



Country Farms Limited v Alios Finance Kenya Ltd (Miscellaneous Civil Application E035 of 2023) [2023] KEHC 25019 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEHC 25019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E035 OF 2023
MS SHARIFF, J
OCTOBER 27, 2023**

BETWEEN

COUNTRY FARMS LIMITED APPELLANT

AND

ALIOS FINANCE KENYA LTD RESPONDENT

RULING

Background

1. Before this court are two pending applications, one dated 5/4/2023 and another dated 13/4/2023. Essentially the latter application was predicated by the interim orders issued on 6/4/2023 with regard to the former application.
2. The orders of the 6/4/2023 were to the effect that; an interim stay of execution of repossession motor vehicles registration numbers KBW 009L, KCB 009P, KBW 990K and trailers registration no's ZE 5514, ZE 5512 do issue and the said motor vehicles be released on a running attachment pending inter parties hearing of the application dated 5/4/2023.
3. The application dated 13/4/2023 now seeks to stay and also set aside the orders of the 6/4/2023.
4. Through concurrence of both parties herein it was agreed that both applications be canvassed together by way of written submissions.
5. After careful consideration of both applications and responses thereto I am of the opinion that dealing with the application dated 5/4/2023 will dispense of the application dated 13/4/2023. The reason for this shall become apparent in the course of this ruling.



The application dated 13/4/2023

6. The application by the Applicant sought the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That the honourable court be pleased to grant the Applicant leave to appeal against the ruling and order of 30th March 2023 in Kisumu CMCC No E279 of 2022 Country Farms LTD Vs Alios Finance LTD.
 5. That the honourable court be pleased to grant a stay of execution of the repossession undertaken by M/S Auckland Auctioneers Agencies through the Respondent's letter of instructions dated 1st February, 2023 pending hearing and determination of the intended Appeal to be filed in the High Court at Kisumu as per the annexed draft memorandum of appeal.
 6. Spent
 7. That costs of this application be provided for.
7. The Applicant grounded the Application on the fact that the honourable D. N. Ogoti had occasioned injustice by denying them a chance to appeal. Additionally that the Respondent had moved to repossess their vehicles with a view to auctioning them and if the vehicles were sold the intended appeal would be rendered nugatory.
8. The Application was further buttressed by the supporting affidavit of Prithpal Singh Pandal the Appellant's director in which he deponed that he had instructed his advocates to appeal the ruling delivered on 30/3/2023 in Kisumu CMCC No. E279 of 2022 Country Farms LTD vs Alios Finance LTD.
9. In addition to this he deponed that if the vehicles are sold then this application and even the intended appeal will be rendered nugatory given that the Respondent has demonstrated willingness to proceed with attachment.
10. He restated his willingness to furnish any such security this court may order and stressed that the intended appeal had high chances of success. He attached a copy of the draft memorandum of appeal, letter requesting for proceedings and a repossession letter.
11. In response the Respondent filed a replying affidavit and written submissions. In the replying affidavit dated 2/5/2023 sworn by Simon Ngigi Gachomo the Respondent deponed that this court lacks jurisdiction to entertain the application as there is no substantive appeal before court.
12. Additionally, they deponed that the ruling or decree sought to be appealed had not been attached to the application. Furthermore, they averred that the draft memorandum was with respect to Kisumu CMCC No E279 of 2022 and not Kisumu CMCC No. 429 of 2018. And therefore the application amounted to challenging the decree in the former file without filing a substantive appeal.
13. In their submissions dated 2/5/2023 the Respondent outlined the following issues for determination;
 - a. Whether this Court has the jurisdiction to entertain the instant Application.



- b. Whether this court should stay execution of the execution undertaken by Auckland Agencies through the Respondent's letter of instruction dated 1st February 2023.
 - c. Whether the application is an abuse of the court process.
14. On the first issue the Respondent submitted that in the absence of an appeal the application had no legs to stand on. They placed reliance on Order 42 Rule 1 to the effect that an appeal to the High Court should be in form of a memorandum of appeal. Additionally, they submitted that this court's jurisdiction could only be invoked by a memorandum of appeal. To this end they placed reliance on the cases of *Abraham Lenauia Lenkeu vs Charles Katekeyo Nkaru* [2016] eKLR and *Blue Nile E.A Ltd vs Lydia Gode Yusuf & another* [2018] eKLR where the courts dismissed applications for stay due to lack of appellate jurisdiction.
 15. Regarding the second issue the Respondent submitted that the execution proceedings commenced by the letter of the 1/2/2023 were not for the proceedings herein but were with respect to Kisumu CMCC 429 of 2018. It was thus their contention that this court cannot order stay of a decree that is not the subject of an appeal before it.
 16. As for the third issue it was the Respondent's submission that the suit was only for purposes of frustrating execution of the decree in Kisumu CMCC 429 of 2018. It was their further contention that the Applicant had filed numerous cases in court aimed at preventing them from attaching and selling the vehicles. Additionally, they stated that the issues raised in the instant motion had been dealt with in Kisumu HCCA No. E005 of 2021 *Alios Finance Kenya Ltd vs County Farms Ltd*.

Analysis and determination

17. After careful analysis of the Application, the Supporting Affidavit, Replying Affidavit and Submissions the following issues crystallize for determination.

Whether the Applicant is deserving of the orders sought.

18. This court is of the opinion that the Applicant has not reached the threshold for grant of orders sought. First of all, the Applicant is seeking leave to appeal against the ruling dated 30/3/2023. They have however not attached the said ruling. It is therefore not possible for the court to ascertain whether the ruling is of the nature that requires leave or not. There is no evidentiary basis to sustain this prayer and it must thus fall by the wayside.
19. Turning to the issue of stay of execution of the vehicles repossessed by Auckland Auctioneers the Applicant has equally not proven this prayer to the required standard. The letter to the auctioneers lists the units to be repossessed. In as much as the Appellant has filed a draft memorandum of appeal there is no nexus between the units to be repossessed and the intended appeal. It is impossible from the letter to know whether the repossession is in regard to the vehicles that are the subject matters in the intended appeal.
20. The respondent has categorically stated that the execution that is presently being undertaken is in respect of a decree arising from a judgment in Kisumu CMCC No 482 of 2018 and not CMCC No 279 of 2022 wherefore the applicant did not approach the court with clean hands as it obtained the interim orders through concealment of material facts. The case of *Delmonte Kenya Limited v Mishack*



Kibe Muiruri & 4 others (2020) eKLR cited with approval the case of *Bahadurali Ebrahim Shamji vs Al Noor Jamal & 2 Others* CA 210 of 1997 aptly rendered itself on the issue, thus:

“it is perfectly well settled that a person who makes an ex parte application to the Court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it And the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.”

21. Given that the Appellant has not attached the order or even decree being appealed it is impossible for this court to satisfy itself as to the substratum of the intended appeal.
22. The upshot of the foregoing is that the application dated 5/4/2023 lacks merit and is dismissed with costs to the Respondent. Consequently, the application dated 13/4/2023 is rendered moot given that it was only seeking to set aside the interim orders of the 6/4/2023.
23. The costs of this application are assessed at Kshs.8000.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 27TH DAY OF OCTOBER 2023

MWANAISHA S. SHARIFF

JUDGE

