



REPUBLIC OF KENYA



**Mwangi & another v Kamunya (Civil Appeal E1277 of 2023)
[2024] KEHC 6351 (KLR) (Civ) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6351 (KLR)

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

CIVIL

CIVIL APPEAL E1277 OF 2023

AN ONGERI, J

MAY 31, 2024

BETWEEN

PATRICK MAINA MWANGI 1ST APPELLANT

DUNCAN MWANGI 2ND APPELLANT

AND

WILSON GITAU KAMUNYA RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 22/11/2023 brought under Order 21 rule 1B, Order 22 rule 22, Order 40 Rule 6, Order 51 rule 1 01 the Civil Procedure Rules, Section IA, 1B, 3A & 95 of the *Civil Procedure Act*, Section 26 *Auctioneers Act* Article 159 (2) (a) & (d) of *the Constitution* of Kenya, 2010 and all other enabling provisions of the law seeking the following orders;
 - i. That this Application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
 - ii. THAT the firm of Kimondo Gachoka, Advocates, be placed on record to act for the Respondents/ Applicants in this suit.
 - iii. That this Honourable Court be pleased to grant interim setting aside and/or stay of execution of the Ruling delivered on 21st November, 2023 by the Honourable Principal Magistrate P. Rotich, pending the hearing and determination of this Application.
 - iv. That this Honourable Court be pleased to grant interim stay of execution of the ex-part Judgment delivered on ex-parte judgment delivered in Milmani CMCC NO. 2476 of 2020



by the Honourable Senior Principal Magistrate D. W. Mburu on 9th July, 2021, pending the hearing and determination of this Application.

- v. That this Honourable Court be pleased to grant interim and ex-parte orders for the halting, cancelling, staying and setting aside of the warrants, proclamation by Carnelian Auctioneers dated 17th April, 2023, proclaiming the Appellants'/ Applicants' Motor Vehicle Registration Number KCD 139J, pending hearing and determination of this Application.
 - vi. That this Honourable Court be pleased to cancel stay, set aside and/or halt the sale by Auction of Motor Vehicle Registration Number KCD 139J, which is scheduled to happen any date from now.
 - vii. That this Honourable Court be pleased to order the immediate unconditional release of Motor Vehicle Registration Number KCD 139J, that is being held at un-disclosed area.
 - viii. THAT this Honourable Court do grant the Defendants/ Applicants police assistance and security while collection the said Motor Vehicle Registration Number KCD 139J from the storage area.
 - ix. THAT this Honourable Court be pleased to grant orders to set aside and/or stay of execution of the Ruling delivered on 22nd November, 2023 together with the ex-parte Judgment delivered in Milmani CMCC NO. 2476 OF 2020 by the Honourable Senior Principal Magistrate D.W. Mburu on 9th July, 2021 pending the hearing and determination of this Appeal.
 - x. That this Honourable be pleased to grant an Order for stay of all proceedings in the trial Court, pending the hearing and determination of this Appeal.
 - xi. That this Honourable Court allow the Applicants/Appellants to furnish the Court with security in the form of a Bank Guarantee from a very well-known, well established and very reputable Bank in Kenya.
 - xii. That the Application be heard inter partes on such date and time as this Honourable Court may direct.
2. The application is based on the following grounds;
- i. Ex-parte Judgment was delivered on Judgment delivered in Milmani CMCC No. 2476 OF 2020 by the Honourable Senior Principal Magistrate D. W. Mburu on 9th July, 2021, awarding the Applicants/Appellants liability 100% }General damages -Kshs.800,000/= & Special damages -Kshs.7,150/= plus costs and interest.
 - ii. The Appellants/Applicants proceeded to file an application seeking to set aside the said ex-parte Judgment but the file went missing for months.
 - iii. The Appellants/Applicants proceeded to file an application dated 22nd February, 2022, seeking to set aside the ex-parte judgment but the file went missing from the registry and Appellants/Applicants filed another application dated 29th May, 2023 the seeking to reconstruct the file and certify the previous application dated 22nd February, 2022 as urgent.
 - iv. The Appellants/ Applicants was granted stay of execution 5th June, 2023, and parties were directed by Court to canvass all the Application by way of written submissions but the Respondent proceed to execute attached the Appellants'/Applicants' Motor Vehicle Registration Number KCD 139J, which prompted the Appellants/Applicants to another application seeking stay of the warrants.



- v. The applications were consolidated as the file continued missing from and on 21st November, 2023, the Trial Court proceed to ignore the previous applications and based its Ruling on the one application dated 22nd June, 2023, and dismissed it as being baseless since it sought no orders, which was not the case.
 - vi. The Appellants/Applicants are highly dissatisfied with the Ruling and have proceeded to file a Memorandum of Appeal dated 14th September, 2023 and were however not granted stay of the Ruling and ex-parte Judgment pending the hearing and determination of the Appeal.
 - vii. The Appellants/Applicants Appeal has high chances of success as the same raises issues of being denied a fair hearing.
 - viii. The Appellants/Applicants are seeking stay pending determination of this Application and Appeal.
 - ix. The Appellants' /Applicants' Insurance is ready, willing and able to furnish the Court with a Bank Guarantee from a reputable Bank, as security to the court.
 - x. This Application is made in good faith.
 - xi. This Application has been brought with no unreasonable delay the Ruling having been delivered on 21st November, 2023
 - xii. The Respondent will not be prejudiced in any way if the application is allowed.
 - xiii. If the stay of execution of the ex-parte Judgment is not granted and/or the same is not set aside, the Appellants/ Applicants will suffered great injustice and prejudice of not being able to defend the suit against them contrary to Article 50 of *the Constitution* of Kenya (2010).
3. The application is supported by the affidavit of Anertia Salinder Gulenywa sworn on 22/11/2023 in which she deponed as follows;
- “i. THAT this Honourable Court be pleased to grant interim setting aside and/or stay of execution of the Ruling delivered on 21st November, 2023 by the Honourable Principal Magistrate P. Rotich, pending the hearing and determination of this Application.
 - ii. That this Honourable Court be pleased to grant interim stay of execution of the ex-parte Judgment delivered on ex-parte Judgment delivered in Miliman iCMCC NO. 2476 of 2020 the Honourable Senior Principal Magistrate D. W. Mburu on 9th July, 2021 pending the hearing and determination of this Application.
 - iii. That this Honourable Court be pleased to grant interim and ex-parte orders for the halting, cancelling staying and setting aside of the warrants, proclamation by Carnelian Auctioneersdated 17th April, 2023, proclaiming the Appellants'/Applicants' Motor Vehicle Registration Number KCD 139J, pending hearing and determination of this Application.
 - iv. That this Honourable Court be pleased to cancel stay, set aside and/or halt the sale by Auction of Motor Vehicle Registration Number KCD 139J, which is scheduled to happen any date from now.



- v. That this Honourable Court be pleased to order the immediate an unconditional release of Motor Vehicle Registration Number KCD 139J, that is being held at un-disclosed area.
 - vi. That this Honourable Court do grant the Defendants/ Applicants police assistance and security while collection the said Motor Vehicle Registration Number KCD 139J from the storage area.
 - vii. The Appellants/Applicants was granted stay of execution 5th June, 2023, and parties were directed by Court to canvass all the Application by way of written submissions, but the Respondent proceed to execute and attached the Appellants'/Applicants' Motor Vehicle Registration Number KCD 139J, which prompted the Appellants/Applicants to file another application seeking stay of the warrants.
 - viii. The applications were consolidated as the file continued missing from and on 21st November, 2023, the Trial Court proceed to ignore the previous applications and based its Ruling on the one application dated 22nd June, 2023, and dismissed it as baseless since it sought no orders, which was not the case.
 - ix. The Appellants/ Applicants are highly dissatisfied with the Ruling and have proceeded to file a Memorandum of Appeal dated 14th September, 2023 and were however not granted stay of the Ruling and ex-parte Judgment pending the hearing and determination of the Appeal.
 - x. That this Honourable Court be pleased to grant orders to set aside and/or stay of execution of the Ruling delivered on 22nd November, 2023 together with the ex-parte Judgment delivered in Milimani CMCC no. 2476 OF 2020 by the Honourable Senior Principal Magistrate D. W. Mburu on 9th July 2021 pending the hearing and determination of this Appeal.
 - xi. That this Honourable be pleased to grant an Order for stay of all proceedings in the trial Court, pending the hearing and determination of this Appeal.
 - xii. That this Honourable Court allow the Applicants/ Appellants to furnish the Court with security in the form of a Bank Guarantee from a very well-known, well established and very reputable Bank in Kenya.
 - xiii. That this Honourable Court be pleased to issue any other order and/or direction it deem fit to grant in the circumstances.
 - xiv. That The costs of this Application abide the outcome of the Appeal.”
4. The respondent opposed the application by filing a replying affidavit dated 22/1/2024 in which it is deposed as follows; he deponed that the appellants appeal is a means of frustrating the respondent’s right to enjoying the fruits of their judgement delivered on 9/7/2021. The appellants ought to have filed their intended appeal within the prescribed timelines set as per section 79G of the [Civil Procedure Act](#).
5. He deponed that the appellants have not advanced any good reason and sufficient reason for the delay. Despite ex-parte judgement being delivered on 9/7/2021 the appellants were well aware of the case



- proceedings beforehand until delivery of judgement. The appellants in the material suit chose not to participate in the said proceedings until proclamation notices were served upon them.
6. He averred that in the event execution of motor vehicle registration number KCD 139J is halted the respondent will suffer irreparable loss and injury as he is the aggrieved party in the primary suit. The appellants have continuously filed frivolous applications which lack any significant bearing, the most recent one dated 22/6/2023 being struck out with costs on 21/11/2023.
 7. The parties filed written submissions as follows; the appellants submitted that by the Trial rendering ruling on only on one application and stating it lacks merit greatly prejudices the Appellants, who had filed an application dated 22/2/2022, seeking to set aside the ex-parte Judgment but the file went missing from the registry and Appellants filed another application dated 29/5/2023 the seeking to reconstruct the file and certify the previous application dated 22/2/2022.
 8. That the Appellants were granted stay of execution 5/6/2023, and parties were directed by Court to canvass all the Application by way of written submissions, but the Respondent proceed to execute and attached the Appellants' Motor Vehicle Registration Number KCD 1391, which prompted the Appellants to file another application seeking stay of the warrants.
 9. The applications were consolidated as the file continued missing and on 21/11/2023, the Trial Court proceed to ignore the previous applications and based its Ruling on the one application dated 22/6/2023, and dismissed it as being baseless since it sought no orders, which was not the case, and thus this Appeal ought to hear and determined, and the Appellants/ Applicants granted a fair trial.
 10. The appellants submitted that the memorandum of appeal raised trial issued that merit consideration by the court as the issues raised mainly tough on the appellants right to a fair hearing as the matter proceeded exparte and the appellants never tendered their evidence. Article 50 of *the Constitution* of Kenya provides for the right to a fair trial and therefore the appeal has a very high chance of success.
 11. On orders for stay of execution the appellant submitted that the continuous detaining of motor vehicle registration number KCD 139J is causing the appellants loss and damage as the vehicle was a source of livelihood. The appellants are willing to provide security in form of bank guarantees of the decretal sum within 45 days.
 12. The respondent alternatively submitted that the Appellants herein had filed a similar application at the trial Court and which is the subject of the instant appeal where the trial Court found that the judgment was regular. The trial Court found that the Appellants herein were duly represented and various notices including Mention Notices, Hearing Notice and Judgment Notice were all sent and received by the Appellants advocates. The trial Court then rendered a ruling on 17/4/2023 where it dismissed a similar application with costs.
 13. The respondent submitted that the trial Court finding was justified and the same has been demonstrated vide the Respondent's Replying Affidavit. The Appellants herein have not shown to Court or disputed that they were represented and is a clear indication that the instant application and the purported appeal has been filed with the sole purpose of denying the Respondent the fruits of his judgment.
 14. The respondent further submitted that the appellants have not adduced any satisfactory reasons to warrant the grant of the orders sought. The delay is so inordinate and the same should be declined. The Appellants herein have also not denied having filed the Statement of Defence or even denied receiving all the mention notices and hearing notice in this suit. It is thus clear that the instant application therefore lacks merits and the same should be dismissed.



15. The issues for determination in this application are as follows;
- i. Whether the ex parte judgement delivered on 21/11/2023 should be set aside.
 - ii. Whether the warrants of proclamation of carnelian auctioneers proclaiming the applicants motor vehicle registration no. KCD 139J should be set aside.
 - iii. Whether the applicant should be granted stay of execution pending appeal.
16. On the issue as to whether to ex parte judgment should be set aside, I find that the said issue should be canvassed at appeal stage since the respondents maintain that the judgment was delivered after interpartes hearing.
17. The governing legal provision for stay of execution pending appeal 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 appeal case of 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 Applicants 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 Applicants”.

18. I grant stay of execution pending appeal on condition that the entire decretal sum is deposited in court within 45 days of this date.

19. I grant the orders seeking the setting aside of the proclamation order.

20. The respondent’s motor vehicle registration no. KCD 139J to be released to the applicant forthwith on condition that the applicant pays auctioneer’s charges.

21. The costs of the application to abide the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2024.

A. N. ONGERI

JUDGE

In the presence of:



..... for the Appellant

..... for the Respondent

