



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CIVIL APPEAL NO. E002 OF 2020**

**SIMBA COOL EAST AFRICA LIMITED.....3<sup>RD</sup> OBJECTOR/APPELLANT**

**VERSUS**

**PETER MWANGI NGUNYI.....1<sup>ST</sup> RESPONDENT**

**ESTHER NJOKI KABOCH.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The appeal herein was filed under certificate of urgency on 9<sup>th</sup> November, 2020. It seeks stay of execution of the lower court judgment in CMCC No. 68 of 2014 and consolidated case No. CMCC No. 106 of 2014, where sale of public auction of bus Registration No. KCJ 388L as the subject matter. Temporary stay is already in place following the urgent application. The applicant also seeks that cost of the application be borne by the Respondents who are the decree holders.

2. The background to the matter is that in CMCC No. 106 of 2014 consolidated with CMCC No. 68 of 2014 between Esther Njoki Kabochi and Peter Mwangi Njuguna (Plaintiffs); Simba Coach Limited and Sigsmudy Pastory Ruwa (Defendants) judgment was entered with liability apportioned at 50:50 between the Plaintiffs and the Respondents.

3. The Defendants having failed to satisfy the decretal amount the plaintiffs sought to execute and vehicle KCJ 388L was attached. The present applicant together with Simba Coach Limited and Simba Credit Solutions (Property) Limited filed objections to execution in the lower court. The objections were dismissed by the trial magistrate in her Ruling of 5<sup>th</sup> November, 2020. It is that ruling on the execution proceedings which is the subject of the appeal herein by the 3<sup>rd</sup> Objector who contends to be the owner of the attached asset KCJ 388L.

4. The present application for stay of execution by the 3<sup>rd</sup> Objector is stated to be brought under **Section 1A, 1B and 3A of the Civil Procedure Act** and **Orders 42 Rule 6 and Order 51 of the Civil Procedure Rules**.

**Preliminary Objection**

5. The Respondents, through Mr. Kiwinda, filed a Preliminary Objection to the application on the following grounds:

1. The Memorandum of Appeal is incurably defective, incompetent and cannot be sustained in Law.
2. That no leave of the court was sought by the appellant herein prior to lodging of the Memorandum of Appeal.
3. Order 43 Rule 1 (k) of the Civil Procedure Rules does not anticipate the filing of appeals, as of right in respect of matters falling under Order 22 Rules 51 - 55 of the Civil Procedure Rules in respect of objection proceedings
4. The leave of the court must be sought before an appeal emanating from the said rules filed, as required by Order 43 Rule 2 and 3 of the Civil Procedure Rules.

The grounds in the Preliminary Objections are self-explanatory. The Respondents also filed a Replying Affidavit and a list and Bundle of authorities.

6. At the behest of the parties, the court ordered submissions to be filed to determine the Preliminary Objection which is the subject of the present Ruling. Both parties complied. The Preliminary Objection is premised on the failure by the applicant to obtain leave to appeal as required by **Order 43 Rule 2 and 3** of the **Civil Procedure Rules**.

7. The applicant, through Mr. Kokul, argues that: the handwritten proceedings in the lower court file CMCC No. 106 of 2014 show that the applicant was granted leave to appeal; that the Preliminary Objection in the present case does not meet the principles for the Preliminary Objection set out in **Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696**. There, it was held that a Preliminary Objection consists of a point of law that may dispose of the suit. It is further argued that **Order 43 Rule 3** of the **Civil Procedure Rules** provides that upon being dissatisfied with an order or ruling which is not an automatic right of appeal, the applicant may seek such leave orally or by application; that the request for typed proceedings and ruling and the trial courts response thereto may be construed as requests for leave to appeal.

8. I have perused the proceedings of the lower court file CMCC 106 of 2014. The record thereof on November 5<sup>th</sup>, 2020, shows that the impugned ruling was read and the following exchange then occurred:

**“Mr. Munguti: We pray for typed proceedings and Ruling for our appeal. We also pray for stay.**

**Mr. Kiwinda: We strongly object as the Ruling has been delivered and the court cannot stay its own finding.**

**Court: Typed proceedings and Ruling be supplied to the parties at own costs. Stay of my Ruling is disallowed.”**

I will come back to this exchange later.

9. The question is whether the issues raised in the objections by the respondents are, or may be, properly characterized as fitting the definition of a preliminary objection.

10. The law on preliminary objections was succinctly stated in the *locus classicus* **Mukisa Biscuits** case (supra). There, Newbold President of the Court stated:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop.”** (Emphasis supplied)

11. The point I wish to emphasise is that a Preliminary Objection is akin to a “demurrer” and cannot be raised if any fact has to be ascertained or if judicial discretion is sought to be exercised. A “demurrer” according to **Blacks Law Dictionary** has its roots in French law ‘demorer’ and Latin ‘demorari’ and is defined as follows:

**“A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the Plaintiff to state a claim for relief and for the defendant.”** (Emphasis supplied)

In other words, a demurrer depends for its foundation on the existing facts and no further facts or evidence need to be ascertained for the preliminary objection to arise and be sustained.

12. Here, it is clear that the question whether there was or is leave to appeal against the ruling depends on how one perceives and interprets the exchange that took place in court on 5<sup>th</sup> November, 2020. It is a point on which the facts need to be ascertained by perusal and interpretation of the proceedings. There, and judicial discretion then applied. It appears that the applicant did not seek any leave, but sought typed proceedings for an appeal. Equally, the court did not grant any leave, as none was sought, but allowed typed proceedings to be availed to the applicant. Determination on this point will require exercise of judicial discretion.

13. From this perspective, the objection as to whether leave was obtained does not properly fit the special description of a Preliminary Objection, although it clearly fits into the category of what is commonly referred to as a ground of opposition.

14. **Section 75** of the **Civil Procedure Act** provides for the orders from which an appeal lies as of right. With regard to the provision of **Order 43 Rule 1 (k)** of the **Civil Procedure Rules**, it provides as follows:

**“(1) 1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1) (h) of the Act:-**

.....

**(k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);”**

15. Neither **Section 75** of the **Civil Procedure Act** or **Order 43 (1) (k)** of the **Civil Procedure Rules** allow for appeal as of right from execution proceedings. In particular **Order 22** of the **Civil Procedure Rules** is titled and concerns “*Execution of Decrees and Orders*”. **Order 22 Rules 25, 57, 61 (3) and 73** of the **Civil Procedure Rules** respectively concern: Stay of execution (**Rule 25**); notification of sale by public auction (**Rule 57**); decree holders making purchases (**Rule 61 (3)**); and sale of execution property (**Rule 73**).

16. From the foregoing, it is clear beyond any shadow of doubt that execution proceedings cannot be the subject of appeal without leave. In support of this position, the respondent cited the case of **Civicon Limited v Collins Omondi Ouko [2016] eKLR** where Meoli J stated:

**“3. Order 43 Rule 1 (K) of the civil Procedure Rules does not anticipate the filing of appeals, as of right in respect of matters falling under Order 22 rules 51-55 of the Civil Procedure Rules; leave must be sought before an appeal emanating from the said rules is filed, as required by Order 43 rule 2 and 3 of the Civil Procedure Rules. The purported appeal before me is therefore incompetent.”** (*Emphasis added*)

17. I agree with the learned Judge’s position that **Order 43 Rule 1 (k)** of the **Civil Procedure Rules** does not anticipate the filing of appeals as of right in execution proceedings falling under **Order 22 Rules 51 to 55** of the **Civil Procedure Rules**. The Judge therefore found the appeal in that case to be incompetent. Here, I am not dealing with the appeal, but only the Preliminary Objection protesting the Notice of Motion dated 9<sup>th</sup> November, 2020.

18. In **Philemon Kiogora Munjuri v William Kamunge Gakui [2019] eKLR** also cited by the respondent, Kamau J upheld a preliminary objection in execution proceedings where it was clear that no leave to appeal had been granted, as a result of which the appeal was automatically dismissed. In the present case the only question for determination is the Preliminary Objection, although the respondent also appears to have made some submission on the substantive appeal and filed authorities thereon.

19. As earlier noted, this court’s ruling only concerns the matter on which the parties agreed to be disposed, namely the preliminary objection. Ultimately, I find that the Preliminary Objection cannot succeed *stricto sensu*, as a demurer because the question of whether there was leave to appeal is a question of fact for which evidence had to be adduced.

20. That notwithstanding, the objections of the Respondent taken as grounds of opposition to the applicant’s application will be difficult - if not impossible - to overcome, and the question is whether in fact the applicant has any footing for his application.

21. For the above reasons, the Preliminary Objection is hereby dismissed, but the objections therein nevertheless stand as concrete grounds of opposition to the applicant’s application.

22. In light of the outcome herein, the parties may move to court appropriately.

#### **Administrative directions**

23. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

24. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

25. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 20<sup>th</sup> Day of January, 2021.**

**R. Mwongo**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Kokul holding brief for Sankale for the Applicants
2. Kiwinda for the Respondents
3. Court Assistant - Chris Leperon