



Coast Bus (Mombasa) Limited & another v Chepkoech (Suing as a Personal Representative and/or Administrator of the Estate of Kiplangat Koech Willy (Deceased)) (Civil Appeal 042 of 2024) [2024] KEHC 13240 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 042 OF 2024
JK SERGON, J
OCTOBER 30, 2024**

BETWEEN

COAST BUS (MOMBASA) LIMITED 1ST APPLICANT

PHILIP ARAKA 2ND APPLICANT

AND

EMMY CHEPKOECH RESPONDENT

**SUING AS A PERSONAL REPRESENTATIVE AND/OR ADMINISTRATOR OF
THE ESTATE OF KIPLANGAT KOECH WILLY (DECEASED)**

RULING

1. The application coming up for determination is a notice of motion dated 1st September, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That this Honourable Court be pleased to order a stay of execution of the judgement/decree and costs dated 13.8.2024 vide Kericho CMCC Number E142 of 2023 pending hearing and determination of Kericho HCCA No. E042 of 2024.
 - (v) That this Honourable Court be pleased to order that the appellant furnishes security in the form of a bank guarantee for Kshs. 3,000,000/= which is the policy limit for the insurer pending hearing and determination of the appeal.
 - (vi) That costs of this application be provided for.



2. The application is supported by grounds on the face of it and the supporting affidavit of Mwana Amina Abdalla an Administration Manager of the 1st Applicant who is the registered owner of motor vehicle registration no. KCU 053C which forms the subject of this case, hence conversant with facts of the suit.
3. She avers that, she is aware that the firm of M/s Kimondo Gachoka and Company Advocates, were instructed by Directline Assurance Co. to act for it and on their behalf in the matter.
4. She avers that they were informed by their advocates on record that recently learnt that judgement was delivered on 13.8.2024 in their absence where the plaintiff was awarded Kshs. 7, 103, 302/= as general damages for loss of dependency, Kshs. 300, 000/= for loss of expectation of life, Kshs. 300, 000/= pain and suffering, Kshs. 219, 450/= for special damages plus costs and interests at court rates.
5. She stated that no order for stay of execution was granted thereby exposing them to an imminent risk of execution proceedings.
6. She also avers that upon perusal of the judgement, they were aggrieved by the said judgement and therefore instructed their advocates to lodge an appeal against the judgement delivered on 13.8.2024 vide Kericho HCCA No. E042 of 2024.
7. She stated that on information of their advocates, it is trite law that an appeal does not operate as stay of execution and therefore their immovable properties were exposed to execution proceedings by way of proclamation and attachment potentially rendering the appeal nugatory.
8. She avers that in the event the orders sought in the instant application are not granted, they would suffer irreparable loss and damages.
9. She avers that their insurer M/s Directline Assurance Co. Ltd is ready and willing to offer security in the form of a bank guarantee for Kshs. 3,000,000/= which is its policy limit pending hearing and determination of the appeal.
10. She avers that the respondent is a person of straw and will not be able to refund the decretal sum when required upon the conclusion of the Appeal.
11. She avers that the applicants have come to court within a reasonable period of time and without undue delay and that the application will not occasion any prejudice to the respondent as the same can be compensated by an award of costs.
12. The respondents filed a preliminary objection dated 19th September, 2024 in response to the appellants application for stay pending appeal on the following grounds;
 - (i) That application dated 1st September, 2024 is sub judice since there exists a similar application before the Chief Magistrate's Court in Kericho CMCC No. E142 of 2023 filed on 20th August, 2024 and is pending determination by the trial court.
 - (ii) That the application herein offends the provision of order 22 rule 1 and order 42 rule 6 as a similar application cannot be presented concurrently before the trial court and the appellate court.
 - (iii) That the application herein is incurably defective, bad in law, incompetent and misconceived and the same ought to be dismissed with costs to the respondent.
13. This court directed the applicant to file a response to the preliminary objection and that parties should file and exchange written submissions in respect to the preliminary objection.



14. At the time of writing this ruling the respondent complied and filed written submissions in support of her preliminary objection.
15. The respondent argued that the preliminary objection was necessitated by the fact that the application filed in this court is similar to an application filed before the trial court seeking the same orders, which application is still pending hearing and determination by the trial court.
16. The respondent argued that the applicants ought to exhaust the trial process in the trial court.
17. The respondent argued that the preliminary objection filed was viable and cited the case of *Mukisa Biscuits v West End Distributors Ltd (1969) EA 696* where Newbold P held that:—"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Law J.A in the same judgement stated that:—"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration." The objection herein is on grounds that the suit is sub judice, that the instant application dated 1st September, 2024 and 20th August, 2024 before the Chief Magistrate Court in Kericho CMCC No. E142 of 2023 are similar as they both resonate around the issue of stay of execution.

18. I have considered the application plus the preliminary objection filed in response to the application for stay of execution pending appeal and the submissions filed by the respondent. The main issue for determination is whether this court can issue a stay of execution whereas there is a similar application pending hearing and determination in the trial.
19. It is not in dispute that the application for stay in the trial court was filed on 20th August, 2024 while the one filed before this court is dated 1st September, 2024. It is also not in dispute that in the two applications, the applicant is seeking similar orders. The two applications are yet to be determined.
20. The Respondent has raised a preliminary objection urging this court to strike out the instant application for being res-subjudice. I am convinced that the instant application is res-subjudice under Section 6 of the *Civil Procedure Act*. The act of filing similar applications in parallel courts in my view amounts to an abuse of the court process. Under Section 6 of the *Civil Procedure Act* requires that the latter application should be stayed to allow the hearing and determination of the earlier application or proceedings. I find the preliminary objection to be properly before this court. The same is upheld thus the hearing of the application dated 1st September, 2024 pending before this court is stayed pending the hearing and determination of the application dated 20th August, 2024 in Kericho C.M.C.C. No.E142 of 2023.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OCTOBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/A – Rutoh



Nyasani holding brief for Ongwacho for Appellant

No Appearance for Mwita for the Respondent

