



**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.....OBJECTOR/APPELLANT**

**VERSUS**

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

**ESTHER NJOKI KABOCHI.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. The application before me dated 25<sup>th</sup> January, 2021 by the applicants seeks orders as follows:

***“that the court do strike out the Memorandum of Appeal as the same is incurably defective, incompetent and cannot be sustained in law as no leave of the court was sought by the appellant prior to lodging the Memorandum of Appeal.”***

It follows hot on the heels of an unsuccessful Preliminary Objection by the same applicant seeking the same outcome.

2. The grounds of the present application are that the applicants as Judgment Creditors are at risk of suffering prejudice should they not be allowed to proceed with execution. They attached vehicle Registration Number KCJ 388L in satisfaction of the decree of the trial court in CMCC No. 106 of 2014 which is sought to be appealed against.

3. The respondents opposes the application arguing that the application was spent following the dismissal of the Preliminary Objection by the Court’s ruling of 20<sup>th</sup> January, 2021; that this application exudes malice aforethought since the respondent filed an application in the lower court seeking leave to file the appeal out of time.

4. In this court’s ruling of 20<sup>th</sup> January, 2021 at paragraph 12, the Court stated that whether there was leave to appeal or not:

***“.....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.”***

5. The court then concluded that the parties may move to court appropriately.

6. As at the present moment, none of the parties has availed the lower court’s interpretation of the events that occurred on 5<sup>th</sup> November, 2020. Equally, there is no ruling or order of the lower court granting leave to appeal out of time.

7. This court concluded its said ruling at paragraph 22 stating:

***“In light of the outcome herein, the parties may move to court appropriately.”***

The court gave this option so as to be fair to the parties in order to allow them to act in such a manner as to enable them to expeditiously take

the options that were to their best advantage in the circumstances moving forward. One would therefore have expected that after the ruling was read out the objector/appellant would forthwith have sought to stay these proceedings until it obtained an interpretation on and or leave from, the lower court. It did not. Instead the respondents have expeditiously approached this court to follow through on the application to strike out the Memorandum of Appeal.

8. Similarly, it has not been shown that proceedings in the lower court have either been stayed or that an outcome has been achieved therefrom which suggests that leave to appeal was granted.

9. Accordingly, for purposes of this Ruling, this court reiterates and adopts the contents of paragraph 14 to 16 of the Ruling of 20<sup>th</sup> January, 2021 in their entirety.

10. In the end, there being nothing before me to show that there was leave granted to appeal, the Memorandum of appeal is hereby struck out for want of leave to appeal.

#### **Administrative directions**

11. 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.

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

13. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 29<sup>th</sup> Day of April, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Kokul holding brief for the Appellants
2. Kiwinga present for the Respondents/Applicants
3. Court Assistant - Quinter Ogutu