



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. E019 OF 2021

BUZEKI ENTERPRISES LIMITED.....APPLICANT

-VERSUS-

EXPRESS SHIPPING & LOGISTICS (E.A) LIMITED.....1ST RESPONDENT

MAKINI AUCTIONEERS.....2ND RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 1st February, 2021 brought under the provisions of Sections 1A, 1B, 3A, and 79G of the Civil Procedure Act, Order 22 Rule 22, of the Civil Procedure Rules, 2010 and all the other enabling provisions of the Law. The applicant seeks the following orders-

i. Spent.

ii. Spent.

iii. That pending the hearing of the appeal this Honourable Court be pleased to issue a stay of execution of the judgment, warrants of attachment and the proclamation notice dated 27th January, 2021 restraining the 2nd respondent their agents, servants or employees from attaching the defendant's/applicant's property in satisfaction of the decree issued on 18th December, 2020;

iv. That this Honourable Court be pleased to enlarge time and grant leave to the applicant to file an appeal out of time against the interlocutory judgment and decree arising out of Civil Suit No. 452 of 2020 in the Chief Magistrate's Court at Mombasa; and

v. That costs be in the cause.

2. The application has been brought on the grounds on the face of it and is anchored on the supporting affidavit sworn on 1st February, 2021 and a supplementary affidavit sworn on 24th February, 2021 by David Muhoro, the applicant's Accountant.

3. On 8th February, 2021, the 1st respondent filed grounds of opposition dated 3rd February, 2021 and on 15th February, 2021 it filed a replying affidavit sworn on the same day by Ms. D. Muyaa, the respondents' Advocate, in opposition to the application herein. The grounds of opposition to the application dated 1st February, 2021 are that-

i. The said application is frivolous therefore an outright abuse of the process of Court;

ii. The application is utterly defective for failure to state the exact ruling or orders it seeks leave to appeal from. The orders sought cannot therefore be granted;

iii. The applicant is guilty of laches. It is therefore undeserving of any discretionary remedy from this Honourable Court;

iv. The applicant has approached this Court with iniquity and unclean hands since it has failed to prosecute another application pending in the primary suit where it seeks to have the order to render security varied to allow it to submit the log books for its motor vehicles the same ones now attached, as security for the decretal award even though that is sought post the setting in of the default clause. It cannot therefore argue before this Court that those same motor vehicles are co-owned with a banking institution or that the same are its tools of trade which are not liable to attachment in execution for that award;

v. As the applicant by the reading of its current application, appears to be seeking leave to appeal against part of orders granted in execution for an award made in favour of the 1st respondent in the primary suit, an appeal does not automatically lie to this Honourable Court and therefore the orders sought cannot be granted in the absence of an order from the Trial Court granting the applicant leave to appeal against the orders reinstating judgment; and

vi. That the application fails to meet the basic tenets for the grant of the orders sought.

4. The said application was canvassed by way of written submissions. The applicant's submissions were filed on 5th March, 2021 by the law firm of A.N Kamau & Co. Advocates, while the respondents' submissions were filed on 8th March, 2021 by the law firm of Kinyua Muyaa & Co. Advocates.

5. Ms. Kamau, the applicant's learned Counsel submitted that the 1st respondent filed CMCC No. 452 of 2020 on the 13th May, 2020 through a plaint seeking US Dollars 155,228.00 together with interest at 2% compounded monthly from 31st May, 2015 until payment in full, among other orders. She submitted that interlocutory judgment was entered against the applicant for the amount prayed in the plaint and a decree of USD 344,608.00 which translates to Kshs. 35,839,232.00 was issued.

6. On the issue of leave to file an appeal out of time, Ms. Kamau relied on Section 79G of the Civil Procedure Act which provides that the grant of leave is discretionary and shall only be granted where an applicant satisfies the Court that there is just and sufficient cause to file an appeal out of time. In regard to the principles to be considered in exercising the said discretion, she relied on the case of **First American Bank of Kenya Ltd vs Gulab P Shah & 2 others** [2002] 1 EA 65, where the factors to be considered by a Court when faced with an application of this nature were outlined as being that the explanation for the delay must be given, the merits of the contemplated action must be considered together with whether or not the respondent can be compensated by way of costs in case of prejudice.

7. It was submitted by Ms. Kamau that the failure to file an appeal in good time was occasioned by the applicant's Counsel's fault as can be seen from the affidavit by Amos Kisilu and as such, in the interest of justice, the mistake of Counsel should not be visited on a litigant. She also submitted that the principle of adequate compensation to the respondent does not apply in this case as the judgment and decree emanate from a Court of incompetent jurisdiction. She placed reliance on the case of **Macfoy v United Africa Co. LTD** [1961] 3 All ER, 1169, where the Court held that if an act is void, then it is in law a nullity and every proceeding which is founded on it is also incurably bad.

8. On whether the applicant's memorandum of appeal raises arguable grounds of appeal, Ms. Kamau submitted that the applicant in its memorandum of appeal raised several grounds of appeal challenging the interlocutory judgment. She submitted that jurisdiction is the judicial primary component that Courts or tribunals derive their authority from as was held in the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] KLR 1. The applicant's Counsel further submitted that jurisdiction is set out either in the constitution or in a statutory provision and once the Trial Court is apprised of the existence of such a limitation, it ought to down its tools as a decision made without the requisite jurisdiction is a nullity.

9. The applicant's Counsel relied on the provisions of Section 7(1) of the Magistrates' Courts Act which provides that the civil jurisdiction of a Magistrate's Court shall be exercised where the value of the subject matter does not exceed Twenty Million Shillings, where the Court is presided over by a Chief Magistrate. She submitted that in the plaint, the 1st respondent was seeking US Dollars 155,228.00 and 2% compounded interest for a period of five years, which interest was determinate at the time of filing the plaint being about US Dollars 354,079.00 and a decree was issued by the Magistrate's Court for US Dollars 344,608.00 which is equivalent to Kshs. 35,839,232.00

10. It was submitted by Ms. Kamau that jurisdiction is determined by the eventual issuance of a decree by a Court that is seized of a matter. In addition, she stated that the final decree of the Court determines the award and adjudication of the dispute between parties and in the event that the award surpasses the pecuniary jurisdiction set out by a statute, then the decree issued thereto is a nullity. She cited the case of **Palezia Bakari v Somoire Keen & 2 others** [2020] eKLR, where the Court of Appeal dealt with an issue of pecuniary jurisdiction in relation to a Magistrate's Court and held that the appellant therein filed the suit in a Court without jurisdiction while knowing the kind of damages that were anticipated.

11. On the issue of stay of execution pending appeal, she stated that if this Court agrees with the applicant that the application to enlarge time is merited, the orders for stay of execution will apply so that the applicant does not suffer irreparable harm. She urged this Court to allow the application as prayed.

12. Ms. Muyaa, learned Counsel for the respondent submitted that there was no justification to enlarge time or to grant leave to the applicant to appeal out of time. She submitted that pursuant to the provisions of Sections 79G and 95 of the Civil Procedure Act, no notification of the intention to appeal was served upon the respondent. She submitted that the applicant had failed to demonstrate that it had any good reason for not filing its appeal within time as against the ruling delivered on 1st October, 2020 by the Trial Court.

13. She contended that the allegations that the Trial Court file was missing from the Registry was a not sufficient explanation since the appellant filed an application before the Trial Court dated 26th November, 2020 which was slated for hearing on 7th December, 2020 and that on the said date, the Court file was available. She submitted that the applicant was guilty of laches for an entire four months, which delay having not been explained away, fettered this Court's jurisdiction to enlarge time and grant leave to the applicant to appeal out of time

14. Ms. Muyaa indicated that the application before the Trial Court is premised on the provisions of Order 45 of the Civil Procedure Rules which provides for review and that the said application is still pending determination before the said Court. In relying on the provisions of Section 80 of the Civil Procedure Act she submitted that the options of a review and an appeal are not simultaneously available to an aggrieved party as once a party has opted for a review, the option of an appeal cannot be granted to the same party.

15. She submitted that Section 75(1) of the Civil Procedure Act sets out the orders from which an appeal lie as of right and that the said

Section must be read together with the provisions of Order 43 Rule 1(1) of the Civil Procedure Rules. She contended that in the appeal the applicant seeks to lodge is against the ruling of 1st October, 2020, which flowed from an application dated 28th July, 2020 that was brought under the provisions of Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules, among other provisions of the law. The respondent's Counsel submitted that Order 43 Rule 1(2) of the Civil Procedure Rules provides that appeals from orders emanating from Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules should be instituted with leave of Court. Ms Muyaa therefore submitted that since there was no application made before the Trial Court for leave to appeal, this Court would be acting in futility were it to enlarge time for purposes of an appeal. She relied on the case of **Serephen Nyasani Menge vs Rispah Onsanse** [2018] eKLR, where the Court dismissed an application similar to this one.

16. The respondent's Counsel submitted that the applicant had not demonstrated what was unjust about the conditional setting aside of a default judgment. She was of the view that the appeal is purely unmerited because a Court's pecuniary jurisdiction is evaluated against the principle sum pleaded and not as against interest to be computed based on a final award of the Court. She indicated that the value of the subject matter in the present case is US Dollars 155,228.00, which after conversion to Kenya Shillings is below Twenty Million Kenya Shillings, thus falling within the jurisdiction of the Chief Magistrate's Court. She submitted that the Court's pecuniary jurisdiction was not an issue in the lower Court in the application to set aside the interlocutory judgment and is generally not a valid point for an appeal.

17. Ms. Muyaa submitted that the respondent shall suffer double jeopardy if the application herein is allowed as it will be exposed to defend both the application for review as well as an appeal from the same orders and at the same time be denied the fruits of a just, proper and regular judgment of the Court, if the present application is allowed.

18. She relied on the provisions of Order 22 Rule 22(1) of the Civil Procedure Rules and submitted that the applicant had not demonstrated sufficient cause to warrant this Court to exercise its discretion in its favour to stay the execution of the Trial Court's decree. Ms. Muyaa stated that the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules ought to be met before an application for stay of execution can be granted, but the applicant herein had not met the said conditions. She relied on the case of **Amal Hauliers Limited vs Abdinasir Abdulnasir Abukar Hassan** [2017] eKLR, to support her submission.

19. The respondent's Counsel further stated that no substantial loss shall be suffered by the applicant if execution was not stayed. She indicated that the applicant was unwilling to render security for the due performance of the decree as may ultimately be binding upon it. She also stated that in the event that the present application was allowed, an order should be made directing the applicant to deposit the equivalent of the principle sum of US Dollars 155,228.00 with interest, in an interest earning bank account to be held jointly by the parties' Advocates at the respondent's bank of choice, pending appeal. She suggested that in the alternative, the applicant should render an irrevocable guarantee from a reputable bank which should be done within set timelines and in default, the orders for stay of execution to lapse and the respondent to be at liberty to carry on with the execution.

ANALYSIS AND DETERMINATION.

20. This Court has considered the application filed herein, the affidavit filed in support thereof, the grounds of opposition and replying affidavit by the respondent and the written submissions by Counsel for the parties.

21. The applicant in its supporting affidavit averred that the 1st respondent had instructed the 2nd respondent to attach the applicant's properties that constitute its tools of trade that are held jointly with NCBA Bank in execution of a judgment, warrants and decree issued on 18th December, 2020. It stated that vide an application dated 28th July, 2020, the applicant sought to have the *ex parte* judgment set aside, which orders were granted vide a ruling dated 1st September, 2020. The applicant also averred that the Court further directed the applicant to deposit with the Court US Dollars 155,228.00 within 30 days, being the principal amount minus interest as a condition for setting aside the *ex parte* judgment.

22. The applicant also averred that vide an application dated 26th November, 2020, it sought to substitute the order to deposit US Dollars 155,228.00 with an order that the applicant deposits original logbooks of its commercial trucks whose value is equivalent to the said amount. The applicant averred that it gave instructions to the firm of Kisilu, Wandati & Company Advocates in Nairobi to pursue the appeal against the entire interlocutory judgment pending the outcome of the application to substitute the orders of deposit of US Dollars 155,228.00

23. The applicant deposed that the said firm of Advocates upon receiving instructions failed to initiate any process of lodging the appeal within the statutory timelines and the said failure was never communicated to the applicant. The applicant has now raised five grounds of appeal in its memorandum of appeal. It averred that the said grounds are not only solid but also arguable points of law with a very high probability of success. It further averred that no prejudice will be occasioned to the respondent if the orders sought are granted.

24. In the replying affidavit by the respondent in opposition to the application herein, it stated that the principal amount is what determines a Court's pecuniary jurisdiction over a matter. The respondent averred that a claim for US Dollars 155,228.00 falls perfectly within the jurisdiction of the Chief Magistrate's Court before which the claim in issue was filed.

25. The respondent deposed that Order 10 Rule 11 of the Civil Procedure Rules empowers a Court to set aside or vary a judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just. It stated that nowhere in the applicant's affidavit did it contest the principal debt

26. The respondent further deposed that the present application was not proper since the applicant filed another application dated 26th November, 2020 in the Trial Court seeking to review the orders of the Court issued in its ruling of 1st October, 2020, which application is pending determination before the said Court. The respondent further stated that the applicant's conduct amounts to an abuse of the Court process and is a demonstration of bad faith.

27. The respondent averred that there is no justification for the grant of orders for stay of further execution as the applicant besides being unable to explain away the delay, failed to demonstrate any real or substantial loss that may ensue, in the event that an order for stay of execution is not granted. The respondent deposed that it would suffer immense prejudice if the prayers sought were granted as it would be deprived of the fruits of a just and procedural award flowing from the reinstated default judgment.

28. The respondent further deposed that the law requires that an applicant exhausts its application for stay of execution in the Trial Court and if dissatisfied with that Court's finding, move to a higher Court for stay pending appeal and as such, this Court lacks jurisdiction to determine the prayer for stay of execution as the same is pending before the Trial Court.

29. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the Court. It provides that:

“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;**
- 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.**

30. Section 75 of the Civil Procedure Act must be read together with Order 43 Rule 1 of the Civil Procedure Rules which sets out the orders and rules in respect of which appeals shall lie as of right. Order 43 Rule 1 sub-rule 3 of the said Rules provides that an appeal shall lie with the leave of the Court from any other order made under the Rules. In this matter, the order sought to be appealed against is as a result of an application dated 28th July, 2020 which was brought under the provisions of Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules, among other provisions of the law. It does not fall under the orders which are appealable as of right under Order 43 Rule 1 of the Civil Procedure Rules. The applicant did not have an automatic right of appeal against the ruling made on 1st October, 2020. It should have sought leave of the Court as prescribed under Section 75(1) of the Civil Procedure Act and Order 43 Rule 1 sub-rule 3 of the Civil Procedure Rules. The latter provisions state that -

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

31. The above provisions are couched in mandatory terms. In the case of **Serephen Nyasani Menge v Rispah Onsase** [2018] eKLR, the Court stated the following-

“where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order.”

32. In the present application, the applicant seeks an order for enlargement of time and leave to file an appeal out of time against the interlocutory judgment and decree arising out of Civil Suit No. 452 of 2020 in the Chief Magistrate's Court at Mombasa. A perusal of the memorandum of appeal annexed to the applicant's supporting affidavit sworn by David Muhoro refers to an appeal against the ruling and order of the Chief Magistrate's Court at Mombasa dated 1st October, 2020 issued by the learned Chief Magistrate Hon. E.K Makori. The present application is not one for leave to appeal, which in any event should have been made at the first instance before the Court that made the order in issue.

33. It is not in dispute that the applicant herein filed an application dated 26th November, 2020, whereby it seeks to review the orders by the Hon Chief Magistrate E.K Makori issued on 1st October, 2020. Order 45 of the Civil Procedure Rules makes it clear that a party cannot seek review of an order and at the same time exercise the option to appeal against the same order. Section 80 of the Civil Procedure Act provides as hereunder:

“Any person who considers himself aggrieved –

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

34. The above provisions of the law leave no ambiguity that the options of both review and an appeal are not simultaneously available to an aggrieved party. One has to choose either of the two options. In the present case, the applicant filed an application for review before the Trial Court. The said application is still pending hearing and determination. The applicant now wishes to file an appeal before the High Court whereas it opted to seek review of the ruling made on 1st October, 2020.

35. The Court of Appeal in **William Karani and 47 Others vs. Michael Wamalwa Kijana and 2 Others Nakuru CA 43 and 153 of 1986**, while explaining the nature of review stated that:

“Section 80 and Order XLIV (now Order 45 under the Civil Procedure Rules 2010) is a means of airing gross or obvious errors when an appeal is allowed by the Act from a decree or Order but no appeal has been preferred and secondly in cases where no appeal is allowed at all... From the nature of section 80 and Order 44 both procedures cannot be adopted at once. Hence supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by a review must merge in the appeal.”

36. In the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited** [2020] eKLR, the Court of Appeal when addressing the issue of whether a party can appeal and file an application for review simultaneously, stated as follows-

“It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of Karani & 47 Others v Kijana & 2 Others [1987] KLR 557 the court held that:

“...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

37. In **African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited** [2003] eKLR, the Court of Appeal had the following to say on the issue of review and appeal-

“It was succinctly stated in *Sarkar’s Law of Civil Procedure* Eighth Edition Volume 2 at page 1592 as follows (omitting the citation of the case law)-

“Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with.”

38. This Court finds that the present application constitutes an abuse of the process of the court as the leave to appeal was not sought and granted to the applicant before moving to this Court to seek leave to appeal out of time against the decision of the Trial Court. The application herein is therefore misconceived and the applicant is engaging in a game of trial and error, an act which this Court cannot countenance as it will occasion prejudice to the respondent and deny it the chance to enjoy the fruits of a valid judgment

39. The upshot is that the applicant’s application dated 1st February, 2021 is bereft of merit and the same is dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JULY, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED

BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Wangari holding brief for Ms Kamau for the applicant

No appearance for the respondent

Mr. Cyrus Kagane – Court Assistant.