



**Kenshiv Limited v Metal Crowns Limited (Civil Suit E100 of 2023)  
[2023] KEHC 21830 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21830 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E100 OF 2023  
JWW MONG'ARE, J  
AUGUST 15, 2023**

**BETWEEN**

**KENSHIV LIMITED ..... APPLICANT**

**AND**

**METAL CROWNS LIMITED ..... RESPONDENT**

**RULING**

1. Before this court are two applications both filed by the Applicant. The first application is filed on February 9, 2023 brought under Order 42 Rule 9 of the *Civil Procedure Rules* and it seeks the following orders;
  1. Spent
  2. Spent
  3. Upon hearing of the Application inter-partes, this honourable court be pleased to extend the stay of execution order pending the hearing and determination of the intended appeal.
  4. This Honourable Court be pleased to grant any such orders as it may deem fit and just to grant
  5. The costs of this application do abide the outcome of the intended appeal.
2. The second application was similarly filed by the Applicant by a Notice of Motion dated March 31, 2023 seeking the following orders:-
  1. Spent
  2. The Applicant be granted leave to file and serve a memorandum of Appeal attached hereto out of time.



3. That costs of this application be in the cause.
3. Both applications are grounded on the grounds set on its face and the supporting affidavits of Raman Binjrat Agarwal, the director of the Applicant and Steve Ogola Advocate sworn on February 9, 2023 and March 21, 2023 respectively. The Applications are opposed and the Respondent has filed a replying affidavit sworn on February 15, 2023 by Peter Gaitho, the Respondents Finance Manager and grounds of opposition dated April 6, 2023.
4. In the first application, the Applicant argues that the funds deposited in court to secure his release from civil Jail should not be forfeited or paid to the decree-holder but instead the court should extend the stay of execution of the decree herein. In addition, the Applicant argues that these funds do not belong to the Applicant/judgment debtor but were raised by well-wishers and friends to comply with orders of the court lifting the warrants of arrest. That the order from the trial court to have these funds paid to the decree-holder will greatly prejudice the Applicant.
5. The second application was filed a month later and on March 31, 2023 with the sole prayer that Applicant be granted leave to file an appeal out of time and that the annexed memorandum of appeal be deemed as filed. The Applicant argues that the right to a fair trial is a fundamental right that has been guaranteed by the Constitution and that right extends to a party being granted leave to file an appeal. The Applicant further reiterates that no prejudice will be suffered by the Respondent if the leave sought herein is granted and that the application has not been brought with inordinate delay.
6. On its part, the Respondent opposes both applications. In response to the application filed on February 9, 2023, the Respondent argue that the same is fatally defective ex-facie. The Respondent contends that a decision made under order 22 Rule 34 does not grant a party an automatic right of appeal and that the party wishing to appeal such an order must first obtain leave from the court that issued the order being appealed against. Having not done so, the Respondent takes the position that the Application is therefore fatal and should be struck off.
7. As regards the application dated March 31, 2023 seeking leave to file and serve the memorandum of appeal out of time, the Respondents have filed grounds of opposition dated April 6, 2023. The Respondent contends that since under Order 43 of the Civil Procedure Rules there is no automatic right of appeal against an order emanating from a decision made under order 22 Rule 34, the court lacks jurisdiction to allow the enlargement of time to file and serve a memorandum of appeal as sought by the Applicant. It is the position taken by the Respondent that the Applicant ought to have moved the trial court under Order 43 Rule 1. Having not done so, the court herein is urged to therefore find that it is bereft of the requisite jurisdiction to grant the reliefs sought.

**Analysis and Determination: -**

8. I have carefully considered the two applications by the Applicant and the responses thereto. I note from the onset that the suit subject matter was filed in the Chief Magistrates Court being CMCC No 3728 of 2019 Metal Crowns Limited –v- Kenshiv Limited and the defendant having been served with summons to enter appearance filed a Memorandum of Appearance but failed to put in a Defence to the suit thereto. Subsequently judgment in default of defence was entered against the Applicant herein and a Decree was thereafter issued and execution proceedings commenced. I note that in the process, warrants for committal to civil jail were issued and subsequently the Applicant deposited the sum of KShs 2,000,000/- in court as security to guarantee his attendance. I further note that the magistrate’s court did order that these funds be released to the Respondent herein towards the settling of the judgment debt which is still due and owing.



9. I have considered the arguments that these funds do not belong to the judgment debtor but were pooled together by well-wishers to stop the detention in civil jail pursuant to warrants of arrest issued by the court. However, I note that none of the well-wishers or third parties to whom these funds are supposed to belong to have sworn an affidavit to claim the said funds. In the premises the court is left to make the deduction that these funds belong to the Applicant who is the judgment debtor and therefore the same can properly be applied towards repayment of the judgments debt. I have also considered the argument advanced by the Respondent that the application is ex-facie fatally defective having been moved before the High Court and not at the trial court. As correctly argued by the Respondents, an application seeking to set aside an order or a decision issued under order 22 Rule 34 of the Civil Procedure Rules must first be moved in the court that made the order in the first instance, but not later than 14 days from the date of the said order. Order 43 Rule 1 of the Civil Procedure Rules identifies the following as orders from which an automatic right of appeal exists. It provides as follows;

' An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—;

- (a) .
- (b) .
- (c) .
- (d) .
- (e) .
- (f) .
- (g) .
- (h) .
- (i) .
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);'

10. The order for deposit of security was issued under order 22 Rule 34 of the Civil Procedure Rules and from the reading of order 43 rule 1(k) of the Civil Procedure Rules above, it is not an order from which an automatic right of appeal lies.

The second tenet of such an application can only be issued if an appeal has been filed and is on record at the time of bringing the said application. As at February 9, 2023 when this application was brought, the Applicant had not filed an appeal to challenge the decision for which a stay is being sought. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:-

'No appeal or second appeal shall operate as a stay of execution or proceedings 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.



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.

Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.'

11. The above order envisions that an application for stay to be made only where a party seeking the same orders has filed an appeal. From the foregoing, it is quite clear that as at February 9, 2023 the Applicant had not filed an appeal and therefore the application was brought on a vacuo and cannot therefore stand. I find therefore that the application dated February 9, 2023 is incompetent and is hereby struck out with costs.
12. The application dated March 31, 2023 seeks leave to file and serve a memorandum of appeal out of time. As argued earlier in the decision herein, there is no automatic right of appeal arising from a decision made under order 22 Rule 34 of the Civil Procedure Rules and that leave to appeal such an order must be sought from the court which issued the order or decision sought to be appealed. The application herein seeks leave to file and serve a memorandum of appeal against a decision emanating from the chief magistrates court in Chief Magistrates Court being CMCC No 3728 of 2019 Metal Crowns Limited –v- Kenshiv Limited. I therefore agree with the Respondent that leave to file an appeal should have been made at the Chief Magistrates Court as provided under Order 43 rule 1(k) cited above. I find therefore the application filed on March 31, 2023 is incompetent and is hereby struck out with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2023**

.....

**J. W. W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

1. Kabue for the Plaintiff/Respondent.
2. Ms. Aswani holding brief for Steve Ogolla for the Applicant.
3. Sylvia- Court Assistant

