



**Carzan Flowers Kenya Limited & another v Mago & 18 others (Miscellaneous Application E009 of 2022) [2023] KEELC 18014 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18014 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
MISCELLANEOUS APPLICATION E009 OF 2022  
LA OMOLLO, J  
JUNE 19, 2023**

**BETWEEN**

**KENYA LIMITED ..... 1<sup>ST</sup> APPLICANT**

**CARZAN FLOWERS KENYA LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH KIBE MAGO & 18 OTHERS ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling is in respect to the Applicant's Notice of Motion application dated 13<sup>th</sup> December, 2022. The said application is brought under Order 42 Rule 6 (1) & (2) of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#).
2. The application seeks the following orders:
  - i. Spent
  - ii. Spent.
  - iii. That there be a stay of execution of the Ruling/Order given on 17<sup>th</sup> November, 2022 pending the hearing and determination of the Appeal.
  - iv. That the costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn by one Richard Fernandes on the 13<sup>th</sup> of December, 2022.



## **Factual Background**

4. This court delivered its ruling on 17<sup>th</sup> November, 2022 where it held that the Applicant and the 19<sup>th</sup> Respondent do jointly and severally pay to the 1<sup>st</sup> to 18<sup>th</sup> Respondents Kshs. 3,163,890. The said amount being costs of the suit in Nairobi Tribunal Appeal No. 190 of 2016.
5. The Applicant being aggrieved by the said ruling approached this court by way of appeal and filed the instant application which seeks relief of stay of execution from the orders emanating from this court's ruling.
6. During the ex-parte hearing of the application, (on 16/12/2022) this court issued an interim order of stay of execution which was conditional on the applicant executing a bank guarantee in favour of the 1<sup>st</sup>-18<sup>th</sup> Respondents within 30 days.
7. On 22/1/23, pursuant to the order issued on 16/12/2022, the Applicant executed a bank guarantee of Kshs. 1,580,995. The same was filed in court on 16/1/23 and is expressed as expiring on 21/12/995.

## **Appellants' Contention**

8. The Applicant contends that it filed a reference dated 23<sup>rd</sup> April, 2022 challenging the decision of the taxing master in Nairobi Tribunal Appeal No. 190 of 2016.
9. It further contends that it is dissatisfied with the ruling of this court issued on 17/11/22 and has lodged an appeal against the said ruling vide a Notice of Appeal dated 29<sup>th</sup> November, 2022.
10. The Applicant also contends that it has an arguable appeal and that if execution is not stayed, the said appeal would be rendered nugatory. It adds that the Respondents will suffer no prejudice if the application is allowed as the Applicant is willing to furnish security pending appeal.

## **1st 18th Respondents' Response.**

11. In response to the application, the applicant filed a Replying affidavit sworn on 12/1/23 and a Notice of preliminary objection dated 12/1/23.
12. The Notice of preliminary objection is as follows:
  - a. That this Honourable Court lacks Jurisdiction to hear and determine the instant application by didn't of Rule 11(3) of the *advocates Remuneration Order* of 2009.
  - b. That no leave has been granted to the Applicant to file an appeal to the Court of Appeal including its Notice of Appeal dated 29<sup>th</sup> November 2022 as prescribed by Rule 11(3) of the *Advocates Remuneration Order* of 2009 to warrant the orders of stay of execution pending appeal as sought in the instant application.
  - c. That without the prerequisite leave to appeal to the Court of Appeal which is mandatory, an appeal cannot be instituted by the Applicant and therefore the instant application is unmerited, frivolous and an abuse of the process of this Honourable Court as there is no pending appeal by the Applicant to warrant the granting of orders of stay execution pending appeal.
  - d. That the Orders of stay execution pending appeal as prescribed by Order 42 Rules 6 (1) and 6(2) as sought by the instant application can only be pegged on



an intended appeal, existing appeal and/or a legitimate appeal by the Applicant which there is currently none.

- e. That without the prerequisite leave to appeal, this Honourable Court is functus officio and therefore no orders of stay execution pending appeal can be granted with regard to the Ruling and Orders of this Honourable Court made on 17th November 2022.

13. The 1<sup>st</sup> -18<sup>th</sup> Respondent end by praying that the application be dismissed with costs.
14. The Replying Affidavit by the 1-18<sup>th</sup> Respondents is sworn by one Davies Mulani who describes himself as an advocate for the 1-18<sup>th</sup> Respondents.
15. He reiterates the contents of the notice of Preliminary Objection and specifically states that the application is unmerited for the reason that the applicant has not sought leave to appeal to the Court of Appeal as provided under Rule 11(3) of the Advocates Remuneration Order of 2009.
16. It is his contention that the requisite leave is mandatory as prescribed in Rule 11(3) of the Advocates Remuneration Order of 2009 adding that the Applicant is not entitled to issue a Notice of Appeal as their Chamber Summons Application dated 25<sup>th</sup> April 2022 was determined as a reference.
17. He further contends that no stay orders of execution pending appeal can be granted by this Court without the requisite leave to appeal as the orders sought by the Applicant are pegged on a non-existence appeal without leave.
18. It is his deposition that the Applicant's appeal has no realistic prospects of succeeding as they have failed to annex a draft of Memorandum of Appeal to help the court determine whether or not the Memorandum has outlined the exceptional points of law that would entitle the Applicant leave to appeal to the Court of Appeal.
19. He deposes that the Applicant has failed to prove that should the appeal succeed, the 1<sup>st</sup> to 18<sup>th</sup> respondents won't be in a position to refund the decretal sum.
20. It is his contention that should the orders sought herein be granted, the 1<sup>st</sup> to 18<sup>th</sup> respondents would be prejudiced as the matter has been pending for over six years.
21. In conclusion he contends that this court He goes on to assert that this court lacks jurisdiction to issue orders of stay of execution pending appeal and that the stay orders issued be vacated because this Court is functus officio with regard to the Ruling and Orders issued on 17<sup>th</sup> November 2022.

#### **Applicants Response to the Reply Affidavit**

22. The Applicant filed a supplementary affidavit dated 8<sup>th</sup> February, 2023 in response to the 1<sup>st</sup> to 18<sup>th</sup> Respondents Replying Affidavit dated 12<sup>th</sup> January, 2023.
23. The Supplementary affidavit is sworn by one Richard Fernandes. The said supplementary affidavit reiterates the contents of the affidavit in support of the application, attaches a draft memorandum of appeal and attempts to clarify the concerns of the 1<sup>st</sup> – 18<sup>th</sup> Respondent in respect of the bank guarantee.



## Issues for Determination

24. The Applicant filed its submissions dated 22<sup>nd</sup> February, 2023. It gave a brief background of this suit and identifies the following issues for determination:
  - a. Whether this court has jurisdiction to hear and determine the instant application
  - b. Whether the instant application meets the threshold to grant orders for stay of execution pending appeal.
25. On the first issue, the Applicant relied on Rule 11(3) of the *Advocates Remuneration Order* (ARO) and Section 16 of the Environment and Land Court Act. It submits that the two sections are conflicting. It adds that they also conflict with the letter and spirit of the Constitution of Kenya.
26. It submits that the right to appeal under section 16 of the *ELC Act* is an unfettered right whereas that under Rule 11(3) of the *ARO* is fettered to the extent that leave must first be sought prior to an appeal being lodged at the Court of Appeal.
27. The Applicant relies on Section 31(b) of the *Interpretation and General Provisions Act* and the Court of Appeal case of Charles Kamuren v Grace Jelagat Kipchoim & 2 others [2013] eKLR. It submits that the said conflict is easily resolved by considering the fact that Section 16 of the ELC Act ranks higher than Rule 11(3) of the ARO in the hierarchy of laws hence it should take precedence.
28. It further submits that the Environment and Land Court Act was enacted after the promulgation of the 2010 Constitution while the *ARO* is a 1965 subsidiary legislation and as such *ELC Act* reflects the letter and spirit of the constitution in so far as access to justice is concerned.
29. In conclusion, the Applicant on the argument by the Respondents that this court lacks jurisdiction to hear and determine the application submit that the same is erroneous and misleading. It urges the court to dismiss the Preliminary Objection dated 12<sup>th</sup> January, 2023.
30. On the second issue for determination, the Applicant relies on Section 42 rule 6 of the *Civil Procedure Rules* and the case of *Tassam Logistics Ltd v David Macharia & Another* [2018] eKLR. It submits that it stands to suffer substantial loss unless the order for stay of execution pending appeal is granted. It relies on paragraph 5 of its Supplementary Affidavit and the fact that the 1<sup>st</sup> -18<sup>th</sup> Respondents Replying Affidavit is sworn by their counsel who does not disclose the financial ability of his clients.
31. The Applicant further submits that the application was filed on 13<sup>th</sup> December, 2022, 26 days after the delivery of the said ruling hence filed without unreasonable delay.
32. The Applicant relies on the decision in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Company Advocates & 2 others* [2014] eKLR and *Ena Investment Limited v Benard Ocbau Mose & 2 others* [2022] eKLR and submits that they have offered adequate security to guarantee due performance of the orders of this court as ordered by Ombwayo J on 16<sup>th</sup> December, 2022.
33. The Applicant further submits that they have annexed a draft memorandum of appeal that raises arguable grounds of the intended appeal.
34. In conclusion, it urges the court to dismiss the Notice of Preliminary Objection and allow its application with costs.



35. The 1<sup>st</sup> -18<sup>th</sup> Respondents filed their submissions on 1<sup>st</sup> February 2023. They identify the following issues for determination:
- a. Whether this Honorable Court has jurisdiction to hear and determine the instant application.
  - b. Whether the Applicant was granted leave to appeal the ruling of 17th November 2022.
  - c. Whether the Applicant deserves orders of stay pending appeal.
36. On the question of Jurisdiction of the court and leave to appeal they submit that Rule 11(3) of the Advocates Remuneration Order of 2009 is prescriptive and therefore the Applicant being aggrieved can only appeal to the Court of Appeal by first seeking and being granted leave by this Honourable Court before filing its Notice of Appeal.
37. It is their further submission that due to the failure in making an application to this Honourable Court for leave this Honourable Court has no proper jurisdiction to hear and determine the instant application.
38. The 1<sup>st</sup> -18<sup>th</sup> Respondents rely on the judicial decisions in
- a. *Owners of the Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd.* [1989], which stated that jurisdiction is everything.
  - b. *Edith Wairimu Njoroge v Brooks Holdings Co. Limited and another* [2018] eKLR in which the Honourable Court cited with approval the holding in the case of Civil Appeal No. (Nairobi) 86 of 2015 *Peter Nyaga Murake v Joseph Mutunga* and held that Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked.
  - c. *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others* [2013] eKLR in which the Honourable Court held that the right of appeal goes to jurisdiction.
39. He submits that the Advocates Remuneration Order provides a platform for people to air their grievances on taxation and procedure for appeal. He relies on the judicial decision in the case of *Machira v Magugu* [2002] 2 EA 428 which was cited with approval in the holding in the case of *Twiga Motors Limited v Dalmas Otieno Onyango* [2017] eKLR.
40. On the question whether this court should grant the orders sought, he reiterates that Applicant did not apply for the requisite leave to appeal in accordance with Rule 11(3) of the Advocates Remuneration Order of 2009. Therefore, this Honourable Court lacks the jurisdiction to hear and determine the instant application.
41. The 1<sup>st</sup>-18<sup>th</sup> Respondents, nevertheless, cites the decision in *Onindo Onindo and Associates v Gatatha Farmers Co. Limited and another* [2002] eKLR as useful in shedding light on the principles to be considered should the court proceed with the hearing on this application.
42. On whether the Applicant has an arguable appeal, they submit that the Applicant failed to annex a draft memorandum of appeal stating the grounds to appeal. As a result of such failure, it is their submission that this Honourable Court cannot determine if the Applicant's appeal has a realistic chance of success. He relies on the case of *Onindo Onindo and Associates* (supra) and the holding in



*Showcase Property Ltd v Mugambi and Company Advocates* [2020] eKLR and the decision in *OGM (Suing as the father of KGW) v FG and another* [2020] eKLR.

### Analysis and Determination

43. This court has perused the application and submissions and is of the view that the issues for determination is:
  - a. Whether this court has jurisdiction to hear and determine the instant application.
  - b. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
44. On the first issue, the 1<sup>st</sup> -18<sup>th</sup> Respondents through their Preliminary Objection contend that this court lacks jurisdiction to hear and determine the application by dint of Rule 11(3) of the *ARO*. They contend that no leave has been granted to the Applicant to file an appeal.
45. The Applicant on the other hand contends that under section 16 of the *ELC Act* it has an unfettered right of appeal whereas that right is fettered under Rule 11(3) of the *Advocates Remuneration Order* so much so that it is required to seek leave prior to lodging an appeal at the Court of Appeal.
46. The applicant argues that Section 16 of the *ELC Act* ranks higher than Rule 11(3) of the *ARO* in the hierarchy of laws and should therefore take precedence.
47. Rule 11(3) of the *Advocates (Remuneration) Order* as contained in the *Advocates Act*, Chapter 16 of the Laws of Kenya provided as follows;

“ Any person aggrieved by a decision of the judge upon any objection referred to such judge under subsection (2) may with the leave of the judge but not otherwise appeal to the court of appeal.” [Emphasis mine]
48. Section 130 (1) of the *Environmental Management and Co-ordination Act* provides as follows;

Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, Appeal against such decision or order to the High court
49. Section 16 of the *Environment and Land Court Act* provides as follows

Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the *Constitution*.
50. In my Ruling dated 17/11/23 at paragraph 118 I spoke to the need to amend the Advocates Remuneration Order and the Environmental Management and Co-ordination Act law so as to ensure that the procedure for approaching this court on decisions from the National Environmental Tribunal acting as a taxing master is uniform. While Rule 11(3) of the *Advocates Remuneration Order* provides for filing a reference, Section 130 (1) of the *Environmental Management and Co-ordination Act* makes provision for filing an appeal to this court to challenge a decision or order of the Tribunal.
51. The Applicant chose to approach this court by way of Appeal rather than a reference. By dint of Section 16 of the *Environment and Land Court Act*, decisions of this court are appealable, as of right, to the Court of Appeal. It follows, therefore, that the applicant has an automatic right of appeal to the Court of Appeal and this obviates the need to seek leave.



52. I find, therefore, that the preliminary objection is not merited. The Applicant being dissatisfied with this Court's ruling delivered on 17<sup>th</sup> November, 2022 must be allowed to approach the Court of Appeal to ventilate its dissatisfaction.

53. On the second issue for determination, the law on stay of execution pending Appeal as follows in Order 42 Rule 6 of the *Civil Procedure Rules* which provides:

“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 order 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 1<sup>st</sup> 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 1<sup>st</sup> Applicant.”

54. The three conditions ought to be met by the Applicant for this court to grant the said orders. The Applicant contends that the 1<sup>st</sup> -18<sup>th</sup> Respondents have failed to disclose their financial ability thus should the 1<sup>st</sup> -18<sup>th</sup> Respondent carry out execution, the Applicant stands to suffer irreparably.

55. The Court of Appeal in the case of *Mukuma v Abuoga* [1988] KLR 645 stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

56. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. I agree with the decision of the court in *RWW v EKW* [2019] eKLR where it was held that:-

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.” [Emphasis mine]

57. The Applicants must also satisfy the court that the application was made without unreasonable delay. The impugned ruling was delivered on 17<sup>th</sup> November, 2022 while the application for stay was filed on 13<sup>th</sup> December, 2022. This is a period of less than a month. I find that the application was brought without unreasonable delay.



58. The Applicant offered security of costs by virtue of a bank guarantee of Kshs 1,580,995 as directed by the court on 15<sup>th</sup> December, 2022. The guarantee lapses in December 2023. The 1<sup>st</sup> – 18<sup>th</sup> Respondents have taken issue with the wording of the said guarantee stating that the guarantee is given in the intended appeal and not in this suit. I have taken note of those concerns and shall give directions remedying them in the subsequent paragraph.

**Disposition.**

59. In the result, the application dated 13/12/22 is hereby allowed in the following terms:

- a. Stay of the execution of the Ruling delivered on 17/11/22 is hereby granted pending the hearing and determination of the Applicant's intended Appeal.
- b. The Applicant shall within 14 days execute a fresh bank guarantee of Kshs. 1,580,995.00 citing this suit as the matter in respect of which the guarantee is given.
- c. The guarantee shall be renewed every 3 months before its lapse during the pendency of the intended appeal.
- d. In the event of failure by the Applicant to abide by (B) and(C) above, the orders of stay of execution herein shall stand vacated.
- e. The Costs of the application shall be in the cause.

60. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF JUNE, 2023.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Opando for Makera for the Applicant.

Mr. Onyacha for the 1<sup>st</sup> -18<sup>th</sup> Respondents.

No appearance for the 19<sup>th</sup> Respondent.

Court Assistant; Ms. Monica Wanjohi.

