



**Arthini v Baye Africa Limited (Miscellaneous Civil Application
E329 of 2024) [2024] KEHC 11382 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E329 OF 2024
MS SHARIFF, J
SEPTEMBER 27, 2024**

BETWEEN

KUTOKA ARTHINI APPLICANT

AND

BAYE AFRICA LIMITED RESPONDENT

RULING

1. The Applicant herein Kutoka Arthini Ltd moved this court vide a notice of motion dated 20th August, 2024 brought under the provisions of Section 95, 1A, 1B and 3A of the [Civil Procedure Act](#) and under order 50 and 51 of the [Civil Procedure Rule](#) 2010, for the following orders:
 1. Spent
 2. Spent
 3. That the Honourable court be pleased to issue orders for stay of execution of the train subordinate court's judgment in Winam Magistrate's Court Civil Case No. E044 of 2023 (*Baye Africa Ltd versus Kutoka Arthini Limited*) delivered by the court on the 24th day of July 2024 at Winam, pending hearing and final determination of the intended appeal herein.
 4. That the Honourable court be pleased to, on priority basis, state the application herein for inter-parties hearing.
 5. That the costs of the application herein be in the cause.
2. This application is supported by the affidavit of Jacob Katuva sworn on 20th August 2024 wherein it is deponed that the Applicant is aggrieved by the judgment of the trial court and that it has an arguable appeal as per the attached draft memorandum of appeal wherefore it is in the interest of justice that an order of stay of execution be granted simultaneously with leave to file an appeal out of time.



3. The Respondent has resisted this application by filing grounds of opposition dated 20th September 2014 wherein it posits that this application is incompetent and an abuse of court process as there is no appeal filed two months down the line after the delivery of judgment on 24/7/2024. Further that the Applicant has not adduced any proof of the request for supply of proceedings of the lower court nor has it applied for leave to lodge an appeal out of time.
4. It is the Respondents stand that this application was informed by the process of taxation of costs commenced by it. The Applicant is also accused of failure to demonstrate urgency.
5. The application was canvassed by way of oral submissions. This court has considered the oral submissions of parties and the issue that emerge for determination is whether the Applicant has made out a case for grant of orders of stay of execution pending the intended appeal.
6. I agree with the Respondent that the Applicant has not filed any appeal nor has it made any prayer for enlargement of time as envisaged under Section 95 of the *Civil Procedure Act*.
7. Apart from invoking the oxygen principle under Section 1A, 1B and the inherent jurisdiction under Section 3A of the *Civil Procedure Act*, the Applicant has not moved this court under Order 42 Rule (6) of the *Civil Procedure Rules* and this court appreciates that omission within the backdrop of its prayers.
8. The Applicant is guilty of material misrepresentation; it spreads that its intended appeal will, if no stay orders are granted, be rendered nugatory yet there has been no effort made by it to demonstrate that there is an intended appeal in the pipeline. A mere annexed of a draft memorandum of appeal without seeking leave to appeal out time will not suffice to prove an intention to appeal on the part of the Applicant.
9. So far this application has solely been made for proposes of wasting court's precious time and it is indeed in abuse of court process.
10. There is in essence no substratum upon which to base this application. It has been made in a vacuum and it thus must fall.
11. This application is thus dismissed with costs to the Respondent assessed at Ksh.25,000.

This file is marked s closed.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF SEPTEMBER, 2024.

M. S. SHARIFF

JUDGE

