



REPUBLIC OF KENYA



**Nyoro Enterprises Limited v Pwani Oil Products Limited (Civil Appeal  
E034 of 2023) [2024] KEHC 4871 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E034 OF 2023  
EM MURIITHI, J  
APRIL 25, 2024**

**BETWEEN**

**NYORO ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**PWANI OIL PRODUCTS LIMITED ..... RESPONDENT**

**RULING**

1. Applicant, prays for stay of execution of ex-parte Judgment dated 17<sup>th</sup> July, 2023 pending the hearing and determination of this appeal.
2. The appeal is from a decision of the trial court dismissing an application for setting aside of the Judgment entered on 17<sup>th</sup> July, 2023.
3. The applicant's case is that it was not given an opportunity to be heard in the matter before Judgment was entered as the applicant and/or their insurer were not served with summons and findings in the trial court suit Meru CMCC No. E703 of 2023. The applicant asserts its rights under Article 47 and 50 of *the Constitution*.
4. The applicant seeks to demonstrate substantial loss by irreparable damage and averring that it "faces imminent threat of execution by auctioning of its property which is its primary tools of trade and source of income".
5. By replying affidavit of 15<sup>th</sup> March, 2023 the respondent urges that the application for stay of execution is incompetent and it ought to be dismissed as an abuse of process.
6. The respondent contends that the applicant was served with summons in the matter and that in fact admitted service in earlier application before the trial court and averred that with "they failed to enter appearance because the officer assigned the matter by the insurer did not forward the matter for action (annexed hereto and marked GK-1 as true copy of the notice of motion)."



7. It is also pointed that no defence on the merits has been preferred and therefore there is no defence for trial” It is further urged in the replying affidavit that the execution process was proper and the notice of entering of Judgment was given and the warrant were issued by a competent court.

### **Determination**

8. The issue before the court is whether the court shall order stay of execution of Judgment pending the hearing of the appeal herein.

### **Principles for grant of stay of execution**

9. The court requires the applicant to demonstrate an arguable case to be presented to the appeal court and that if stay of execution is not granted the applicant shall suffer irreparable or substantial loss and if it considers to grant stay, an order for security in terms of Order 46 Rule 2 of the Civil Procedure Rules shall be made.

### **Arguable case**

10. It does not appear established that the summons to enter appearances and pleadings. In this case, were not served on the defendant, the case raised by the defendant’s Insurer Officer Sophie Omolo in the affidavit in support of the application for setting aside the Judgment before the trial court merely raised issue of hearing notices, or notice of entry of Judgment as follows: -

“ 3. That the defendant was surprised by the progress of this matter and hurriedly forwarded the Auctioneers documents to their Insurer who engaged their internal mechanisms and discovered pleadings in the matter were served upon the defendant and forwarded to the insurer for action but the same were never acted upon since the officer dealing with the matter left the insurer’s employer and never handed over this file for action, hence the suit proceeded ex-parte without the participation of the defendant. (Annexed hereto and marked SO2 is a copy of the delivered summons to enter appearance.”

“ 4. That neither the defendant nor their insurer have been served with a hearing notice or notice or entry of Judgment yet ex-parte Judgment in the matter has already been issued and warrants of attachment and sale extracted for the sum of Kshs. 1,024,701/=.”

11. The court has also noted the Affidavit of Service of Teddy Tumaini Kanga of 17<sup>th</sup> June, 2023 which in elaborate details shows service on the defendant at its office, through the office of Director Care of Alex Mariga, “of summons to enter appearances attached with a plaint, list of documents, bundle of documents, plaintiff’s list of witness and witness statement”.
12. With respect, no arguable case or serious questions to be put before the appellate court in the appeal has been established.

### **Substantial Loss**

13. Other than the generalised statement that “the appellant faces imminent threat of execution by auctioning of its property which is its primary tools of trade and source of income, hence they will suffer irreparable damages” no details of the alleged prospective imminent loss is given for the court to be able to assess that substantial loss may be suffered. Substantial loss must be relative to the nature of



the applicant's business, and generally execution of a lawful order of court in scrupulous compliance with rules of the court cannot be said to occasion substantial loss.

14. The court of appeal had occasion to consider the principles for the setting aside of Interlocutory Judgment in *James Anyita Nderitu and another v Marios Phitrotus Githikas and another* [2016] eKLR. The case before this court does not, with respect, prima facie raise the grounds for setting aside of a regular Interlocutory Judgment.

### **Orders**

15. Accordingly, for the reasons set out above, the court finds, that the application for stay of execution dated 13<sup>th</sup> March, 2024 does not have merit and it is dismissed.

16. The respondent shall have the costs of the application.

Order accordingly.

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF APRIL, 2024.**

**EDWARD M. MURIITHI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

### **Appearances**

Ms. Wambua Kilonzo Advocates for the Respondent

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Kiruki & Kayika Advocates for the Appellant

