



**Cebit Cargo Limited & another v Bartemwet & 3 others (Miscellaneous Civil Application E043 of 2021) [2022] KEHC 10511 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10511 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
MISCELLANEOUS CIVIL APPLICATION E043 OF 2021**

**RL KORIR, J  
JUNE 20, 2022**

**BETWEEN**

**CEBIT CARGO LIMITED ..... 1<sup>ST</sup> APPLICANT**

**PACK INGREDIENTS EAST AFRICA LTD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHRISTAINA CHEPKOECH BARTEMWET ..... 1<sup>ST</sup> RESPONDENT**

**BENSON KIPTONOH NGENO ..... 2<sup>ND</sup> RESPONDENT**

**RICHARD KIPTICH KORIR ..... 3<sup>RD</sup> RESPONDENT**

**ANNAH CHELANGAT KORIR ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicants filed a notice of motion application dated 20<sup>th</sup> December 2021 which sought the following Orders:
  - I. Spent.
  - II. Spent.
  - III. That there be a stay of execution of the decrees entered in Bomet CMCC No. 113 of 2016 and CMCC No. 115 of 2016 pending the hearing of the applications for review and setting aside of judgments and decrees entered in the said suits.
  - IV. That costs of this application be in the cause.
2. The Application was brought under the provisions of the *Judicature Act* (High Court Practice and Vacation Rules), Order 21 rule 12 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure*



Act. The application was based on the grounds on the face of the application and further by the supporting affidavit sworn by Philemon Aduda on December 20, 2021.

### **The Applicants' Case And Submissions.**

3. It was the Applicants case that on March 6, 2016, one of their Motor Vehicles Registration Number KCB 377V was involved in a road accident that resulted in two fatal casualties. That at the time of the accident the vehicle was comprehensively insured by AMACO Insurance Company.
4. The Applicants stated that the Insurance Company appointed the firm of O.M Otieno & Co. Advocates to represent them and that the last time they heard from the advocates was when they entered appearance. It was their case that they were not involved or informed of any proceedings in the said suit.
5. It was the applicants case that the advocates appointed by their Insurance Company recorded a Consent in court committing them to bear liability of 75% and thereafter failed to inform them of the said commitment. It was their further case that the Consent must have been entered by mistake or by fraud.
6. The Applicants opined that there was an Inquest into the deaths being Inquest No. 10 of 2016 at Bomet Magistrate's Court. That the court absolved the Applicants from any blame in the deaths. It was their further case that the Consent violated the findings of the Inquest.
7. The Applicants stated that they were embarrassed on 3<sup>rd</sup> December 2021 when Elimonyaco Auctioneers raided their offices in the company of policemen and sought to attach their movable assets. It was their case that unless the execution proceedings were stayed, they would suffer grave injustice and their business might collapse because the Decrees amounted to almost Kshs 7,000,000 which was a substantial amount.
8. It was the Applicants' case that they applied to the Magistrate's court for Stay orders pending the hearing of their applications for review and setting aside. That the court found no urgency in their Application notwithstanding the clear danger of attachment.
9. The applicants submitted that they sought to overturn the Decrees and consequential orders entered in the trial court. That the said applications would be rendered academic if the Respondents were allowed to proceed with execution.
10. It was the applicants submission that article 159 of the Constitution was clear that parties should be afforded an opportunity to seek substantive justice and not be shoved off on technicalities.
11. The applicants submitted that while there was no pending application or suit before the court, section 3A of the Civil Procedure Act gave the court inherent powers to make such orders as may be necessary for the ends of justice or to prevent the abuse of the court process.
12. It was the applicants' final submission that the consent was fraudulently negotiated and Judgment entered in favour of the parties who were to blame for the accident terming it an act of injustice.

### **The Respondents' Case.**

13. The respondents opposed the application through a replying affidavit dated January 4, 2022 where they stated that the applicants had filed a similar application before the trial court which sought similar orders for stay of execution and that the application was still pending. It was their case that the present application was sub judice and an abuse of the court process.



14. It was the respondents case that the jurisdiction of this court to entertain an application for stay was premised on a pending appeal. That there was no pending appeal and therefore the application was fatally defective. It was their further case that there are no substantive orders sought.
15. The respondents stated that there had been no explanation why the decretal sums had not been paid 4 years since the judgments were delivered in both matters. That it was a mockery when the Applicants alleged that the attachment incident was embarrassing because they have been waiting for justice for about 6 years while the Applicants carried on with their business normally.
16. It was the Respondents case that the proceedings and Ruling in Inquest Number 10 of 2016 did not affect the Judgments delivered and that the same was never raised in the proceedings before the trial court. It was their further case that the issue of the Consent violating the findings of the inquest was a matter to be addressed before the trial court in the substantive suit and not in this application.
17. The Respondents stated that the Applicants had been aware of the Judgments and the Decretal sum of Kshs 7,000,000 and had they acted promptly and paid, it would not have accumulated to the current figure.
18. The Respondents averred that the Applicants blamed their advocates for not informing them about the judgment yet they went to slumber for over 5 years without following up on their advocates to confirm the status of their case.

#### **The Respondents' Submissions.**

19. The Respondents submitted that the application was brought under order 21 rule 12 of the [\*Civil Procedure Rules\*](#) which provided for payment by instalments and not a Stay of Execution. That the application was therefore fatally defective and the same ought to be struck out.
20. It was the Respondents submission that the jurisdiction of this court to entertain such an application was limited to a pending appeal. That in this case, there was no pending appeal and that the applicants had not provided any security for the Decretal sums which have remained unpaid for a period exceeding 4 years. They relied on the case of [\*Everlyn Jebitok Keter Vs Henry Kiplagat Muge & 2 others\*](#) (2011) eKLR and [\*Kenya Tanzania Uganda Leasing Co. Ltd Vs Mukenya Ndunda\*](#) (2013) eKLR to support their submission.
21. The Respondents submitted that the Applicants prayer for Stay of Execution was made pending the hearing of the applications and was not extended to their determination. That the applications had already been heard and the only remaining thing was the trial court to make a finding. It was their submission that the present application was spent.
22. It was the respondents submission that the applicants raised a red flag when they stated that if they paid the decretal sum it would collapse their business. it was their further submission that if the decretal sum continued to accumulate, the applicants would never pay them. They relied on the case of [\*Rocky Driving School Limited Vs Cute Kitchen Limited\*](#) (2015) eKLR to support this submission.
23. I have read through and considered the notice of motion application dated 20<sup>th</sup> december 2021, the replying affidavit dated January 4, 2022, the applicant's written submissions dated February 17, 2022, the respondent's written submissions dated March 17, 2022 and the applicants response to the respondents written submissions filed on March 23, 2022 and I deduce two issues for my determination:
  - i. Whether this court has the jurisdiction to determine the notice of motion application dated 20<sup>th</sup> December 2021



- ii. Whether the Orders sought can be granted
24. Jurisdiction is defined in the *Black's Law Dictionary, 10<sup>th</sup> Edition* as:  
 “A court’s power to decide a case or issue a decree”.
25. In the case of *Phoenix of E.A. Assurance Company Limited Vs S. M. Thiga T/A Newspaper Service* (2019) eKLR, the Court of Appeal stated that:-  
 “It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?  
 In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae”.
26. The applicants stated that they approached the trial court and filed applications for stay of execution of the Judgments and decree of the said suits which were Bomet CMCC No. 113 of 2016 and Bomet CMCC No. 115 of 2016. They further stated that the trial court found no urgency in their applications and were instead given hearing dates of January 17, 2022 and February 16, 2021.
27. For the applicants to approach this court with the same prayers, it means that order 42 rule 6 will be invoked. The said Order stipulates:-
1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
  2. . No order for stay of execution shall be made under sub rule 1 unless:-
    - a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.
28. It is clear from the wording of order 42 rule 6 that for this court to entertain an application for stay of execution from the lower court, an appeal must be lodged. from the record, there was no memorandum of appeal attached in the applicant’s application. There is no indication either that an appeal has been preferred to this court. In the case of *Patrick Kalaya Kulamba & another vs Philip Kamosu And Roda Ndanu Philip (Deceased)* (2016) eKLR, Meoli J. held:-  
 “Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed”.



29. The applicants have not followed the requisite procedure when approaching the High Court for stay of execution. They have gone ahead and claimed that this court is empowered by section 3A of the Civil Procedure Act and article 159 of the Constitution to make just decisions in the interests of justice. In the case of *FCS Ltd v Odbiambo & 9 others* (1987) KLR 182 – 188, the Court of Appeal held:

“The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the Civil Procedure Act on inherent jurisdiction of the court to do justice.”

Similarly, in the case of *Speaker of the national Assembly vs James Njenga Karume* (1992) eKLR, the Court of Appeal held that:

“Where there was a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament; that procedure should have been strictly followed.”

30. It is my finding that the applicants’ failure to include and/or attach a memorandum of appeal was fatal. This court does have jurisdiction to entertain an application for stay of execution of a decree from the lower court if the same is not being appealed.

31. Furthermore, there is no evidence on record to indicate that the application for stay of execution in the trial court was determined. The aforementioned application sought the following orders and it would be an abuse of the court process to determine the present application which is also before the trial court. I agree with the sentiment of Mativo J. where he described the concept of abuse of court process in the case of Satya Bhama Gandhi V Director of Public Prosecutions & 3 others (2018) eKLR where he stated that: -

“The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.



- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent”.

32. As I pen off, it is salient to note that order 21 rule 12 which the applicants cites does not provide for a stay of execution of a decree. It is my observation also that the case that the applicants advanced in this application should have been reserved for their appeal.

33. In the end, I find that this court has no jurisdiction to hear and determine the notice of motion application dated December 20, 2021 and the same is struck out with costs to the respondents.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 20TH DAY OF JUNE, 2022**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered virtually in the absence of Mr. Olonde for the Applicants, Ms. Kusa for the Respondent, and Kiprotich (Court Assistant), and emailed to the parties at:**

