



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISC. E072 OF 2021

CO-OPERATIVE BANK OF KENYA LTD.....APPLICANT

VERSUS

OWINO KOJO ALIAS VICTOR BRIAN OWINO

ALIAS VICTOR BRIAN OWINO KOJO.....1ST RESPONDENT

KHETIA DRAPERS LIMITED.....2ND RESPONDENT

AND

JENKS AUCTIONEERS..... INTERESTED PARTY (AUCTIONEER)

RULING

1. By a Notice of Motion dated **28th October, 2021**, the Applicant herein sought for an order of stay of execution of the judgement, decree and warrants of attachment issued to Jenks Auctioneers (hereinafter referred to as Interested Party) in **Bungoma Cmcc No. 664 of 2016** pending the hearing and determination of the Appeal.

2. According to the Applicant, the trial court in its Judgement awarded the Plaintiff (1st Respondent herein) **Kshs. 529,000/= (Kenya Shillings Five Hundred and Twenty-Nine Thousand)** plus costs and interests. Being aggrieved by the said decision, the Applicant filed an appeal in this court vide Memorandum of Appeal on **29th October, 2021**.

3. The 1st Respondent and Interested Party in response to the application raised a Preliminary Objection dated **3rd November, 2021** against the suit and the application dated **28th October, 2021** wherein he raised the following points of law: -

i. This Honourable Court lacks jurisdiction to hear and determine this suit and Notice of Motion application dated 28th October, 2021.

ii. The Jurisdiction and power to stay execution resides with the trial court and the court to which a decree is sent for execution as follows:

a) Under Order 22 Rule 22(1) of the Civil Procedure Rules, the court to which a decree has been sent for execution may stay execution upon sufficient cause being shown.

b) Under Order 42 Rule 6(1) of the Civil Procedure Rules, the trial court may order stay of execution pending hearing and determination of an appeal with sufficient cause being shown. In fact, the trial court issued an order of stay of execution on 8th September, 2021.

c) High Court can only grant a temporary injunction in exercise of its appellate jurisdiction under Order 42 Rule 6(6) of the Civil Procedure Rules. The suit does not involve the said (appellate) jurisdiction.

The 1st Respondent and the Interested Party prayed that the application dated **28th October, 2021** and suit be dismissed.

4. Parties agreed to canvass the preliminary objection aforesaid by way of written submissions. Vide submissions filed on **15th November, 2021**, the Applicant submitted that the position adopted by the 1st Respondent that the grant of stay of execution pending appeal is purely exercised originally by the court that issued the decree and that one can only approach the High Court by way of appeal once such an

application for stay of execution is denied, is a clear misinterpretation and misconception of the law. Counsel further submitted that this court has original jurisdiction to entertain an application for stay of a decree of the lower court whether or not similar orders of stay had been issued by the trial court. Counsel finally submitted that the power and jurisdiction to grant leave for purposes of filing an appeal is within this court's jurisdiction. Counsel relied on **Order 42 Rule 6(1), Rule 6 (6), Order 22 Rule (1) and Order 50 Rule 6** and the cases of **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa (2016) eKLR**, and **Patrick Kalava Kulumba & Another vs. Philip Kamosu and Roda Ndanu Philip (suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) (2016) eKLR**.

5. The 1st Respondent and the Interested Party filed their submissions on 22nd November, 2021. Counsel submitted that, Order 42 Rule 6(6) of the Civil Procedure Rules cannot be relied upon in this suit since it provides for power of High Court in exercise of its appellate jurisdiction to grant a temporary injunction and the jurisdiction referred to is that relating to an appeal against the judgment of a lower court which must have been filed prior to reference to Order 42 Rule 6(6). Counsel argued that in the present case, no appeal had been filed. Counsel further submitted that, Order 22 Rule 22(1) grants jurisdiction to the court to which a decree has been sent for execution which is not the High Court in this present case and wanted this court to dismiss the Notice of Motion application dated 28th October, 2021. Counsel relied on the cases of **Owners of Motor vessel "Lillian S" v. Caltex Oil (Kenya) Ltd (1989) eKLR and Omega Enterprises (Kenya) Limited v. Kenya Tourist Development Corporation Limited & 2 Others (1998) eKLR**.

6. I have considered the Preliminary Objection together with the parties filed submissions. I now proceed to determine whether this court has jurisdiction to determine the Notice of Motion Application dated **28th October, 2021**.

7. It is trite that courts are creatures of statute, based on the constitution with their jurisdiction prescribed therein. That being the case, jurisdiction is the authority a court has whenever it has to decide matters that are litigated before it or take cognizance of matters prescribed in a formal way for a decision. Jurisdiction cannot be implied or be conferred by agreement of parties. See celebrated case of **Owners of the Motor Vessel "S" Lillian (Kenya Ltd) [1989] 1KLR**. The same principle was discussed **Halsbury's Laws of England 9th edition at pg. 927** where it provides inter alia that:

"Procedure for involving the jurisdiction of the court should not be confused with the authority of the court to decide matters which on the face of the proceedings have been properly prescribed in the formal way for its decision and which are within its jurisdiction."

8. The Constitution of Kenya 2010 provides for unlimited jurisdiction in criminal and civil matters, and appellate jurisdiction of the High Court under **Article 165 (3) (a) (c) and (e)** thereof. As an appellate court, it is guided by section **78** of the **Civil Procedure Act and Order 42, Rule 32 of the Civil Procedure Rules** in civil proceedings. **Rule 32** provides as follows:

"The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal."

The reading of **Rule 32** under **Order 42** of the Civil Procedure Rules empowers this court to exercise jurisdiction to consider and make orders or objections raised in respect of a judgement or ruling from the lower court as is the case in the Applicant's Notice of Motion. That considerations may be exercised in the whole of the order, decree or partially as the case may be depending on the issue objected to by an appellant.

Section 78 of the **Civil Procedure Act** provides as follows:

"(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –

- (a) To determine a case finally;**
- (b) To frame issues and refer them to trial;**
- (c) To take additional evidence or to require the evidence to be taken;**
- (d) To order a new trial.**

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearby as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

Order 42 rule 1 (1) provides:

"Every appeal to the high court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

9. In this respect, the Applicant brought itself within the statutory provisions in a formal way by filing a draft memorandum of appeal as provided for under **Order 42 (1) (2) of Civil Procedure Rules**, in accompaniment to its stay of execution application. The function of any

pleadings like a memorandum of appeal under **Order 42 (1) (2)** of the Civil Procedure Rules is to put the other party on notice of what to expect at the trial. The applicant has annexed a draft copy of its memorandum of appeal and seeks to be granted leave to file the same out of time. As to whether the application has merit, the respondents need not jump the gun by raising a preliminary objection but to canvass the said application on merit.

10. The **Civil Procedure Act** under **section 1 (A)** and **1 (B)** on overriding objective was enacted to enable this court to deal with cases justly in accordance with test founded in rule **1(A)**. The elements expressed in the provisions obligates this court to ensure so far as is practical that cases are dealt with fairly, expeditiously and proportionately since delay is always the enemy of justice. Further, every party who has lodged a claim before the court ought not to be shut out but must be given an opportunity of being heard. As noted above, this court in its appellate jurisdiction has the requisite jurisdiction to hear and entertain the present application and even to grant interim orders of stay of execution as the justice of the case demands.

11. In the instant application, the Applicant has sought for an order of stay of execution pending interpartes hearing and pending the intended appeal. Even though the Applicant might have sought other reliefs before the trial court, he is entitled to seek alternative reliefs that are available as of right.

12. It is clear that in the matter of justice, the case for the Applicant's claim is indeed ripe for this court to exercise its unlimited jurisdiction under **Article 165 3 (a)** of the **Constitution of Kenya of 2010**. The necessary conditions for exercising the power to adjudication under the Civil Procedure Act and Rules has arisen as the dispute between the parties is properly before this court. The procedure provided for on any issues arising out of the judgement, decree or an order for the appellate court to be seized of jurisdiction of the matter is available to the Applicant at this stage as of right.

13. This court has unlimited jurisdiction by virtue of a competent application for stay of execution pending interpartes hearing and pending the intended appeal by the Applicant pursuant to section **3** and **3A** of the **Civil Procedure Act** and **Order 42 (1) (2) of the Civil Procedure Rules**. It seems to me, therefore in applying the law and principles in the cited texts and authorities, this is a typical example of the observance of the court process by the Applicant. This court is the appellate one where the applicant intends to agitate its intended appeal and hence, the preliminary objection raised if allowed, will have the effect of completely shutting out the applicant from being heard which is against the sacrosanct tenets of natural justice and its rights of access to justice and fair trial under articles 48 and 50 of the Constitution.

14. In the result, it is my finding that the 1st Respondent and interested party's preliminary objection dated **3rd November, 2021** lacks merit. The same is dismissed with no order as to costs. The parties are now directed to set down the application dated 28th October, 2021 for hearing on priority basis.

15. It is so Ordered.

DATED AND DELIVERED AT BUNGOMA 29TH THIS DAY OF NOVEMBER, 2021.

D. KEMEI

JUDGE

In the presence of:

No appearance – Nyachai Ashitiba for Applicant

Kojo for 1st Respondent

No appearance – Musumba for 2nd Respondent

No appearance - for Interested Party

KIZITO Court Assistant