



**Mogare v Nyamongo & 3 others (Civil Appeal E007 of 2022)
[2023] KEHC 24520 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E007 OF 2022
WA OKWANY, J
OCTOBER 31, 2023**

BETWEEN

JOASH MOGARE APPELLANT

AND

EVANS NYAMWARO NYAMONGO 1ST RESPONDENT

THE OCS, NYAMIRA POLICE STATION 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

WILFRED MOCHAMA MABEYA 4TH RESPONDENT

RULING

Background

1. The Respondents herein were the Defendants before the lower court in Nyamira CMCC No. E013 of 2020, where the Plaintiff sued them for conspiring to defraud him (Plaintiff) of his motor vehicle. In a judgment rendered on December 20, 2021, the trial court found that the Plaintiff did not prove ownership of the suit vehicle and dismissed the suit. Aggrieved by the said decision, the Appellant/Plaintiff filed an appeal before this court which was heard and determined on June 22, 2023. This Court found that the 1st and 4th Respondents conspired to dispossess the Plaintiff/Appellant of the suit motor vehicle and allowed the appeal. This court ordered the Respondents to pay Kshs. 3 Million for loss of income, Kshs. 500,000/= as general damages, costs of the appeal and interests. The Respondents are aggrieved by the Judgement of this Court and have opted to pursue an appeal before the Court of Appeal.



Application

2. This ruling is in respect to the Application dated July 4, 2023 wherein the Respondents/Applicants seeks orders to stay the judgment and subsequent orders of this court pending the hearing and determination of the appeal filed in the superior court.
3. The Application is supported by the Applicants' affidavit and is premised on the following grounds: -
 1. The judgment was delivered on June 22, 2023 by this honourable Court which the Respondents are not satisfied with.
 2. The Respondents have moved to the superior court vide an appeal to exercise their right of appeal.
 3. Meanwhile the Appellant has commenced the process of execution of the said judgment by requesting a copy of the judgment and extracting a decree herein.
 4. That the intended execution will totally paralyze the Respondents' business occasioning great loss and damage.
 5. The execution shall equally render the Respondents' appeal nugatory and be in violation of its Constitutional right of appeal as an aggrieved party.
 6. That it is in the interests of justice that the Application herein be allowed.
4. The Appellant/Respondent opposed the application through his Replying Affidavit dated July 12, 2023 wherein he states that the application is incurably defective, incompetent, bad in law and an abuse of the court process. He further states that the application does not meet the threshold set for the granting of orders for stay of execution pending appeal.
5. The Application was canvassed by written submissions which I have considered.
6. The gist of the Application is the prayer for an order of stay pending appeal before the Court of Appeal. Before I delve into determining the merits of the Application, I must consider whether this Court has jurisdiction to hear and determine such an Application.

Whether an Application under Order 42 Rule 6 can be made after delivery of Judgment

7. Jurisdiction is everything as it gives the court authority to determine matters before it. This principle was explained in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. where Nyarangi JA held as follows: -

“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.”



8. A court derives its jurisdiction from either the Constitution or statute. The apex Court pronounced itself in this regard in the case of Samuel Kamau Macharia v KCB & 2 Others, Civil Application No. 2 of 2011 thus: -

“A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law.”

9. This Court's jurisdiction is provided for under Article 165 (3) of the Constitution. It states as follows: -

165. High Court

(3) Subject to clause (5), the High Court shall have—

- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—



- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).
10. Article 165 vests this Court with appellate jurisdiction to hear and determine appeals from subordinate courts. Any Appeal filed before this Court under Article 165 must be one emanating from the decision of the subordinate courts because it is at that point that the appellate jurisdiction of this Court is invoked. The same cannot however be said of a Notice of Appeal filed against the decision of this Court in the Court of Appeal because such a decision would form the subject of the appeal in the superior court, and render the High Court devoid of the jurisdiction to entertain the appeal.
11. Turning to the facts of this case, it is not disputed that this Court has already heard and determined this matter on appeal from the trial court. In other words, this court is *functus officio*. The Respondents herein filed a Notice of Appeal dated June 29, 2023 expressing their intention to appeal this decision before the Court of Appeal. This means that having rendered itself through the judgement, any issues that that may subsequently arise with respect to this case can only be determined before the Court of Appeal. This means that the appropriate forum to canvass the issue of stay of execution is the court to which the appeal lies and not the court from which the decision being appealed against emanated.
12. I am guided by the decision of the Supreme Court in [Malcolm Bell v Board of Governors of Moi High School Kabarak & Another](#), Supreme Court Petition Nos. 6 and 7 of 2013 (Consolidated) where the learned judges held thus: -

“It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court’s capability to arrive at a just decision on the merits of the appeal, would be substantially diminished. Both the [Constitution](#) and the [Supreme Court Act](#) have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case.”
13. Similarly, in [Dickson Muricho Muriuki v Timothy Kagundu Muriuki & 6 others](#), Civil Application, Nyeri 21 of 2013 (UR 5/2013) [2013] eKLR the Court of Appeal held thus: -

“On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of *functus officio* is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after



judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts.” (Emphasis added)

14. Having regard to the principle of finality of proceedings, as stated in the above cited authorities, I find that this Court does not possess the authority to act on the Notice of Appeal dated June 29, 2023 and cannot issue orders for stay with respect to its own decision which is the subject of appeal in the superior court. I further find that determining this Application will go against the principles inherent to the concept of hierarchy of courts and finality in litigation. My take is that the appropriate forum to address this Application is the Court of Appeal where the appeal lies.
15. The upshot is that the Application has been presented before the wrong forum and is therefore struck out with costs to the Respondent.
16. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER 2023.

W. A. OKWANY

JUDGE

