



**Chege & another v Beth Mobility LLP & 2 others (Commercial Appeal E096 of 2022)
[2023] KEHC 1390 (KLR) (Commercial and Tax) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E096 OF 2022
DO CHEPKWONY, J
FEBRUARY 28, 2023**

BETWEEN

BEATRICE NJERI CHEGE 1ST APPELLANT

TRIS MOTORCYCLES LIMITED 2ND APPELLANT

AND

BETH MOBILITY LLP 1ST RESPONDENT

QUESTWORKS MOTORLAB LLP 2ND RESPONDENT

TUA INTERNATIONAL GROUP LIMITED 3RD RESPONDENT

RULING

1. Before this court for determination are two applications, namely a Notice of Motion application dated July 26, 2022 by the Appellants and the application dated July 26, 2022 filed by the Respondents. The Appellants application is expressed in terms of Order 22 (1), Order 51(1) of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act*. The Applicants/Appellants' main prayer in the application is:

[3]. That this Honourable Court be pleased to stay orders issued on July 12, 2022 in the subordinate court in MCCOMMSU No E462 of 2022 pending hearing and determination of the appeal.

2. The application is premised on the grounds on its face and supported by the annexed affidavit of Beatrice Njeri Chege the 1st Applicant.
3. She has deposed that she is the Director of the 2nd Appellant, who was among the Defendants/ Respondents in MCCOMMSU No E462 of 2022.



4. The Appellants avers that they filed a Replying Affidavit while the 3rd Defendant/Respondent raised a Preliminary Objection. The matter was fixed for mention on which day the court directed parties to file submissions and proceeded to issue further orders.
5. She has stated that the Appellants are heavily prejudiced by the omnibus orders in place as she cannot operate her accounts nor transact any business at the shop, hence all the operations of the Appellants have basically been shut down.
6. She has further deposed that the 2nd Appellant has loans which she is servicing, so that if the orders remain in force, it would mean she will default on the loans with a risk to her credit standing and attachment.
7. In disguised response to the application dated July 26, 2022, the 1st and 2nd Respondents filed the second application by way of a Notice of Motion dated August 24, 2022 mainly seeking for the following order;

[3]. That this Honourable Court be pleased to set aside and/or vacate the interim orders of stay issued on August 2, 2022.'

8. The application is anchored on the grounds on the application and supported by the affidavit of Philip Kamau Mwangi sworn on August 24, 2022. The deponent avers that the Appellants' application is devoid of merit, grossly misleading and not supported by necessary documentary evidence as the Appellants did not furnish the court with any evidence that they can provide security for the due performance of the decree to warrant the issuance of the stay orders by this court.
9. The deponent has stated that the application and the appeal amount to forum shopping and offend the doctrine of sub-judice as the 3rd Respondent filed an appeal being Milimani HCCA No E487 of 2022 dated June 29, 2022 challenging the very orders the Appellants seek to challenge in this appeal where the Appellants are named as Respondents. In other words, it is argued that the application dated July 26, 2022 is exactly the same as the one pending in Milimani HCCA No E487 of 2022.
10. He also avers that the Appellants in this matter are related to the 3rd Respondent in that the 1st Appellant is the beneficial owner and Director of both the 2nd and 3rd Respondents.
11. His contention is that the filing of multiple appeals and applications is vexatious, frivolous, abuse of court process and wastage of scarce resources. That if the Appellants were aggrieved by the orders of July 12, 2022, they should have joined the appeal by the 3rd Respondent in the High Court Civil Appeal No E487 of 2022.
12. He goes on to state that the 1st and 2nd Respondents should not be subjected to double jeopardy by being required to respond to multiple appeals and applications that emanate from the same subject matter and filed by related Appellants who are all sued as Defendants in the subordinate court.
13. He then avers that the Appellants have come to this court with unclean hands because prior to obtaining orders of stay from this court on August 2, 2022, the Appellants disobeyed the orders they seek to stay, hence should not be allowed to benefit from their act of contempt by delaying the prosecution of this case. That they had been ordered by the Subordinate Court not to transfer any money from the Defendants' Bank Account but the 1st Appellant caused to be withdrawn and transferred millions of shillings from the bank account of the 2nd Appellant.
14. The 1st and 2nd Respondents also filed a Notice of Preliminary Objection dated August 12, 2022. The Preliminary Objection is crafted in the following manner;



1. That the substantive appeal and the application dated July 26, 2022 are sub-judice and an abuse of the court process and therefore should be struck out in limine because there exists other appeal by the Appellants against the same orders of the subordinate court in MCCOMMSU No E462 and between the same parties in High Court Civil Appeal No E487 of 2022.
2. That as a result of the above, the Appellant's application is grossly misconstrued and misconceived and thus is a waste of precious and scarce judicial time.
15. The 1st Respondent also filed a Replying Affidavit in response to the application dated July 26, 2022. The affidavit is sworn by Philip Mwangi Kamau who describes himself as a partner in the 1st Respondent's partnership.
16. He deposed that the 1st Appellant is a sole director of the 2nd Appellant and owns 50% of shares with the 3rd Respondent who is also one of the Directors.
17. That the 3rd Respondent already filed an appeal and an application dated June 29, 2022 as HCCA No.E487 of 2022 seeking to vary the order made on June 13, 2022 in MCCOMMSU No E462 of 2022. Pursuant to the appeal and application, the court issued an order of stay dated July 7, 2022.
18. She states that on July 12, 2022, the subordinate court issued orders that are subject to the current appeal and application. The 3rd Respondent filed a Notice of Motion application on July 12, 2022 in HCCA No E487 of 2022 seeking stay orders of July 12, 2022 and named the 1st and 2nd Appellants as Respondents despite their deep connections and relations.
19. That both applications in this matter are dated July 26, 2022 and the application dated July 12, 2022 in HCCA No E487 of 2022 are between the same parties and seek the same orders issued on July 12, 2022 in MCCOMMSU No E462 of 2022. Thus the current appeal and application amount to sub-judice in light of the earlier appeal in HCCA No E487 of 2022.
20. The deponent has stated that the multiple appeals are likely to subject the 1st and 2nd Respondents to double jeopardy as they have to prepare and file responses over the same matter and between the same parties.
21. The Appellants filed a Replying Affidavit dated September 16, 2022 sworn by the 1st Appellant. The said affidavit shall be treated as a rejoinder as well as a response to the application dated August 24, 2022.
22. She has deposed that it has been the practice of the Respondent, over time and again to introduce unnecessary technicalities to sway the court away from substance of the matter before it.
23. That the issues being raised in the current application could easily have been put in a response to the Appellants' application and the same canvassed instead of clogging the court with multiple applications.
24. The companies are legal persons and the fact that she has shares with the 3rd Respondent does not stop her from instituting a suit or appeal in her own right.
25. She has further deposed that the 1st and 2nd Respondents have failed to inform the court that there are two separate and distinct orders that have been appealed from by the parties in the said appeals and which affect the parties differently.
26. She states that it is trite that companies are independent legal persons and the interests of the Appellants and business relationship with the 1st and 2nd Respondents do not overlap as each has a distinct claim.



27. That this appeal is not sub-judice as it relates to orders of a different date from the appeal by the 3rd Respondent and affecting the parties in different ways.
28. Lastly, it is curious how the 1st and 2nd Respondents have been dealing with the Appellants without a hitch but all over sudden they have decided that there is danger and sought to push the Appellants out of business for their own selfish reasons.
29. On September 19, 2022, this court issued directions that the applications dated July 26, 2022, August 24, 2022 and the Notice of Preliminary Objection be disposed of by way of written submissions. Both parties complied with the court's directions and filed their respective submissions in support and in opposition to the applications and the Preliminary Objection. The Appellants' submissions are dated September 9, 2022 while the 1st and 2nd Respondents' submissions are dated September 19, 2022.

Analysis and Determination

30. I have considered the applications before Court together with the Preliminary Objection, the response thereto and the submissions filed by both parties in support and in opposition alongside the cited authorities. I find the issues emerging for determination by this Honourable court are:
 - a. Whether or not the Appellants have met the threshold for the grant of the orders of stay of execution pending the hearing and determination of an appeal;
 - b. Whether this matter is sub-judice
31. On the first issue of whether the application dated July 26, 2022 is sub-judice, Section 6 of the [Civil Procedure Act](#) states that:

' No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed,'
32. Therefore, the doctrine of subjudice is to the effect that it prevents a court from proceeding with trial of any suit in which the matter in issue is directly or substantially the same with the previously instituted suit between the same parties pending before the same or another court with jurisdiction to determine it.
33. In the instant suit before court, I have perused the application in Civil Appeal No E487 of 2022 and note that the application is seeking stay of orders issued on June 13, 2022 in the subordinate court vide MC COMMSU No E462 of 2022. The court issued orders of stay on July 7, 2022 and the matter is scheduled for mention on January 24, 2023. The Appellant in Civil Appeal No E487 of 2022 is the 3rd Respondent in this suit.
34. The application currently before court is seeking to stay orders issued on July 12, 2022 in MC COMMSU No E462 of 2022. It is evident that the two matters are seeking to stay orders issued in different Subordinate courts even though the parties are relatively similar.
35. An application for stay of execution such as the one currently before court, is premised on the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules which empowers the court to stay



execution either of its judgment or that of a court whose decision is being appealed from pending the hearing and determination of the appeal. The said Order provides that;

' (1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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.'

36. The principles guiding Courts on applications in granting an order for stay of execution are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which states as follows:

- (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 applicant 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 applicant.

37. The Court of Appeal in the case of *Butt –vs- Rent Restriction Tribunal (1979) eKLR*, substantiated the guiding principles on the exercise of discretion by a Court where it held as follows;

- i. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion.
- iii. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
- iv. The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement.'

38. In the case of *RWW –vs- EKW (2019) eKLR*, the Court in considering a stay of execution pending appeal stated as follows;

' The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.'

39. From the provisions and court findings above, it is clear that an order of stay of execution may be granted upon satisfaction of the conditions as set out under Order 42 Rule 6(2) of the Civil Procedure Rules, which include; substantial loss may result to the applicant, the application has been made



without unreasonable delay and such security as the court orders for the due performance of such the decree.

40. In the instant case before court, on whether the Applicants have demonstrated that they have met the threshold set for the grant of the orders of stay, I have perused the file and in particular the application by the Appellants. I find that the impugned order was issued on July 12, 2022 and application filed on July 26, 2022, which is a period of within 14 days. This is thereby a demonstration that the application was filed within reasonable time and was not delayed.
41. As for substantial loss, the Appellant has stated that the order issued on July 12, 2022 has led to closure of her accounts that she cannot transact any business or service her loans, which she finds prejudicial to her. She has attached a copy of loan statement to confirm this.
42. However, the Appellant has made no mention of the willingness to provide security for the due performance of the decree, which is always regarded as a demonstration of good faith by a party seeking to stay orders which are likely to impede on the other parties' right to enjoy fruits of its Judgment.
43. However, be that as it may and in order not to render this appeal nugatory, I have taken into consideration the weighty issues raised and the indication that there are other appeals pending in respect of the same parties therein and proceed to allow the Applicant's application dated July 26, 2022 on the following conditions:-
 - a. The Appellants do deposit the decretal amount in a joint interest-earning account of both counsel for the parties within 30 days from today.
 - b. The Applicant to file and serve Memorandum of Appeal and or in the alternative be at liberty to seek to be enjoined in th pending appeals in respect of the subject matter, if at all, within 30 days from today. Failure to comply with Order (a) and (b) above will render the stay orders issued herein vacated.
 - c. I proceed to dismiss the application dated August 24, 2022 having treated the same as a disguised response to the application dated July 26, 2022.

Orders accordingly

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of;

M/s Waweru for Applicant

Mr. Kwanjera counsel for 1st and 2nd Respondent

Court Assistant - Sakina

