



**Northwave Credit Ltd & another v Mutunga (Civil Suit E274 of 2023)
[2023] KEHC 26905 (KLR) (Commercial and Tax) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E274 OF 2023
A MABEYA, J
DECEMBER 15, 2023**

BETWEEN

NORTHWAVE CREDIT LTD 1ST APPELLANT

**JULIUS KIMANI NJOROGE T/A EXTRA MILES AUCTIONEERS 2ND
APPELLANT**

AND

JOHN KIMUNYI MUTUNGA RESPONDENT

RULING

1. This is a ruling on the appellants' application dated 17/10/2023. The same was brought under Order 42 Rule 6 for stay of further proceedings and execution in SCCCOM No. E7099 of 2023, John Kimunyi Mutunga vs Northwave Credit Ltd & Anor.
2. The grounds for the application were set out in the supporting affidavit of Peter Njagi sworn on 17/10/2023. The same was that while the appellant had advanced to the respondent a sum of Kshs. 1,243,779/= and defaulted in repayment, he had approached the Small Claims Court seeking an injunction from repossession of a vehicle given as security. That the appellant had raised an objection as to jurisdiction as it had a counter-claim for Kshs. 1.8M but that Court had held that the amount of claim is Kshs. 417,612/= and that it therefore had jurisdiction.
3. That unless the stay sought is granted, the suit may proceed before that court and thereby extremely prejudice the appellant.
4. The Motion was opposed vide the Grounds of Opposition dated 17/10/2023 and replying affidavit of John Kimunyi Mutunga sworn on 26/10/2023. The grounds were that the Court lacked jurisdiction



to entertain the application for want of a Memorandum of Appeal. That no leave had been sought in terms of Order 43 Rule 1 of the Civil Procedure Rules.

5. I have carefully considered the record and the respective contestations.

6. Section 75 of the *Civil Procedure Act* provides:-

" (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration; [Rev. 2012] CAP. 21 Civil Procedure 33 [Issue 1]
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court; (
- f) an order under section 64;
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section."

7. From the foregoing, it is clear that it is not all orders or decrees that an appeal lies as of right. Where no such right applies, one must seek leave to appeal before lodging an appeal. Appeals lie as of right from orders specified in subsection (1) (a) to (h).

8. In the present case, the order appealed from is one which arose out of a preliminary objection. The objection had challenged the jurisdiction of the court to entertain the respondent's case before the Small Claims Court.

9. The background to the application is short as the facts are scanty. On 1/11/2022, the parties entered into a loan agreement by which the appellant loaned the respondent a sum of Kshs. 1,243,779/= to finance the purchase of Motor vehicle Number KCM 785 U. The respondent defaulted and the appellant repossessed the motor vehicle on a date not disclosed.

10. What the court can discern from the record is that as at 5/11/2022, the respondent had paid a total sum of Kshs. 1,036,724/=. In September, 2023, the respondent rushed to the Small Claims Court and argued that the amount due from him was only Kshs. 417,612/= and that therefore that Court had jurisdiction to entertain the matter. The appellant lodged an objection arguing that the Small Claims Court had no jurisdiction as the appellant had a counterclaim of Kshs. 1,838,938/30. That is the objection that was dismissed and on which the appeal relates.



11. It is clear from the foregoing that the order appealed against does not fall under those orders where there is an automatic right to appeal. In this regard, the proceedings before court were commenced without leave and they do not lie. The court has no jurisdiction to entertain the same.
12. Accordingly, the proceedings are struck out with costs to the respondent.
13. Even if the Court had jurisdiction to entertain the appeal, I doubt if the objection would have seen the light of the day. This is so because, the claim as lodged by the respondent clearly showed that the amount in dispute was within that court's jurisdiction. If the appellant wished to put a counterclaim, that is its own claim. The same had nothing to do with the claim by the respondent.
14. I have always known a counterclaim to be an independent and separate claim from the main claim. The fact that a party intends to counterclaim in a matter is not sufficient to deny a Court pecuniary jurisdiction in a matter filed before it and which is within jurisdiction. A counterclaim can be separately and independently instituted if the claimant so desires. He cannot drag a party whose claim is within jurisdiction into its quagmire. I say no more.
15. Accordingly, the proceedings herein are struck out with costs to the respondent and the file closed.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

A. MABEYA, FCI ARB

JUDGE

