated 24th November 2023 showing that the matter was slated for 14th December 2023, and not 19th December 2023. This therefore, did not constitute proper and correct communication, as the information in the notice on next date was misleading.
- xviii. That on 18th December 2023 in the morning, Counsel for the Applicant received an alert from the E-filing Case Tracking System that the matter was slated for mention that morning at 9AM
- xix. That since Counsel for the Applicant was away on annual leave, Mr. Ngararu Maina, Advocate, appeared before the Court holding his brief, where no other party had appeared on that day.



In good faith, Mr. Maina explained to the Court about the mix up, as the Court Assistant had informed Mr. Gitonga that she had communicated the date as 18th December 2023.

- xx. That Mr. Maina informed the Court that Counsel on record was away on leave, and that he had requested to have a new date in the new term, one that would be after 15th January 2024. That the Court indulged him and recorded a new mention date of 31st January 2024. On 19th December 2023, the matter would only be mentioned to confirm the convenience of the date taken and not to take a Ruling as would later transpire to be the case.
- xxi. That on 19th December 2023, Mr. Maina, who was also out of town, was unable to log in due to network issues. However, his legitimate expectation was that the mention on 19th December 2023 was to just confirm that the date was convenient for all parties, where a new date would be fixed if any of the parties was not available on 31st January 2024.
- xxii. That the appellant was shocked to receive a notification later on that day the status of the matter had been updated to Ruling delivered on that 19th December 2023.
- xxiii. That indeed the Applicant, who had already expressed her desire to be heard, hence seeking the date of 31st January 2024, was condemned unheard on subject Application/ Notice to Show Cause.
- xxiv. That the deposited sums were as a result of the Warrant of Attachment dated 11 November 2019 and served on the 1st Defendant on 15th November 2019, broke down as follows:
 - a. Decretal amount- Kes.5,337,319.00/=
 - b. Interest on decretal amount- Kes.24,657.53
 - c. Further costs- Kes.1,300.00/=
 - d. collection fee- Kes1,500/=Total: Kes.5,364,776.53
- xxv. Indeed, the deposited sums were made available to the Plaintiff as acknowledged by himself in the letter of 30th March 2023 to the Deputy Registrar, High Court.
- xxvi. The purpose for which the proclamation was purportedly made had therefore been satisfied by the full payment. Any subsequent attempt to proclaim or attach any of the appellant's/ Applicant's property is not only irregular but also evidence of fraudulent dealing with the Applicant's property and misrepresentation of facts by the Plaintiff.
- xxvii. There is imminent danger of execution proceedings against the appellant without granting it a chance to be heard in the Application as the Plaintiff has threatened execution by serving the appellant with Proclamation of Attachment of its moveable property by Anfield Auctioneers under the instruction of the Plaintiff dated 21st December 2023. This will not only affect the appellant's operations but will also cripple its statutory mandate as a government agency. It is noteworthy from the proclamation inventory that the 1st respondent intends to seize the motor vehicles of the appellant.
- xxviii. The Applicant herein has an arguable appeal which raises triable issues and it is in the interest of justice that the orders granted on 19th December 2023 be set aside and it be heard on merit. The Memorandum of Appeal has been filed.



- xxix. It would not be in the interest of justice for the auctioneer to be allowed to proceed with the attachment of the appellant's/Applicant property without giving the appellant a chance to be heard.
- xxx. This Application has been made without undue delay. A similar application for stay of execution under Order 42 of the Civil Procedure Rules had been made to the trial Court on the 27th December 2023 and which application was on the 28th December 2023 dismissed by the very Hon Lucy Ambasa, CM as not urgent.
- xxxi. The 1st respondent will not suffer any prejudice if the orders sought herein are granted in facilitating an inter partes hearing. Justice leans on the side of issuing the sought injunctive relief to guarantee status quo.
3. The application is supported by the affidavit of David Ongaresworn on 2/1/2024 in which the above grounds were reiterated.
 4. The respondent filed two replying affidavits both sworn on 16/1/2024 in which it is deponed that all the requisite notices were served on the Applicant, their stamp was appended on the Respondent's copies and the affidavits of service filed in Court. He contended that this application is thus only meant to delay him from enjoying the fruits of his judgement.
 5. He deposed that this matter came up on 14/12/2023 for notice to Show Cause but the file was missing, causing the Court to direct that parties follow up with the registry and obtain a date. The Appellant had been duly served with the Notice to Show Cause. The Registry issued parties with the date of 18/12/2023 for the Notice to Show Cause, and the hearing date was served on the applicant along with the Notice to show cause.
 6. He explained that on 18/12/2023 the matter was not heard but it was slated for 19/12/2023, on which day, the Applicant's Counsel was not in attendance. The Court noted that the Applicant's Counsel had misrepresented to the court the previous day that the parties had agreed to adjourn the notice to show cause.
 7. He further deposed that the decree issued in 2019 was never fully complied with as the interest awarded was never settled. The Applicant has not given any evidence that the interest on the decretal sum was ever settled.
 8. He also deposed that the Appellant is barred from making any new arguments against the Notice to Show Cause as the same ought to have been made in the trial Court.
 9. He further explained that at the time of filing the current application, the application in the Lower Court had not yet been heard, making the current one irregular and sub-judice. He contended that the applicant is forum shopping in contravention with procedure and undermining the jurisdiction of the courts. The applicant has also not given any reason why the current application was not filed in the lower court.
 10. He deposed that he would suffer untold prejudice if the orders sought are granted as he will not be able to enjoy the fruits of his validly obtained judgement.
 11. The applicant filed a supplementary affidavit sworn by B. Mamoona 22/1/2024 in which he stated that the main issue for determination was whether the Appellant paid the decretal sum of Kshs. 5,364,776.53. He deposed that the Applicant settled the entire decretal sum of Kshs. 5.36 million plus interest and court collection fees deposited into court and proved via the receipts annexed as DO3 and DO4, which the Respondent has not denied.



12. The Applicant submitted that it settled in totality the decretal amount of Kenya Shillings Five Million Three Hundred and Sixty Four Thousand and Seven Hundred and Seventy Six and Fifty Five Cents (KES 5,364,775.55/=), having challenged the Decree lodged Nairobi HCCA E058 of 2021 and deposited in Court the entire decretal sum in 2 parts. That the High Court in CA E058 of 2021 as consolidated with HC Misc.749B of 2021 also noted and declared the full compliance of the applicant, vide its Ruling dated 17th December 2021. The Respondent in a letter to the Deputy Registrar acknowledged that the deposited sums were available and applied for the release thereof.
13. Counsel for the Applicant further submitted that the Respondent seeks to unjustly enrich himself from public resources. The Respondent by using underhanded methods is striving to unjustly profit himself from a matter that was already settled by the Honorable Court. He contended that the interest on the decretal amount summed up by the Trial Court lacks in merit, for the Applicant had already deposited KES 5,364,775.55/= to the Court which served as proper execution of the decretal amount dated 19th December 2023. From the foregoing, the execution was unlawful and ought to be nipped in the bud.
14. He also submitted that the respondent was denied the rights at Article 50(1) of the Constitution that makes provision for fair hearing. He relied on the case of Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board Petition No. 495 Of 2015 [2016] eKLR, para 43, the learned judge Onguto J was conscious of Article 50 (1), stating that:

“The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of the Constitution makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
15. He further relied on Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals, and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”
16. He asserted that Article 50(1) of the Constitution of Kenya provides that:

“Every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.”
17. He asserted that the Applicant was condemned unheard by the Trial Court. The orders granted by the Trial Court ought to have audience of both parties to the proceedings more so when the applicant had appeared before the very Court on the 18th December 2023. The Trial Court thus denied the Applicant herein access to justice by condemning the Applicant unheard.

He contended that that the award granted by the Trial Court lacks in merit for the Applicant paid in totality the decretal amount KES 5,364,775.55/= . Thus, the unjust award only seeks to unjustly enrich the Respondent.



18. The Applicant thus prayed that the instant application be allowed and directions on the pending appeal be given.
19. The Respondent submitted that the Applicant was duly served with the Notice to Show Cause which came up on 14th December 2023 when the court was not sitting prompting the court to issue another date for 19th December 2023. The applicant on their part, chose not to attend and/or file a response to the said applications. When the said matter came up, warrants of attachment were issued based upon calculation of the interest on the principal sum.
20. Counsel for the Respondent contended that the failure of the Applicant to attend court was their own doing and not the doing of the Respondent. The applicant cannot feign ignorance despite the notices and their own admission that indeed they were aware of the date. The Respondent discharged its obligation to the applicant and it was to inform them of the said date and serve them with the requisite notices. The right to a fair hearing encompasses granting parties and opportunity to be heard. He relied on the Court's decision in *Peter Ngigi Kigira v Fredrick Nganga Kigira* [2022] eKLR; where the court held as follows;

“Although the *Constitution* guarantees the right to be heard, the Applicant was granted the opportunity to be heard but squandered it by failing to attend Court for the hearing not once but twice. The right to be heard does not mean a party will be heard on his own terms. If that were to be the case, then the business of the Court would be interrupted at will as and when a party feels like being heard. Once a date has been given and a party fails to appear for the hearing the Court is mandated to proceed with the hearing of the parties that are ready to be heard. Courts time is precious and must be utilized prudently. The Applicant is not without a remedy against his agent for the appropriate action.”

21. He thus submits that the orders were granted procedurally and ought not be set aside. Further he submitted that granting substantive orders on an interlocutory appeal, that being quashing the orders of 19th December 2023 and the warrants of attachment is highly irregular. He contended that this court cannot determine an appeal based on an interlocutory application which seeks to supersede the substratum of the appeal. Even if the court would consider issuing the same, the grounds of appeal as per the annexed memorandum of appeal as well as on the face of the application are not sufficient to grant the orders sought. He relied on the reasoning in *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] eKLR where the court of appeal reaffirm its decision in *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] eKLR and stated that

‘a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once’

22. He asserted that no special circumstance has been revealed and as such the court ought not grant the said orders. He submitted that the orders of 19th December 2023 as well as warrants of attachment thereafter were proper and ought not be set aside and/or revoked.
23. He further submitted that the Conditions for grant of a stay of execution are well set out in the Order 42, the Applicant must satisfy this honourable Court of the Following conditions; Substantial loss unless stay of execution is granted. the Appellant has deposited security as pre- satisfaction of the Decree/ security for due performance of the Decree. Appeal will be rendered nugatory if the stay of execution is not granted Appeal has arguable grounds with high chances of success



24. He submitted that the Applicant did not display how what loss or damage would occasion the Respondent from satisfaction of the Decree. The Applicant is in a position to satisfy the decretal sum without resulting to the attachment of motor vehicles. If the Applicants had responded to the Notice to show Cause applications served upon them severally and convinced the Court that indeed the sum was undeserved which is not the case, no attachment of their properties would occur.
25. Further, that the applicant has brought no evidence to controvert this position and in line with that he referred to the decision in *Antoine Ndiaye v African Virtual University* 2015 eKLR where it was stated as follows in regard to the inability of a party to refund the decretal amount in the event of a successful appeal;
- “it matters not the amount involved as long as the Respondent cannot pay back. The Onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant follows after the long adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is therefore not enough for a party to jut allege as is the case here.....The legal burden does not shift to the Respondent to prove he is possessed of means to make a refund...”
26. He contended that the applicant has shown no good will to pay the decretal sum, and should this court be so inclined to grant stay of execution they prayed that the court be so guided to order that the Applicant/Appellant does satisfy the following conditions; That the Appellant does pay the Respondent half of the Decretal in the sum of Kshs 1,413,471.15/= being half of the decretal sum plus costs. That Appellant does deposit the remainder of the decretal amount in a joint interest earning account in the joint names of the advocates for the parties.
27. He also submitted that the Grounds of appeal are neither arguable nor do they remotely have any chances of success.
28. He asserted that the applicant has failed to demonstrate any of the limbs required to consider an application of this nature, that a stay of execution is not warranted in this suit and that the Application dated 2ND January 2024 ought to be dismissed with costs to the Respondent.
29. On the issue of costs, Counsel for the Respondent relied on Section 27 (1) of the *Civil Procedure Act*, Cap 21 which provides as follows;
- “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”
30. He urged this Honorable Court to find that the Applicant has failed to discharge his burden of proof on a balance of probabilities which it follows then that costs should be awarded to the Respondent.
31. The issues for determination in this application are as follows;



- i. Whether stay of execution should be granted pending appeal.
 - ii. Whether the warrants of attachment should be set aside.
32. On the issue as to whether the applicant should be granted stay of execution pending appeal, the governing provision is Order 42 rule 6 which states as follows;
- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
33. The duty of the court is to balance the interests of the parties. The applicant has a right to appeal while the respondent has a right to enjoy the fruits of the judgment.
34. In this case, the applicant maintains that the decretal sum has been fully settled while the respondent states that the sum is still outstanding and submitted that should court be inclined to grant stay, they seek for orders that ½ the decretal sum of ksh.1,413,471.45 be deposited in court and the half in a joint interest earning account held in the joint names of the advocates for both parties.
35. The applicant annexed receipts as DO3 and DO4 which have not been disputed by the respondent.
36. In the circumstances, I grant stay of execution pending appeal.
37. The warrants of attachment to be and are hereby set aside.
38. The application dated 2/1/2024 is allowed. The costs of the application to abide the appeal.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
26TH DAY OF APRIL, 2024.**

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

