



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

MISC. CIVIL APPLN. NO. 61 OF 2019

SUKARI INDUSTRIES LIMITED.....APPLICANT

-VERSUS-

OLALE GEORGE ONYANGO.....RESPONDENT

RULING NO. 2

1. This ruling follows the first ruling which dismissed the Applicant's application which sought for leave to appeal out of time and a stay of execution. The application was dismissed on 11/12/2019.
2. On 13/12/2019 the Applicant filed a Notice of Motion dated 11/12/2019. The application sought for the following orders: -
 1. **The service of this application be dispensed with in the first instance owing to the urgency disclosed on the affidavit in support of this application together with certificate of urgency annexed hereto.**
 2. **Pending the hearing and determination of this application interparties or further orders, this court be pleased to grant the appellant / applicant herein interim orders of stay of execution of the ruling in MIGORI HIGH COURT MISC APPLICATION NO. 61 OF 2019 SUKARI INDUSTRIES LTD vs. OLALE GEORGE ONYANGO delivered on 11th December, 2019.**
 3. **This Honourable Court be pleased to grant a stay of execution of the ruling in MIGORI HIGH COURT MISC APPLICATION NO. 61 OF 2019 SUKARI INDUSTRIES LTD vs. OLALE GEORGE ONYANGO pending the hearing and determination of the Appeal filed in the Court of Appeal at Kisumu.**
 4. **The costs of this application be in the cause.**
3. The body of the application contained the grounds upon which the application was premised. The application was supported by the affidavit of *David Okoth*, the Applicant's Accounts Manager. The Affidavit detailed the background of the application.
4. The Respondent herein opposed the application by filing Grounds of opposition on 18/12/2019.
5. The Applicant filed a Supplementary Affidavit on 17/01/2020 where a copy of the Notice of Appeal against the ruling delivered on 11/12/2019 was annexed.
6. Directions were taken and the application was heard by way of written submissions. Both parties were duly represented by Counsels. They all filed written submissions.
7. The Applicant contended that it had satisfied the requirements of **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and submitted that the application was filed without any unreasonable delay. It also submitted that regardless of the sums of money in issue the concept of substantial loss entailed instances where the Applicant will go through hardships in recovery of the sums upon the success of the appeal.
8. The Applicant further contended that despite expressing its apprehension on the recovery of the judgment sums the Respondent did not file an Affidavit of Means to the effect that the Applicant shall not be prejudiced in the recovery process.

9. On security the Applicant submitted that it had already complied with and deposited one-half of the decretal sum in a joint interest-earning account in the names of the Advocates.

10. The Applicant relied on **Kiplagat Kotut vs. Rose Jebor Kipngok (2015) eKLR**, **Kenya Commercial Bank Limited vs. Sun City Properties Limited & 5 Others (2012) EKLR** and **Kenya Shell Limited vs. Benjamin Karuga Kibiru (1986) KLR 410** in buttressing the position that no stay of execution will be granted unless the conditions in **Order 42 Rule 6(2)** of the **Civil Procedure Rules** were satisfied.

11. Opposing the application, the Respondent vehemently submitted that the starting point was that there was no appeal upon which the stay may be granted under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. He pointed out that the first application principally sought the leave of this Court to lodge an appeal out of time. When the application was dismissed then the Applicant was caught up by **Section 75** of the **Civil Procedure Act, Cap. 21** of the Laws of Kenya and **Order 43 Rule 1, 2, 3 and 4** of the **Civil Procedure Rules** to first seek the leave of this Court to lodge the appeal to the Court of Appeal. Since no leave was sought or granted, the Respondent submitted that, there was no competent appeal before the Court of Appeal upon which the discretion of this Court could be exercised on whether to grant the stay of execution orders.

12. The Respondent relied on **Francis Ndahebwa Twala vs. Ben Nganyi (2018) eKLR**, **N M vs. S U W M (2013) eKLR** and **Notherwood Agencies v. Raj Devani & Another (2019) eKLR** in support of its position. It prayed for the dismissal of the application with costs.

13. The application subject of this ruling principally sought for a stay of execution of the ruling rendered in this matter on 11/12/2019. As stated, the said ruling was on the Notice of Motion dated 07/10/2018. For ease of this discussion, the said application sought for the following orders: -

1. THAT this application be certified urgent and be heard ex-parte forthwith in the first instance.

2. THAT the Honorable court be pleased to issue an order of stay of execution of the Judgment and Decree in MIGORI CMCC NO. 660 OF 2016 OLALE GEORGE ONYANGO vs. SUKARI INDUSTRIES LIMITED pending hearing and determination of this application.

3. THAT the Applicant be granted leave to Appeal out of time against the Judgment and Decree given on the 25th June, 2019 by Hon. Obiero (Principal Magistrate) in MIGORI CMCC NO. 660 OF 2016.

4. THAT there be a stay of Execution of the Decree in MIGORI CMCC NO. 660 OF 2016 pending the hearing and determination of the intended Appeal.

5. THAT costs of this application be in the cause.

14. I will refer to the Notice of Motion dated 07/10/2018 to as '*the leave application*', the Notice of Motion dated 11/12/2019 to as '*the stay application or the current application*', the **Civil Procedure Act, Cap. 21** of the Laws of Kenya to as '*the CPA*' and the **Civil Procedure Rules** to as '*the Rules*'.

15. The leave application was dismissed. That is the decision on which the Applicant sought to stay its execution pending the hearing and determination of an appeal before the Court of Appeal pursuant to the Notice of Appeal dated 11/12/2019.

16. *But what would be the effect of granting the orders sought in the stay application?* The answer is straight-forward. If the stay application is allowed as prayed, then the order refusing to grant the leave of the Court would be accordingly stayed. That will mean the leave application will not be deemed disposed of pending the appellate decision. Therefore, although the Applicant did not clearly so pray, the effect of allowing the stay application will be staying the execution of the decree in *Migori CMCC No. 660 of 2016* pending the determination of the appeal before the Court of Appeal.

17. That hence brings me to the question as to whether there is an appeal before the Court of Appeal. The Applicant filed a Notice of Appeal against the whole ruling on the leave application. The notice was filed on the same day the impugned ruling was delivered. That was on 11/12/2019.

18. There is no doubt that the appeal was on the ruling and order of the Court. For clarity, the impugned ruling was not on the judgment and decree of the trial court in *Migori CMCC No. 660 of 2016*.

19. Appeals from orders are provided for under **Section 75** of the **CPA** and **Order 43** of the **Rules**. **Section 75** of the **CPA** provides as follows: -

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-

- a) **Order 1 (parties to suits);**
- b) **Order 2 (pleadings generally);**
- c) **Order 3 (frame and institution of suit)**
- d) **Order 4, rule 9 (return of plaint);**

- e) **Order 7, rule 12 (exclusion of counterclaim);**
- f) **Order 8 (amendment of pleadings)**
- g) **Order 10, rule 11 (setting aside judgments in default of appearance).**
- h) **Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);**
- i) **Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);**
- j) **Order 19 (affidavits);**
- k) **Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);**
- l) **Order 23, rule 7 (trial of claim of third person in attachment of debts);**
- m) **Order 24, rules 5, 6, and 7 (legal representative);**
- n) **Order 25, rule 5 (compromise of a suit);**
- o) **Order 26, rules 1 and 5(2) security for costs);**
- p) **Order 27, rules 3 and 10 (payment into court and tender)**
- q) **Order 28, rule 4 (orders in proceedings against the Government);**
- r) **Order 34 (interpleader);**
- s) **Order 36, rules 5, 7 and 10 (summary procedure)**
- t) **Order 39, rule 2, 4 and 6(furnishing security);**
- u) **Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);**
- v) **Order 41, rules 1 and 4 (receivers);**
- w) **Order 42, rules 3, 14, 21, 23 and 35 (appeals)**
- x) **Order 45, rule 3 (application for review)**
- y) **Order 50, rule 6 (enlargement of time);**
- z) **Order 52rules 4, 5, 6 and 7 (advocate)**
- (aa) **Order 53 (judicial review orders)**

2. An appeal shall lie with the leave of the court from any other order made under these Rules.

20. **Section 64 of the CPA** provides for compensation for arrest, attachment or injunction on insufficient grounds.

21. I will also reproduce **Order 43 Rules 1, 2, 3 and 4** of the **Rules** hereunder: -

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-

- a) **Order 1 (parties to suits);**
- b) **Order 2 (pleadings generally);**
- c) **Order 3 (frame and institution of suit)**
- d) **Order 4, rule 9 (return of plaint);**
- e) **Order 7, rule 12 (exclusion of counterclaim);**

- f) Order 8 (amendment of pleadings)
- g) Order 10, rule 11 (setting aside judgments in default of appearance).
- h) Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);
- i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- j) Order 19 (affidavits);
- k) Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);
- l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- m) Order 24, rules 5, 6, and 7 (legal representative);
- n) Order 25, rule 5 (compromise of a suit);
- o) Order 26, rules 1 and 5(2) security for costs);
- p) Order 27, rules 3 and 10 (payment into court and tender)
- q) Order 28, rule 4 (orders in proceedings against the Government);
- r) Order 34 (interpleader);
- s) Order 36, rules 5, 7 and 10 (summary procedure)
- t) Order 39, rule 2, 4 and 6(furnishing security);
- u) Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);
- v) Order 41, rules 1 and 4 (receivers);
- w) Order 42, rules 3, 14, 21, 23 and 35 (appeals)
- x) Order 45, rule 3 (application for review)
- y) Order 50, rule 6 (enlargement of time);
- z) Order 52rules 4, 5, 6 and 7 (advocate)
- (aa) Order 53 (judicial review orders)

2. An appeal shall lie with the leave of the court from any other order made under these Rules.

3. An applications 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.

4. Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refreshing such relief.

22. From the foregone, the appeal from the ruling of this Court delivered on 11/12/2019 to the Court of Appeal did not fall within **Section 75** of the **CPA**. In essence it was not one of the appeals which could have been preferred *as of right*; that is without the leave of the Court.

23. I have also closely considered **Order 43 Rules 1, 2, 3 and 4** of the **Rules**. The order appealed against in this case was on the refusal to grant leave to appeal out of time. That order is not among those provided for under **Rule 1**; which appeals could be filed as of right. The order appealed against is hence caught up by **Rule 2**.

24. **Rule 2** is tailored in mandatory terms by the use of the word ‘*shall*’. From the record, no leave was neither sought nor granted at the delivery of the impugned ruling. Further, the stay application did not seek the leave to appeal as one of the orders.

25. What is therefore the implication of filing an appeal without first seeking and obtaining leave of the Court as required under the Rules?

26. The Supreme Court in *Civil Application No. 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2014) eKLR* referred to its earlier finding in *Law Society of Kenya vs Centre for Human Rights and Democracy & Others, Supreme Court Petition No. 14 of 2013* where it had held as follows: -

[36] *The use of the word 'shall' in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.*

[37]

[38]

[39] *If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine 'the appeal' on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.*

27. The foregone position was aptly reiterated by the Courts in **Francis Ndahebwa Twala vs. Ben Nganyi** (supra), **N M vs. S U W M** (supra) and **Notherwood Agencies v. Raj Devani & Another** (supra). These decisions were extensively referred to by the Respondent's Counsel in his detailed submissions.

28. I must state that in instances where the leave of the Court to lodge an appeal must first be sought and granted, there can be no competent appeal if such leave is not first sought and granted. It is the leave which grants the Courts, either appealed from or appealed to, the jurisdiction over the matter. Failure to obtain the prior leave renders the entire proceedings a nullity. The Courts must down their tools for want of jurisdiction (See **Owners of Motor Vessel 'Lilian 'S' vs. Caltex Oil (K) Limited (1989) KLR 1**).

29. The upshot is therefore that there is no competent appeal against the impugned ruling. On that basis, this Court lacks the jurisdiction to deal with the application seeking stay of execution pending the determination of a 'legally-non-existent' appeal.

30. Pursuant to an order made earlier in this matter I hereby order that this ruling shall apply *mutatis mutandis* to **Migori High Court Misc. Civil Application No. 62 of 2019 Sukari Industries Limited vs. Ochola Peter Ariyo.**

31. In the end, the following final orders do hereby issue: -

a. **The Notice of Motion dated 11/12/2019 is hereby dismissed with costs;**

b. **The interim orders of stay of execution of the judgment and decree in Migori CMCC No. 660 of 2016 Olale George Onyango vs. Sukari Industries Limited are hereby discharged forthwith;**

c. **The sums of money deposited in the joint interest earning account in the names of the Advocates herein to be forthwith released to Messrs. Tom Mboya & Company Advocates.**

d. **Costs of the Notice of Motion dated 11/12/2019 assessed at Kshs. 25,000/=.**

32. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020

A.C. MRIMA

JUDGE

Ruling delivered electronically: -

1. info@ooadvocates.com for Ogejo, Olendo & Company Advocates for the Applicant.
2. tommboyaadvocates@gmail.com for Tom Mboya & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE