



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISCELLANEOUS APPLICATION NO. 60 OF 2016**

**GACHANJA MUHORO & SONS LTD .....APPLICANT/APPELLANT**

**VERSUS**

**CORNELY KIMANTHI KUTI .....DEFENDANT/RESPONDENT**

**RULING**

**The application**

[1] By a miscellaneous application in the form of a Chamber Summons dated 1<sup>st</sup> March 2016, and expressed to be brought under Order 50 rule 6; Order 51 rule 1, 4 & 7, sections 3A and 63 [ of the Civil Procedure Act] the applicant seeks orders as follows:

1. *That the application herein be heard urgently and ex-parte in the first instance.*
2. *That this Honourable Court be pleased to grant leave to the applicant to file an appeal herein as the Subordinate Court has denied to grant the same.*
3. *That Motor Vehicle KXH 092 proclaimed by Kande Auctioneers on behalf of the Defendant/Respondent be preserved since taken on 14<sup>th</sup> November, 2015.*
4. *That the Subordinate Court Case and file Machakos CMC 379 of 2013 be call for under the supervisory role of the high court confirmation of the judgment (if any).*
5. *That Orders do issue appropriately to avert the diversion of justice as the said proceeding's thereon do not show that justice has been done to the applicant.*
6. *Since the case in the Subordinate Court has never been heard Orders do issue on the next cause of action.*
7. *That costs of this application be provided for."*

[2] The application is based upon grounds set out in the application as follows:

**"Grounds**

- a. *A sum of Kshs.3,062,482.00 has been paid to the defendant fully and as demanded.*
- b. *Various sums have been claimed from the applicant herein and cannot be able to clearly tell which is the clear figure.*
- c. *The Subordinate court acts in a manner to divert the cause of justice.*
- d. *That even the latest ruling of the lower court is not available in the proceedings herein.*
- e. *That the respect and honour of our courts would be eroded if this honourable court do not act fast enough.*
- f. *For the ends of justice to prevail, let the honourable court supervise this particular file of Machakos CMCC No. 379 of 2013 to avert a possible loss of life between the Applicant and*

Respondent.

g. *That justice may be served to all.*”

[3] The application was supported by the affidavit of Geoffrey Muiruri Gachanja of 1<sup>st</sup> March 2016 setting out the facts relied on as further grounds of the application.

[4] The defendant filed a replying affidavit sworn on the 10<sup>th</sup> March 2016 setting out his defence to the application in paragraphs 3-10 as follows:

**“Replying Affidavit dated 10<sup>th</sup> March, 2016**

**Paragraph 3 – 10**

3. **THAT** I deny the contents of paragraph 3 and 5 of the Affidavit that the Applicant/Appellant stayed in my premises for 10 months. This is because the Applicant/Appellant stayed in my premises three months after the expiry of the Notice of Termination of Lease that he had given thereby exiting in March 2013 as opposed to exiting in December 2012 as he was supposed to and as stated in paragraph 5 of the Affidavit.

4 **THAT** in response to paragraph 4 of the Affidavit, the issue has been raised by the Applicant/Appellant time and time again and in paragraph 6 and 7 of my Affidavit dated 7<sup>th</sup> December, 2015, I explained that the sum of Kenya Shillings Two Million One Hundred Thousand (Kshs. 2,100,000/-) had been paid by way of three (3) Bankers Cheques and was expended as per the terms of Clause 2(b) and (c) of the lease agreement as follows:

- i. Kenya Shillings One Million Two Thousand (Kshs. 1,200,000/-) as rent for the months of March 2012 to June 2012.
- ii. Kenya Shillings Nine Hundred Thousand (Kshs. 90,000/-) paid as three months deposit which amount was forfeited in lieu of sufficient notice terminating the lease.

5 **THAT** further the amount owing of Kenya Shillings Three Million Sixty Two Thousand Four Hundred and Ninety Five (Kshs. 3,062,495/-) plus auctioneers fees to me by the Applicant/Appellant was made up as follows:

i. Rent for the months of July 2012 to March 2013 at a monthly rent of Kshs. 300,000/- making a total of **Kshs.2,700,000/=** as rent arrears;

ii. Advocates legal fees for preparation of the lease as provided under clause 3(u) of the lease agreement **Kshs. 146,160/=**

iii. Legal fees, cost and disbursement for Machakos case **Kshs. 216,335/=**

iv. Auctioneer fees and charges **Kshs. 395,247/=**

v. Total **Kshs. 3,457,742/=**

6 **THAT** I deny the contents of paragraph 5 of the Affidavit and aver that the Applicant/Appellant never informed me nor my Advocates on record that he had deposited any money in Court and his Advocates only informed my Advocates vide a letter received on 16<sup>th</sup> November, 2015, two (2) days after I proceeded to execute against the Plaintiff/Objector and his motor vehicle had been impounded by the auctioneers (**Attached hereto and marked CKK 1 is a copy of the letter dated 16<sup>th</sup> September 2015 but received on the 16<sup>th</sup> November, 2015**).

7 **THAT** further I am informed by my Advocates on record which information I verily

believe to be true sent their representative to Court to check on the status of the matter and the Registry attendants informed them that there had been no money deposited in Court. I request the Court to confirm that indeed the Applicant/Appellant deposited the said sum of Kenya Shillings Nine Hundred and Sixty Two Thousand, Nine Hundred and Eight Two (Kshs. 962,982/-) in Court.

8 **THAT** suffice to say that even if the Applicant/Appellant deposited the said amount of Kenya Shillings Nine Hundred and Sixty Two Thousand, Nine Hundred and Eight Two (Kshs. 962,982/-) in Court the money does not satisfy the outstanding debt/rent arrears owed to myself by the Applicant/Appellant and that the Applicant/Appellant is truly indebted to me for an amount of **Kenya Shillings Two Million Four Hundred and Ninety Four Thousand, Seven Hundred and Sixty (Kshs. 2,494,760/-)**.

9 **THAT** the Applicant/Appellant is abusing the Court process and the Court record shall bear me witness that the Applicant/Appellant has made every effort to evade paying the outstanding amounts by seeking stay orders on several different occasions whenever I sought to distress for the outstanding rent owed to me which stay orders the Honourable Court dismissed and ordered him to pay the outstanding amounts. In that regard the contents of paragraphs 6, 7, 8, 9 and 10 are denied on the fact that the Applicant/Appellant cannot keep coming to Court over the same issue as it is surely an abuse of the Court process.

10 **THAT** in response to Paragraph 11, the Applicant/Appellant motor vehicle was lawfully and legally detained and attached for distress of rent owing to me and therefore cannot claim compensation. In addition the Motor Vehicle together with the goods in the Motor Vehicle were already sold by the Auctioneers and I was only able to recover a sum of Kenya Shillings Six hundred and Twenty Three Thousand Seven Hundred and Thirty One Thousand (Kshs. 623,731/-) leaving a balance of **Kenya Shillings One Million Four Hundred and Seventy Six Two Hundred and Seventy Two (Kshs. 1,476,272/-)** still owing to me. (Attached hereto and marked CKK 2 is a copy of the letter from the Auctioneers together with my Advocates' reply to the Auctioneers requesting them to proceed to obtain the remaining balance)."

### **The background of the case**

[5] The applicant was the plaintiff in the Machakos Chief Magistrate's Court civil case No. 379 Of 2013 by a Plaint dated 26<sup>th</sup> April 2013 suing upon rescission of a contract for lease and seeking specific reliefs as follows:

- a. A restraining order against the defendant from demanding for Ksh.3, 158,151/= or any sum.
- b. An order that the defendant do refund a sum of Ksh 2,100,000/= that was deposited to his account by the plaintiff.
- c. Interest on (b) above.
- d. Cost of the suit.
- e. Any other relief deemed convenient to award herein.
0. By a Defence and Counter-claim dated 4<sup>th</sup> June 2013 the defendant prayed for judgment against the Plaintiff for –
  - a. Ksh.2,700,000.00/- being rent arrears.
  - b. Ksh.146,160.00/= being legal costs incurred.
  - c. Interest on (a) and (b) above.
  - d. Costs of the suit.
0. A motion by the plaintiff dated the 26<sup>th</sup> April 2013 seeking orders for stay of execution of a Proclamation dated 8/4/2013 among other reliefs was dismissed by the trial court (Gesora, SPM) whereupon by an application dated 28<sup>th</sup> October 2014 the defendant sought principally an order that –
  - a. **The court do dismiss the plaintiff's case and adopt the ruling of the Notice of Motion in**

**the application dated 26/4/13, issued on 4<sup>th</sup> October 2013 as the judgment of the Court in the present case.**

The grounds of the application as set out in the ruling of the court thereon dated 3/3/2015 were that –

- a. That the issues presented in the plaint were canvassed in the Notice of Motion application dated 26/4/2013
- b. That the respondent had not sought to amend his plaint and as such no new issues have been since brought in as evidence.
- c. That the plaintiff/respondent failed to file and prepare an appeal against the said ruling within the statutory period prescribed in law.
- d. That the respondent's case is a delay tactic aimed at frustrating and denying the applicant his rights to distress for rent.

[6] In its ruling dated 3/3/15 on the application of 28<sup>th</sup> October 2013, the Court (J.N. Nyagah, CM) adopted the ruling of the court of 4/10/13 as a judgment of the in the case and held:

*“The application was heard by Mr. Gesora (SPM) who dismissed it with costs to the defendant's. This is after the disposal of the application that the defendant came up with the present application.*

*The amount of money claimed by the defendant was Kshs. 3,158,151/=. The respondent is not seriously opposing the application date 28/10/14. All what they are demanding i[s] for the applicant to produce ETR Receipts and invoices before they pay the money. Whether the applicant had paid revenue to Kenya Revenue Authority or not should be the concern of KRA and not the respondent. He cannot refuse to pay money owing on the grounds that the applicant has not paid revenue to KRA.*

*Upon dismissal of the plaintiffs application dated 26/4/113, the parties were not with anything to litigate over. **The application herein to adopt the ruling dated 4/10/13 as the judgment in this case is allowed as prayed. Stay of execution orders is lifted by the court on 26<sup>th</sup> April, 2013 are lifted as prayed.** The defendant/applicant to have the costs of the application.*

*Ruling read and delivered in open court this 3/3/15.*

**J.N. Nyagah**

**Chief Magistrate”**

[7] Counsel for the parties – Mr. Bw'omote for applicant and Ms. Gichuki for the Respondent - made oral submissions on 23<sup>rd</sup> March 2016 with respect to prayers nos. 2,4 ,5, 6 and 7 as the court had already granted prayer 3 of the application, and ruling was reserved.

### **Determination**

*Leave to appeal*

[8] The court agrees, as submitted by counsel for the applicant that an appeal from the decision of a trial court under Order 22 rules 52 and 53 can only be appealed from with leave of court. Order 43 rule 1 (k) only allows appeals as of right from order of the court with respect to as relevant '(k) Order 22, rules 25, 57, 61 (3) and 73 (orders in execution)'. Order 43 rule 2 of the Civil Procedure Rules provides for appeal with leave of court as follows-

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

[9] It would appear to me that there may not be need for leave to appeal as the ruling sought to be appeal from was a final decision on the matter between the parties with the meaning of Order 43 rule 3 of the Civil Rules as follows:

*“3. Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.”*

### ***The test for the grant of leave to appeal***

[10] In the event that I am wrong on that count, I consider that leave to appeal ought to be granted upon consideration of at least three facts as follows:

- a. Whether there is an arguable case or serious question to be presented to the appeal court for determination, such an arguable case not necessarily ;
- b. Whether refusal of leave would cause an injustice on the applicant; and
- c. Great hardship would be occasioned to the respondent by grant of leave to appeal.
0. Upon considering the facts of this case, I consider that the applicant has an arguable cases in at one issue to be presented to the appeal court, that is whether a ruling of the court dismissing an application for stay of execution of a proclamation for distress of rent may be adopted as a judgment of the court to finally and summarily determine a suit in which the defendant has a counter-claim. The applicant has an arguable case that he has been denied his constitutional right to fair hearing under Article 50 (1) of the Constitution. I also consider that that an injustice would be occasioned to the applicant who would stand to lose his property which has been attached by the respondent in execution of the order of the trial court. The respondent’s hardship in delayed recovery of arrears of rent, if due, will be compensated by interest if he is eventually successful.
0. It is, therefore, the view of this court that in refusing leave to appeal the trial exercised its discretion wrongly and this court is pursuant to the authority of ***Mbogo v Shah*** (1968) EA 93 entitled to interfere and grant the leave sought and permit the issues raised by the applicant to be adjudicated by the appellate court.

### ***Appeal and or supervisory jurisdiction***

[11] To grant leave to appeal and exercise supervisory jurisdiction as sought will only mean that two proceedings over the same subject matter before the High Court with a possibility of conflicting decisions thereon if the two proceedings are heard by different courts. That cannot be consistent with the overriding objective of the civil process under section 1A of the Civil Procedure Act which is “to facilitate the **just, expeditious, proportionate** and affordable resolution of the civil disputes governed by the Act.”

[12] Under Article 165 (3) (e) of the Constitution, the High Court has jurisdiction to hear appeals from the subordinate courts as conferred on it by legislation in this case the Civil Procedure Act. Under sub-Article 6 of Article 165, the court has supervisory jurisdiction over subordinate courts with powers under sub-article (7) to call for the record thereof as follows:

*“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*

[13] In the same manner as an appeal subsumes a review, I consider that the supervisory jurisdiction may be exercised within the context of an appeal as a broad spectrum remedy for correction of errors of law and fact. see *William Karani & 47 others v Wamalwa Kijana & 2 others* [1987] eKLR, where Platt, JA set out the respective merits of an appeal against a review as follows:

*“Both section 80 and order XLIV commence by explaining the fundamental nature of review. It is to be a means of curing 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. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and order XLIV 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 review must merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or order complained of, and then by an appeal complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal.”*

[14] I consider that an appeal on the merits of the case will entail the consideration by the court all the issues that the applicant may wish to raise on the legality of the process adopted by the trial court in dealing with the present dispute as the review under the supervisory jurisdiction of the court would accomplish as, on appeal, the court will also have the original record of the trial court before it.

[15] In order not to prejudice the findings of the appeal court, the court does not determine the merits of the case including the assertion, denied by the applicant, that the proclaimed goods have been disposed by the auctioneers.

[16] The Relief sought in Prayers Nos. 5 and 6 will await the determination of the appeal.

[17] In accordance with Order 51 rule of the Civil Procedure Rules, 2010 the originating application herein should have been made by way of a Notice of Motion for leave to appeal pursuant to Order 43 rule (2) but in view of the redeeming provisions of Order 51 rule 10, nothing turns on the default. Order 51 rule 10 (2) provides as follows:

*“2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”*

### **ORDERS**

0. The applicant’s application dated 1<sup>st</sup> March 2016 is granted in terms of prayers Nos. 2 and 3 thereof. Prayers 4, 5 and 6 to await the determination of the appeal.
0. Costs of this application to abide the appeal.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF MAY 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Bw'omote for the Appellant

Mr. Kanura for the Respondent

Mr. Moruri - Court Assistant.