



REPUBLIC OF KENYA



KENYA LAW
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**Njogu & another v Simiyu (Miscellaneous Application E084 of 2023)
[2023] KEHC 26144 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E084 OF 2023**

DK KEMEL, J

NOVEMBER 30, 2023

BETWEEN

MARTIN NJOGU 1ST APPLICANT

CARWORLD JAPAN KENYA 2ND APPLICANT

AND

JEREMIA SIMIYU RESPONDENT

RULING

1. The Applicants filed the present application dated 3.7.2023 seeking the following prayers: -
 1. Spent
 2. Spent
 3. That the Applicants be granted leave to file an appeal from the ruling in Bungoma CMCC NO. E090 of 2021 dated and delivered by Hon. E Ayuka Principal Magistrate on 18/9/2023.
 4. That under the supervisory jurisdiction of the High Court over subordinate courts, the proceedings file, records of all rulings in respect to Bungoma CMCC NO. E090 OF 2021 be moved to this court to aid in the determination of the application.
 5. That the costs of the application be provided for.
2. The application is premised on the grounds set out on the face thereof and by the supporting affidavit of Symon Lariak the Assistant Legal Manager of the applicants Insurers sworn on 22.9.2023. The Applicants gravamen is inter alia; that the Auctioneer filed his bill of costs in the primary suit instead of via miscellaneous application and that the learned trial magistrate assessed the same; that the applicants lodged an application dated 5.7.2023 seeking to set aside the certificate of taxation but which was dismissed on 18.9.2023; that the Applicant filed an application seeking leave to lodge appeal against the



ruling of the trial court but that the trial court rescheduled the same for mention on 16.10.23; that the applicants moved to this court for protection as the Auctioneer will proceed to execute the decree even when the application for leave to lodge appeal is still pending before the trial court; that by the time ruling on the pending application will be delivered, the applicants will have already run out of time to file the appeal and will need to seek leave over the same; that the applicants are exposed to execution on a certificate of execution that is unknown in law; that the trial court is deliberately frustrating the applicants by granting them a far off date; that this court has power under *the constitution* to exercise supervisory jurisdiction over subordinate courts to call for the proceedings of the trial court and check on the property thereof; that it is in the interest of justice that an order for leave to lodge appeal and stay of execution be granted in the circumstances.

3. The Auctioneer through his learned counsel Paul Juma filed grounds of opposition dated 29.9.2023 inter alia that the application is frivolous, vexatious and devoid of merit; that it is trite law that an order of stay cannot be granted in respect of taxed costs; that the application is Res-judicata in that the trial court's decision dated 18.9.2023 has already settled the matter.
4. Mr Anwar, learned counsel for the Respondent, filed grounds of opposition dated 18.10.2023 inter alia; that the application contravenes the mandatory provisions of order 43 rule 1(3) of the Civil Procedure Rules making the trial court the first port of call for application for leave; that the dispute herein is between the Applicants and the Auctioneer and that the Respondent is not a necessary party as there is no order sought against it; that the matter herein is sub judice in view of the admission that there is a similar application still pending before the trial court and as such the applicant is out on a forum shopping which is an abuse of the court process . Learned Counsel later presented brief oral submissions to the effect that the Applicants prayer for leave to appeal is similar to the one vide a pending application before the trial court and hence the present proceedings are sub judice. It was further argued that the Applicants have confirmed that the Respondent is not a necessary party and hence the claim against him ought to be dismissed.
5. Parties were given time to reach a settlement in the matter but the same failed paving way for reserving the matter for ruling.
6. The Applicants counsel filed submissions dated 13.10.2023 reiterating the averments in their supporting affidavit.

Analysis and Determination

7. I have given due consideration to the application, grounds of opposition and rival submissions. It is not in dispute that the applicants upon their application for stay of execution being dismissed on 18.9.2023 by the trial court, subsequently filed an application dated 19.9.2023 seeking for leave to lodge an appeal against the said ruling and that the said application is still pending determination. It is also not in dispute that the present application seeks similar orders as those in the application dated 18.9.2023 save only for a prayer pursuant to the court's supervisory role under article 165 and 27 of *the Constitution* . It is also not in dispute that the applicants have not enjoined the Auctioneer as a respondent or interested party in these proceedings and further failed to involve the respondent herein in the proceedings. This being the position, the only issue for determination is whether the application has merit.
8. Starting with the issue of leave to appeal, the applicants do confirm that they have already filed a similar application which is now pending determination before the trial court indeed, by dint of the provisions of section 75 (1) of the *Civil Procedure Act* and order 43 rule 1 (3) of the *Civil Procedure Rules* which requires that an applicant seeking for leave to lodge appeal must first approach the trial court at first instance. It is noted that the Applicants application dated 19.9.2023 seeking for such leave



is still pending determination by the trial court. The applicants have tried to explain themselves as to why they have approached this court namely that the dates the trial court gave them were rather far off and that they are likely to be late in lodging their appeal. That in my view is not convincing since the trial court is still seized with the matter and is in charge of its processes and will eventually address the applicants' issue and still has the discretion to grant the Applicants the requisite leave even if the days might have elapsed. It is not for the Applicants to be decided for the trial court. The conduct of the Applicants in rushing to this court for similar reliefs while there is a pending application before the trial court is an abuse of the court process. In fact, the present application is sub judice as the earlier application dated 18.9.2023 is still pending determination before the trial court. The applicants, if they decide to approach this court for leave to lodge appeal ought to have waited for the determination of their application. They did not even indicate whether their application pending in the trial court had been withdrawn. As long as that application is still pending determination, the applicants are barred by the doctrine of sub judice from bringing a similar application in this court.

9. The Applicants, while filing the present application, failed to rope in the Auctioneer either as a respondent or interested party. They also failed to plead their grievances against the respondent. During the canvassing of the application, learned counsel admitted that the Respondent is not a necessary party in the proceedings since their dispute had been settled. The applicants' main grouse is that the Auctioneer should not have filed his bill of costs in the original file in a miscellaneous file. If that is the case, then they should have made him a party in these proceedings. The lower court proceedings indicate that the applicants' property captured the Auctioneer as a necessary party. I find that the Applicants should have been patient with the trial court which is currently handling the pending application dated 19.9.2023 wherein the applicants have tabled their grievances. To that extent, the applicants are clearly out on a forum shopping and which should not be countenanced.
10. As regards the issue of the Applicants invitation that this court should exercise its powers pursuant to the provisions of Article 165 (6) and (D) of the constitution, it is necessary to highlight the said provisions

165(6) "The high court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising Judicial quasi – judicial function but not over a superior court".

165(7) "For the purposes of clause (6), the High court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice".

The applicants have made a raft of allegations against the trial court inter alia; that it gave a far off date for mention regarding the applicants application dated 19.9.2023; that the court file still remains at the chambers of the trial magistrate and cannot be accessed by the Applicants; that the trial court seems to be out at locking the Applicants from accessing justice.

I have perused the lower court record and note that the learned trial magistrate rendered his decision vide the ruling dated 18.9.2023 and that the Applicants shortly moved the said court through their application dated 19.9.2023. The trial court has given its directions regarding the matter it is seized of. The trial court is an independent court capable of conducting its affairs in accordance with the law. Even though the Applicants have claimed that the date given by the trial court is rather too far, they have not availed evidence to the effect that the learned trial magistrate left out suitable dates in the court diary and opted to give the Applicants a far off date. It is not proper for the parties or even this court to micro manage the trial court in the manner it conducts its affairs. No evidence has been shown by the Applicants that the trial court has exercised its powers and processes capriciously to the prejudice or disadvantage of the Applicants. I find that the applicants will still have their day in court as long as



they followed the requisite steps. I have not seen or found any impropriety on the part of the trial court to warrant intervention by this court under article 165 (6) and (7) of *the constitution*. The Applicants just need to be a little bit patient as the trial court will eventually determine their pending application. The applicants' worries that the period of appeal might elapse before they have lodged the appeal does not arise since the trial court has the discretion to extent time within which to file their appeal.

11. In view of the foregoing observations, it is my finding that the applicants' application dated 3.7.2023 lacks merit. The same is dismissed with costs to the Respondent and Auctioneer.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER 2023

D KEMEI

JUDGE

In the presence of:-

Oduor for Wekhomba for Applicants

Wekesa for Anwar for Respondents

Wekesa for Paul Juma for Auctioneer

Kizito Court Assistant

