



REPUBLIC OF KENYA



KENYA LAW
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**Ibae v Mwaura & another (Civil Appeal E136 of 2023)
[2024] KEHC 8374 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E136 OF 2023
JK NG'ARNG'AR, J
JUNE 26, 2024**

BETWEEN

JOHN KANYIRA IBAE APPELLANT

AND

EUNICE WAIRIMU MWAURA 1ST RESPONDENT

WAMBUGU JULIUS GUCHU 2ND RESPONDENT

*((An appeal from the ruling and order of the Chief Magistrate's Court at Limuru
(P.M. Mugure, PM.) delivered on 17th May 2023 in CMCC No. E428 of 2022))*

JUDGMENT

1. By judgment of the trial court dated 11th January 2023, the trial court in CMCC No. E428 of 2022 entered judgment in favor of the 1st respondent, the plaintiff therein, against the appellant and 2nd respondent jointly and severally. They were found 100% liable and thus ordered to pay Kshs. 1,800,000.00 in general damages for pain, suffering and loss of amenities, Kshs. 15,100.00 in special damages, costs and interest. A decree was extracted to this effect on 27th February 2023. The record shows that warrants of attachment of movable property in execution of the decree were extracted on 25th August 2023. Prior to this process, vide an application dated 28th April 2023 and filed on 3rd May 2023, the appellant sought the following reliefs:

1. ... Spent;
2. That the Honorable Court be pleased to grant leave to the firm of Kimondo Gachoka & Company Advocates to come on record for the 1st defendant/applicant to file their defence out of time;



3. That there be stay of gazettement and selling of motor vehicle registration number KCW 279U pending the hearing and determination of this application;
4. That there be stay of any proceeding/directions/execution of the judgment entered/delivered on 11th January 2023 and decree herein pending the hearing and determination of this application;
5. That pending the hearing and determination of this application inter partes, this Honorable Court be pleased to order stay of proclamation and warrants of attachment;
6. That the interlocutory judgment entered, together with the ex-parte judgment delivered of Kshs. 1,815,100.00 and all other consequential orders thereof delivered on 11th January 2023 herein against the 1st defendant/applicant be set aside, and the 1st defendant/applicant be granted a chance to file their defence out of time, ventilate it on merit and authenticate the plaintiffs supporting documents;
7. That this Honorable Court allow the applicant to furnish the court with security;
8. That the proposed defence, list of witnesses and documents attached hereto be deemed duly filed and served upon payment of requisite court fees;
9. That the process server to be cross examined on his/her affidavit of services to enable the court determine the facts of the case;
10. That this application be served on the plaintiff and heard inter partes on such date and time as this Honorable Court may direct;
11. That costs of this application be in the cause.

2. The application was supported by the grounds on the body of the motion and the supporting affidavit of the appellant. That application was opposed. The 1st respondent filed a replying affidavit dated 12th May 2023 on 17th May 2023. The application was canvassed by way of written submissions. In its ruling dated 25th October 2023, the trial magistrate found that the application lacked merit and was dismissed with costs to the 1st respondent. However, the appellant is dissatisfied with the findings dated 17th May 2023 where the trial court held:

“Parties to file and exchange their submissions to the application dated 28/04/2023 within 14 days each. Mention to fix ruling date 21/06/2023. No interim orders granted at this stage.”

3. It is those findings that precipitated the filing of the present appeal.
4. The appellant filed a memorandum of appeal dated 22nd May 2023 on 24th May 2023. He raised two grounds opposing the impugned ruling of 17th May 2023 on the following grounds: that the trial court erred in failing and declining to grant interim/temporary orders of stay of execution pending the hearing and determination of the application filed in the lower court and that the trial court erred in law and in fact by failing to thoroughly consider the appellant’s application and documents annexed



thereto and the ramifications in failing to grant temporary stay of execution. For those reasons, the appellant urged this court to allow the appeal, set aside the orders of 17th May 2023 and order costs.

5. Although the appeal was directed to be disposed of by way of written submissions, the parties herein did not furnish their submissions for my determination. It is also instructive to note that the record of appeal had not been placed before me. However, this court shall rely on the trial court file that was furnished before this court. I have considered the impugned ruling, examined the memorandum of appeal and analyzed the law. This is an appeal against the trial court's exercise of its discretionary powers. The court in *United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd* [1985] E.A held as follows when dealing with a trial court's exercise of discretion:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

6. The appellant herein is dissatisfied with the fact that the trial court failed to grant him interim stay of execution thereby exposing the appellant to potential execution. It is instructive to note that the application was canvassed by way of written submissions and a ruling delivered on 25th October 2023 dismissed the application with costs. Noticeably, during the pendency of the application, although the 1st respondent took out warrants of attachment on 25th August 2023, no execution of the decree took place. The apprehension that execution would take place during the pendency of the application was therefore not supported by any cogent evidence bearing in mind that execution is a lawful process and a party must furnish sufficient reasons to warrant a clog on the same.
7. The trial court exercised its discretion not to grant interim orders. Ultimately, the trial court found that the application lacked merit and was dismissed on 25th October 2023. The appellant failed to establish that the learned magistrate misdirected himself in law, misapprehended the facts, took account of considerations he ought not to have taken account of, failed to take into account relevant factors and that the discretion was plainly wrong. Furthermore, interim orders of stay of execution are not automatic and an applicant must advance compelling reasons to interfere with execution of stay. That was not established and as such, the trial court's findings were proper.
8. Consequently, I find that the appeal herein lacks merit. It is dismissed but with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

No appearance for the Appellant

No appearance for the Respondent

Court Assistant- Peter Ong'idi

