



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 120 OF 2012
COLLIN BETT TRADING AS C.K. BETT TRADER.....PLAINTIFF/APPLICANT
VERSUS
ECOBANK KENYA LIMITED.....1ST DEFENDANT/ RESPONDENT
WATTS ENTERPRISES.....2ND DEFENDANT /RESPONDENT

RULING

1. This court delivered a Ruling on the **30th June, 2014** dismissing an application whereby the applicant sought issuance of injunctive orders restraining the respondents from disposing of a house situated on title number **Kajiado/Kaputiei – North/ 19044**.
2. ON the **18th July, 2014**, the applicant moved this court by way of certificate of urgency seeking injunctive orders to issue against the respondents restraining them from disposing of the property pending hearing and determination of the appeal filed in the Court of Appeal.
3. The respondents raised a Preliminary Objection on the grounds that this court has no jurisdiction to hear the application, the applicant having filed a similar application in the Court of Appeal under **rule 5(2)** of the **Court of Appeal Rules**.
4. At the hearing, **Mr. Luseno**, counsel for the respondent argued that this court lacks jurisdiction to entertain the application, the applicant having exercised his right of appeal by filing a Notice of Appeal and Notice of Motion under **Rule 5(2) (b)** of the **Court of Appeal Rules**. The application is similar to the one before this court. Secondly, he asked the court to make a finding that summons taken out were invalid. The defendant having not been called upon to enter appearance, the suit had abated.
5. In response thereto, **Masika**, counsel for the applicant stated that summons in the matter having been issued on the **18th July, 2014** were valid for **12 months**, therefore the suit had not abated. With regard to the issue of jurisdiction it was admitted that an application had indeed been filed in the Court of Appeal and certified as urgent. But the prayer sought was pending lodging, hearing of the intended appeal. He called upon this court to exercise its powers by hearing the application in the interest of justice.
6. The application is brought pursuant to **Order 42 rules 6** of the **Civil Procedure Rules** which provides for stay of execution of proceedings in case of appeal. This means that there would be no inconsistency

in this court hearing the application. The court would have jurisdiction to determine the application seeking interlocutory orders pending appeal. (*See Madhupaper International Limited versus Kerr[1985] KLR 480*).

7. However, the issue of jurisdiction on the part of this court has been questioned by virtue of the fact that a duplicate application has been filed in the Superior Court. Jurisdiction when questioned by a party must be addressed; failure to do so renders the process a nullity. In the case of *The owners of Motor-vessel 'Lilian S' versus Caltex Oil Kenya Ltd 1989* KLR at page 14, Nyarangi, J stated:-

“Jurisdiction is everything, without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction”

8. It is not denied that an application has been filed in the Court of Appeal. The respondent has attached to the replying affidavit documents that were filed in the Court of Appeal. There is an index that illustrates that an application similar to the one before this court was filed. A Notice of Appeal and draft Memorandum of Appeal was also filed. That particular application had already been certified as urgent. It is pending granting of directions.

9. The Court of Appeal is seized of jurisdiction to grant orders sought therefore the application is rightly before the superior court.

10. The question to be posed now is whether an appeal is on record? An appeal is deemed filed the moment a Memorandum of Appeal is presented in terms of **Order 42 rule 10(2)** of the **Civil Procedure Rules** and the date of appeal shall be deemed to be the date of filing of the appeal. (*see Nakuru Modern Feeds Ltd versus Benson Kariuki [2013] eKLR*).

11. From the foregoing, filing a duplicate application in this court and the Court of Appeal is an abuse of due process.

12. It is my view that it would be erroneous for this court to entertain an application that is already before the Court of Appeal. There cannot be two (2) similar applications in two (2) different courts seeking the same orders at the same time.

13. In the result, the applicant having moved the Court of Appeal, the jurisdiction is removed from this court. The Preliminary Objection raised is therefore meritorious. The Notice of Motion dated **18th July, 2014** be and is hereby struck out with costs to the respondents.

DATED, SIGNED and DELIVERED at MACHAKOS this 13TH day of AUGUST, 2014.

L.N. MUTENDE

JUDGE