



**Put Sarajevo General Engineering Company v Lion Global Limited & 2 others (Civil Application E144 of 2022) [2024] KEHC 16719 (KLR) (Commercial and Tax) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16719 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPLICATION E144 OF 2022  
BM MUSYOKI, J  
NOVEMBER 22, 2024**

**BETWEEN**

**PUT SARAJEVO GENERAL ENGINEERING COMPANY ..... APPELLANT**

**AND**

**LION GLOBAL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**AFRICACE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JEREMIAH KIARIE MUCHENDU T/A ICON AUCTIONEERS .... 3<sup>RD</sup>  
RESPONDENT**

*(Being an application for stay of execution of orders issued on 28th September 2022 and any other pending execution in relation to the case in cmcc no. 9421 of 2018 by Hon H.M. Nyaberi)*

**RULING**

1. This is an interesting and unique application. I say interesting and unique because it is a stand-alone application in that there is no appeal filed alongside or before it neither is it hinged on any suit. The prayers in the application which is dated 11-10-2022 are as follows;
  - a. On the grounds more specifically set out in the certificate of urgency filed herewith this application be certified urgent and be heard on a priority basis and the orders herein be granted in the first instance.
  - b. Leave be granted to the firm of M/S E.M. Wageita & Company Advocates to come on record on behalf of the applicant herein.
  - c. Pending the inter-parte hearing and determination of this application, this court be pleased to issue an order of stay orders issued on 28<sup>th</sup> September 2022 and any other orders issued in cmcc



no. 9421 of 2018 directed at the 3<sup>rd</sup> respondent jointly and severally restraining them whether by themselves, their employees and/or agents or persons acting on their authority otherwise howsoever from proceeding with execution or further execution of any nature.

- d. Pending the inter-parties hearing and determination of this application, this Honourable Court be pleased to issue an order of injunction directed at the 3<sup>rd</sup> respondent jointly and severally restraining them from effecting or causing to be effected the transfer of the motor vehicles held in the possession of the 3<sup>rd</sup> respondent.
  - e. This Honourable Court be pleased to set aside or stay any sale by public auction purportedly to have been conducted by the 3<sup>rd</sup> respondent.
  - f. The court be pleased to make any orders it shall deem just in the circumstances of the case.
  - g. The costs of this application be awarded to the applicants.
2. I have reproduced the above orders in verbatim and I will not dwell on obvious glaring grammatical errors which to me cannot pass as typographical. The application was argued by way of written submissions. The applicant's submissions are dated 2-12-2022 while the 1<sup>st</sup> and 2<sup>nd</sup> respondents' are dated 20-06-2024. The respondent has asked me to strike out the application for being incompetent and fatally defective because there is neither an appeal or a suit on which the application can stand. The applicant has not addressed me on this point which I consider preliminary.
  3. The application is said to be brought under Articles 50, 159(2) and 259 of the Constitution; Sections 1A, 1B and 3A of the Civil Procedure Act; Order 9 Rules 9 and 10; Order 40 Rules 1 and 4; Order 42 Rules 6(1)(2) and Order 50 Rules 1, 3 and 4 of the Civil Procedure Rules and all enabling provision of the law. It is supported by affidavit of one Josephine Oluoch who describes herself as the administration director of the applicant. In short, the said affidavit states that the 2<sup>nd</sup> respondent herein had filed an application in the lower court which was dismissed on 28-09-2022. She has attached the application and the order dismissing it. The affidavit also exhibits an advertisement for sale of some motor vehicles in execution of the lower court's judgment and another application dated 6-07-2022 filed by the applicant seeking to join the National Bank of Kenya to the suit. It then ends with averment that the applicant will suffer substantial loss if the application is not allowed.
  4. I have reproduced the summary of the contents of the supporting affidavit to make it clear that it does not say much. The applicant does not tell the court what it intends to do after the application is disposed of. It would appear that the 2<sup>nd</sup> respondent herein was not a party to the suit in the lower court as it is not defendant or a plaintiff. Its interest in the suit was that of an objector. It is not clear what interest the 2<sup>nd</sup> respondent has in this application since it did not appeal the decision which dismissed its application.
  5. The 1<sup>st</sup> and 3<sup>rd</sup> respondent have opposed the application through an affidavit of Daniel Kimunya Mathenge who describes himself as the director of the 1<sup>st</sup> respondent. The deponent avers that the 2<sup>nd</sup> respondent had made an application in the lower court claiming that the attached properties belonged to it which application was dismissed. Although the full facts of the lower court matter have not been disclosed in this matter, it appears from the replying affidavit that it had proceeded to hearing where the applicant was represented by advocates and judgment given in favour of the 1<sup>st</sup> respondent.
  6. Although the application cites several pieces of legislations some of which do not exist, the nature of its prayers dictates that the same is an application under Order 40 Rules 1 and 4 and Order 42 Rule 6 of the Civil Procedure Rules. I do not see the relevance of Articles 50, 159 and 259 of the Constitution



in this matter. The other cited sections are oxygen and general provisions which cannot stand on their own in an application of this mature.

Order 40 Rule 1 of the [Civil Procedure Rules](#) provides that;

Where in a pending suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree; or that the defendant threatens or intends to remove, dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit; the court may by order grant a temporary injunction or restrain such act, or make such other orders for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.’

7. It is clear that an application made under this Rule must be anchored on an existing suit. As observed earlier, there is no pending suit on which this application can be anchored on. By virtue of Order 3 Rule 1 of the [Civil Procedure Rules](#), a suit can only be commenced by way of plaint. The other methods of commencement of a suit are by way of an originating summons under Order 37 of the [Civil Procedure Rules](#) and other relevant laws or petitions. A suit cannot be commenced in the manner this application has been made. Even if it were to be commenced by way of an application, the prayers sought in the application are not final in nature as they do not dispose or adjudicate on the rights of the parties with finality. In [Fidelity Bank Limited v John Joel Kanyali](#) (2014) KEHC 5860 (KLR), the court held as follows;

“It is clear from the above that a civil action can only be commenced by filing a petition, summons and plaint. This was made clear by the Court of Appeal in the case of *Board of Governors, Nairobi School v Jackson Ireri Geta* (1999) KLR. The court stated as follows;

Pleading is defined in Section 2 of the *Civil Procedure Act* to include a petition or summons, and the statement in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply to the plaintiff of any defence or counterclaim of the defendant; this definition, is couched in such a way as to accord with Order IV rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suits, which Rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

The use of the term ‘summons’ in the definition of the term ‘pleading’ must be read to mean ‘originating summons’ as that is a manner prescribed for instituting suits.

Chamber summons is not a manner prescribed for instituting suits and cannot therefor be a pleading within the meaning of that term as used in the *Civil Procedure Act* and Rules made thereunder.’

Similarly as stated by the Court of Appeal, I say notice of motion is not a manner prescribed for instituting a suit. It cannot be a pleading as defined in Cap 21 and its Rules. Accordingly there is no suit before court which can sustain the notice of motion”



8. Again I seek guidance in *Speaker of the National Assembly v Karume* (1992) KECA 42 (KLR) in which the Court of Appeal held that;

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.’

9. Order 42 Rule 6 of the *Civil Procedure Rules* similarly anticipates a pending appeal within which an application for stay of execution may be filed. Although the application was filed on 11-10-2022 which time was within the period prescribed by the law for filing appeals, it cannot pass for an appeal. An appeal must be commenced by way of memorandum of appeal and none has been filed in this matter. Actually, the heading of the application is shown as ‘in the matter of an intended appeal’. The court has not been told whether an appeal was ever filed despite the same issues having been raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. I take the position that where there is no appeal or an application for leave to appeal, no application can competently be canvassed under the said Order 42 Rule 6 of the *Civil Procedure Rules*. In *Thiong’o (Suing as the legal representative of the Estate of Michael Thiong’o Gatete) & Another v Ontonyi & 3 Others* (2024) KEELC 6865 (KLR) Honourable Justice Sila Munyao held that;

The long and short of it is that I am not persuaded that there is a Notice of Appeal lodged upon which an application for stay pending appeal can be mounted. In essence, you cannot seek stay pending appeal when you have no appeal in the first place. You need first to lodge a notice of appeal which will be the foundation for seeking a stay pending appeal. It would be a paradox for a court to give an order of stay pending appeal when there is no appeal. That would be a stay in a vacuum and not a stay pending appeal.’

10. Assuming that there was either a pending suit or appeal or both, there will still be headwinds in the application before me. Prayers 3 and 4 of the application seek orders pending hearing and determination of the application. These prayers were granted on 12-10-2022 and have been extended from time to time. Now that I am determining this application, the orders will come to an end leaving me with only prayers 5, 6 and 7.
11. Prayer 5 of the application seeks that the court sets aside or stays sale of unidentified motor vehicles. I have gone through the application and the supporting affidavit and I am unable to see any grounds in support of such prayers. It is acknowledged by the applicant that the sale or intended sale was in execution of a valid court decree which has not been set aside or satisfied. A court decree cannot be unlawful or wrong unless it has been successfully challenged. The applicant has not sought to set aside, review or vary the decree in the lower court which remains unsatisfied. The applicant has not even made any attempt to show what is wrong or unlawful with the lower court decree and in the circumstances, I find the prayer unmerited.
12. Prayer 6 of the application asks that this court makes orders which it deems fit and just in the circumstances. I could only consider such a prayer if I have a competent application before me and where the ends of justice dictate so. I have no other orders in mind which can help this application other than an order for dismissal.
13. In view of the above analysis, I do agree with the counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents that the application before me is incompetent and incapable of producing any substantive positive orders. The application is hereby dismissed in its entirety. The costs of the application are awarded to the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**



**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of;

Mr. Mureithi for the applicant; and

Miss Makori for the 1<sup>st</sup> and 3<sup>rd</sup> respondents; and

In absence of the 2<sup>nd</sup> respondent.

