



Mjomba & 3 others v Information and Communication Authority (Miscellaneous Civil Application E115 of 2021) [2023] KEHC 22949 (KLR) (Civ) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E115 OF 2021**

JN MULWA, J

SEPTEMBER 29, 2023

BETWEEN

**MAGDALENE M. MJOMBA 1ST CLAIMANT
KWAME SHIROYA 2ND CLAIMANT
ZABLON M. RINGEERA 3RD CLAIMANT
ANTHONY K. MUGAMBI 4TH CLAIMANT**

AND

INFORMATION AND COMMUNICATION AUTHORITY RESPONDENT

(Judgment delivered on July 21, 2022 by Hon Justice Sergon J)

RULING

1. By an Application dated August 1, 2022, the Applicant, Information and Communication Technology Authority (ICTA) approached the Court for Orders:
 1. Spent
 2. That this Honourable Court be pleased to grant stay of execution of the Judgment delivered on July 21, 2022 pending hearing determination of this application inter-parties.
 3. That this Honourable Court be pleased to grant a stay of execution of the Judgment delivered on July 21, 2022, pending the hearing and determination of this Suit.
 4. That this Honourable Court do set aside the Judgment that was delivered on July 21, 2022 by Hon Justice Sergon J.



5. That upon grant of Prayer (4) above, the Honourable Court be pleased to order that the matter be set down for hearing de-novo.
6. That costs of this application be in the cause.
2. The Supporting Affidavit is sworn by one Mary Murugi Ngige, an Advocate and State Counsel in the State Law Office, on August 1, 2022; and ground stated at the face of the application, and submissions dated October 24, 2022.
3. By the above, it is evident that the main ground for the application is an order to set aside the Judgment delivered by the Court on July 21, 2022. There is no threat of execution as it is over one year since the impugned Judgment was delivered, and no execution proceedings have been undertaken by the Respondents, if any.
4. This Court notes that this Suit was initially handled by the Hon Chitebwe J by whose ruling dated September 30, 2021 declined to direct and refer the dispute between the parties to arbitration, and as ably stated at the last paragraph of the ruling at page 8 that the parties had not exhausted their right to appoint an arbitrator under the *Arbitration Act*, and therefore dismissed the application as having been premature.
5. Upon the said ruling, the parties on February 1, 2022 agreed by consent to let the Court determine the dispute based on their pleadings, and submissions as filed and make a decision on liability and quantum. The Judgment dated July 21, 2022 is the subject of this ruling.
6. In opposing the motion, the Respondents (Claimants) filed a Replying Affidavit sworn on April 29, 2022, and their submissions dated October 24, 2022.
7. Before venturing into the analysis of the parties issues, it is important to note that the Applicant herein has lodged an appeal against the Court's Judgment delivered on July 21, 2022 (Sergon J) by a Notice of Appeal dated July 27, 2022.
8. The question that arises therefore is whether the Applicant is in order to pursue the application before the Court dated August 1, 2022 and particularly Prayers Numbers 3 and 4 being orders for stay of execution pending hearing and determination of this Suit, and an order to set aside the Judgment of the Court in the Suit at the same time.
9. In my considered view, a party cannot file an appeal and at the same time seek to set aside the Judgment appealed from. It cannot be permissible to pursue an appeal and an application concurrently as it is manifestly an abuse of court process.
A party must decide which option to take, but not both as doing so is an abuse of the Court process.
10. In the Court of Appeal Case *Geo Chem Middle East -vs- Kenya Bureau of Standards* (2020) the Court of Appeal pronounced itself thus
“...it is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed.”
11. Further, it is instructive to state that Section 2 (2) of the Court of Appeal Rules defines an appeal to include an intended appeal. By the Applicant lodging the Notice of Appeal against the whole of the Court's Judgment aforesaid, it is clear that there is an appeal already filed and once the appeal is filed,



any application in the manner of review or setting aside of the said Judgment subject of the appeal cannot be entertained unless the appeal is withdrawn.

12. The issues set out in the application ought to be determined in the appeal; and doing otherwise would be usurping the powers and functions of the Court of Appeal which again is unlawful as the High Court lacks such jurisdiction. See *Karani & 47 Others –vs- Kijaa & 2 others* (1982 KLR 557, *African Airlines International Limited (2003) –vs- East & Southern Africa Trade Bank Limited* (2003) IEAI (CAK) as well as *Acorn Properties Ltd –vs- Isaac Gathungu Wanjohi and 2 others* (2021) eKLR where the Court, in very similar circumstances, found the application for review of its orders when an appeal against the same orders was filed by way of a Notice of Appeal to be incompetent and dismissed it.
13. Further, in the case *Timothy Otuya Afubwa & another vs. County Government of Trans Nzoia & 3 others* (2016) eKLR, the applicant sought to set aside a Judgment of the Court when there was filed a Notice of Appeal against the said Judgment.
14. The Court observed that:

“...Respectfully therefore, I find it inconceivable that the Applicant expects this Court to determine its motion by setting aside its Judgment while turning a blind eye on the Notice of Appeal....”
15. There is therefore no doubt what direction this court is about to take in view of the above decisions and pronouncements. The Applicant having decided to take the Appeal option which is legally provided under the Civil Procedure Rules and the Court of Appeal Rules, the Court finds itself to be functus officio, and is thus barred from entertaining the instant application.
16. The upshot is that the application dated August 1, 2022 is incompetent, and is hereby dismissed.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

JANET MULWA

JUDGE

