



**Nganga & another v Mbithuka (Civil Appeal E756 of 2021)
[2023] KEHC 3170 (KLR) (Civ) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E756 OF 2021

CW MEOLI, J

MARCH 30, 2023

BETWEEN

CHARLES MUIRURI NGANGA 1ST APPLICANT

MICHAEL GATTITU 2ND APPLICANT

AND

BENSON MBITHUKA RESPONDENT

RULING

1. The live prayers in the motion dated November 25, 2021 by Charles Muiruri Nganga and Michael Gatitu (hereafter the 1st & 2nd Applicant(s)) seek that:-
 5. That the honorable court be pleased to grant the Applicants an interim stay of execution of an *ex parte* judgment of July 24, 2019 in Nairobi Milimani CMCC No 10651 of 2018 together with warrant of attachment and proclamation dated November 19, 2021 pending hearing and determination of the appeal.
 6. That the honorable court be pleased to cancel, set aside, recall or lift the warrants of attachment herein for having been issued irregularly.
 - 7....
 8. That the execution proceedings to enforce the *ex parte* judgment and decree be declared a nullity.
 9. That the Respondent bears the auctioneers costs.
 10. That this honorable court allow the Applicants to furnish the court with security in the form of a Bank Guarantee from Family Bank of Kenya” (sic).



2. The motion is expressed to be brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 21 Rule 8 & 9, Order 22 Rule 22, Order 42 Rules 6, and Order 51 Rule 1 of the *Civil Procedure Rules* inter alia. It is based on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Purity Waikwa, counsel having conduct of the matter on behalf of the Applicants.
3. To the effect that warrants of attachment were extracted on November 19, 2021 in respect of a decree issued in favor of Benson Mbithuka (hereafter the Respondent) on July 24, 2019 in Nairobi Milimani CMCC No 10651 of 2018; that despite the execution being sought after the lapse of more than one year, no notice to show cause was served on the Applicants pursuant to the mandatory provisions of Order 22 Rule 18 of the *Civil Procedure Rules*. Counsel further deposes that the Applicants being dissatisfied with ruling of the lower court delivered on November 23, 2021 have preferred an appeal against it. Further that, if execution is not stayed, the Respondent will proceed to execute the decree thereby rendering the appeal nugatory occasioning substantial loss and damage to the Applicants.
4. Counsel expressed apprehension that the Applicants may be unable to recover proceeds of the execution from the Respondent if the appeal eventually succeeds. Moreso, as the Respondent's means are unknown. Counsel asserted the Applicants' willingness to furnish security in the form of a bank guarantee for the eventual performance of the decree.
5. In opposing the motion, the Respondent filed grounds of opposition dated March 29, 2022, a notice of preliminary objection dated May 5, 2022 and a replying affidavit of even date. The Respondent takes issue with the motion on grounds that the motion is frivolous, vexatious, scandalous and an abuse of the court process; is riddled with falsehoods and deliberate misrepresentation of material facts; and does not raise any ground to warrant the setting aside of the judgment of January 24, 2019 in Nairobi Milimani CMCC No 10651 of 2018.
6. Moreover that, there was no ruling delivered in the said lower court suit on November 22, 2021 and the court only gave directions that the Applicants' motion dated November 20, 2021 be served for interpartes hearing on December 15, 2021. That the said directions do not comprise a ruling capable of appeal as such the appeal herein is a non-starter. And besides, the motion dated November 20, 2021 runs afoul of the res judicata rule, the Applicants having filed a similar motion before the lower court dated August 25, 2020.
7. In addition to the foregoing, the current motion dated November 25, 2021 offends the res judicata rule as issues raised herein were canvassed in Nairobi Milimani High Court Civil Misc Application No 364 of 2020 wherein a similar motion was dismissed by a ruling delivered on November 18, 2021; and that the said ruling prompted the motion dated November 20, 2021 before the lower court and gave rise to the current appeal which is aimed at misleading the court to revisit a matter upon which it has conclusively pronounced itself. Finally, that the motion dated November 25, 2021 is a dilatory tactic to deny the Respondent the fruits of his judgment and ought to be dismissed with costs.
8. The grounds of the preliminary objection are to the following effect. First, the appeal offends the mandatory provisions of Section 7 and 65 of the *Civil Procedure Act* and Order 10 Rule 11 of the *Civil Procedure Rules*. Hence both the appeal and motion dated 25.11.2021 are an abuse of the court process and should be struck out with costs.
9. The Respondent deposed in his replying affidavit that no ruling was delivered on November 23, 2021 in Nairobi Milimani CMCC No 10651 of 2018 and the present appeal stems from the lower court's directions given on the Applicants' motion dated November 20, 2021 which directions are herein purported to be a ruling. Hence the appeal is a non-starter and the present motion an abuse of the court process in a bid by the Applicants to keep the Respondent from enjoying the fruits of his judgment.



10. He further states that the Applicants filed a motion dated August 25, 2020 before the lower court seeking to set aside the *ex parte* judgment that was entered in Nairobi Milimani CMCC No 10651 of 2018 on July 24, 2020; that the said motion was scheduled for hearing on September 9, 2020 when it was dismissed for non-attendance by Applicants; that instead of seeking reinstatement of the dismissed motion the Applicants thereafter filed Nairobi Milimani High Court Civil Misc Application No 364 of 2020 which motion was struck out by this court vide a ruling delivered on November 18, 2021.
11. That after the ruling above, the Applicants filed the motion dated November 20, 2021 in the lower court which declined to certify the motion urgent and directed that the same be heard *inter partes*. That in utter contempt of the ruling of this court delivered on November 18, 2021 and with the aim of abusing the court process the Applicants rushed back to this court with the present appeal and motion even before the lower court could determine the motion dated November 20, 2021. The Respondent therefore views the instant appeal and motion dated November 25, 2021 as frivolous, vexatious and a clear abuse of the process of the court and therefore ripe for dismissal.
12. The motion was canvassed by way of written submissions. Counsel for the Applicants relied on Order 42 Rule 6 of the Civil Procedure Rules and the decisions in *Global Tours & Travels Ltd*, Nairobi H.C Winding Up Cause No 43 of 2000, and *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR *inter alia* in supporting the motion. She asserted that the memorandum of appeal herein raises issues that merit this court's consideration on appeal.
13. In pressing the prayer for stay of execution pending appeal, counsel called to aid the decisions in *Butt v Rent Restriction Tribunal* [1982] KLR 417, *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* Nairobi Civil Application No 238 of 2005 among others. She asserted if stay of execution is denied, the intended appeal will be rendered nugatory, exposing the Applicants to suffer what she termed as irreparable loss and damage.
14. Counsel defended the suitability of security in the form of a bank guarantee and asserted that the Applicants are apprehensive that they will not recover any monies that may be paid to the Respondent. Counsel cited the decisions in *Water Resources Management Authority v Krystalline Salt Limited* [2018] eKLR and *Shanzu Beach Resorts Limited v Crown Marble & Quartz* [2020] eKLR in support of the assertion that the Applicants' insurer was going through financial constraints arising from adverse effects of the COVID-19 pandemic.
15. The Respondent's counsel in addressing the competence of the appeal, submitted that an appeal to a superior court can only lie from a decree or order of the lower court and in the instant matter the lower court did not adjudicate upon the Applicants' motion dated November 20, 2021. Hence, there exists no ruling, judgment, decree, or order arising from the directions given by the lower court in respect of the foregoing motion. Counsel relied on the decision in *Equity Bank Limited v Taiga Adams Co. Ltd* [2006] eKLR to submit that the appeal is a non-starter and hence the relief of stay of execution pending appeal is untenable.
16. Moreover, he contended that the instant motion is caught up by the *res judicata* rule. He cited the decision of this court in *Charles Muiruri Nganga & Anor v Benson Mbitbuka* [2021] eKLR. The court was urged to dismiss the motion and to order immediate release of the funds deposited in court as security.



17. The court has considered the material canvassed in respect of the motion. The court proposes to first deal with the preliminary objection raised by the Respondent. Section 65 of the Civil Procedure Act provides that;-

- “(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
- (a)
 - (b) from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of the third class, on a question of law or fact;
 - (c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors”.

18. Section 2 of the same Act defines a “decree” as; -

“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- (a) any adjudication from which an appeal lies as an appeal from an order; or
- (b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;”

19. And an “order” is defined as “the formal expression of any decision of a court which is not a decree and includes ...;” As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law J. A. stated:”

“So far as I am aware, 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”



See also the case of *Oraro v Mbaja* [2005] KLR 141, and *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR.

20. The Respondent's preliminary objection essentially challenges the jurisdiction of this court to entertain the instant proceedings. That is a pure point of law. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi, JA (as he then was) famously stated:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
21. The court has taken the liberty of perusing the respective affidavit material before it. The events leading to the instant appeal can be restated briefly as follows. The Respondent sued the Applicants in Nairobi Milimani CMCC No 10651 of 2018. Despite the Applicants being duly served with pleadings they failed to enter appearance or file defence and consequently, an interlocutory judgment was entered against them. Thereafter, the lower court suit proceeded for formal proof hearing with final judgment subsequently entered against the Applicants on July 24, 2019. This prompted the Applicants to file the motion dated August 25, 2020 seeking to set aside the ex parte judgment, which motion was dismissed for non-attendance on September 9, 2020.
22. Instead of seeking reinstatement of the dismissed motion dated August 25, 2020, the Applicants filed Nairobi Milimani High Court Civil Misc Application No 364 of 2020. The motion was struck out vide a ruling delivered on November 18, 2021 by this court. Once more, the Applicants moved the lower court vide the motion dated November 20, 2021 seeking inter alia to set aside the judgment of July 24, 2019. On November 22, 2021 the lower court upon considering the motion at ex parte stage certified it urgent and directed that the motion be heard inter partes on December 15, 2021. Aggrieved perhaps by the fact that no interim orders were granted as sought, the Applicants proceeded to file this appeal and accompanying motion rather than seek to have the said directions reviewed by the lower court.
23. In the circumstances, the court agrees with the Respondent that by dint of Section 65 as read with Section 2 of the *Civil Procedure Act* the directions issued by the lower court on November 22, 2021 did not amount to an appealable ruling or order and or decree of the lower court as purported by the Applicants. Hence the appellate jurisdiction of this court has not been properly invoked.
24. Secondly, at the moment, there are two concurrent proceedings ongoing before this court and before the lower regarding two similar motions by the Applicants both seeking to stay of execution of the judgment of July 24, 2019 in Nairobi Milimani CMCC No 10651 of 2018. The motion dated 20.11.2021 seeking stay of execution of the judgment of July 24, 2019 which was filed before this purported appeal is still pending before the lower court and issues raised therein are therefore sub judice pursuant to section 7 of the *Civil Procedure Act*. Besides, there is no appeal before this court in respect of the said judgment and it is difficult to see how this court could properly grant stay of execution in a situation where its appellate jurisdiction has not been invoked by way of a competent appeal concerning the judgment whose execution is sought to be stayed.
25. In closing, the Court must express its displeasure with the conduct of the Applicants in this matter. They have dissipated valuable court time through incessant and misconceived applications. Earlier,



they filed before this court Nairobi Milimani High Court Civil Misc Application No 364 of 2020 being an application which properly belonged in the subordinate Court. In this purported appeal, the Applicants mischievously misrepresented the direction by the lower court to be a ruling, with the intent of procuring from this court temporary reliefs which they had been unable to obtain in the lower court. This conduct constitutes a gross abuse of the appellate jurisdiction of this court and the court frowns upon it.

26. The court concurs with the Respondent that both the appeal and motion before this court not only represent an abuse of court process but that they are also incompetent. The appeal and accompanying motion are hereby struck out with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 30TH DAY OF MARCH 2023

C.MEOLI

JUDGE

In the presence of:

Ms. Gulenywa for the Applicants

Mr.Kibiku for the Respondent

C/A: Carol

