REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELCA NO. 3 OF 2020

MOSES MEIBAKO NGATUNY....1st APPELLANT/APPLICANT

KOIYAGI NGATUNY ALIAS

KOIYIAKI TOBIKO ATETI.....2nd APPELLANT/APPLICANT

SITONY NGATUNY.....3rd APPELLANT/APPLICANT

VERSUS

PEIPEI OLE MOSOIKO.....RESPONDENT

RULING

1. The Applicants in their application under certificate of urgency dated 25th August 2020 sought for orders of stay of execution pending Appeal pursuant to which the Respondent filed his Replying Affidavit and a Notice of Preliminary Objection both dated the 22nd September 2020 in response to the effect that the court lacked jurisdiction to hear and determine the application pursuant to the provisions of Section 7 of the Civil Procedure Act as the matter was res judicata. Secondly that the application was sub judice by virtue of the provisions of Section 6 of the Civil Procedure Act.

2. On 28th October 2020 the court directed that the Preliminary Objection be canvassed, in the first instance, by way of written submissions thus taking precedence over the application dated 24th August 2020.

3. Parties complied with the court directions and filed their respective written submissions to which I shall summarize as herein under.

Respondent's written submissions.

4. The Respondent while in support of their application on a preliminary point of objection framed their issues for determination as follows ;

i. Whether the Applicants filed a similar application before the trial court

ii. Whether this court has jurisdiction to entertain the matters contrary to Section 7 of the Civil Procedure Act.

5. The Respondent subsequently submitted that the Appellants were Defendants before the trial court in Kilgoris ELC No. 9 of 2018 in which the matter was heard and determined. Being dissatisfied with the decision of the trial court they filed an Appeal before the Narok Environment and Land Court wherein the matter was transferred to the present court. While the Appeal was still pending, the Applicants filed an application before the trial court dated 4th February 2020 (see annexure POM 01) which application was premised on the same provisions of the law and grounds as in the instant application.

6. The application was heard and determined by the trial court wherein it had been dismissed. The Applicants have moved to this court and filed a similar application for stay pending appeal which application is now res judicata and contrary to the provisions of Section 7 of the Civil Procedure Act therefore the court lacks jurisdiction to hear and determine the impugned application.

7. That jurisdiction was everything and where the court lacked the same, it could not move any step further. That the provisions of Sections 7 of the Civil Procedure Act ousted and the jurisdiction of this court to hear and determine the present application. Reliance was placed on the case of **Owners of Motor Vessel Lillian 'S' vs Caltex Oil (Kenya) Ltd [1989] KLR 1**

8. The Respondent further submitted the since the Applicants' application dated 25th August 2020 offended the mandatory provisions of the law and could not be entertained by the court, the same ought to be struck out with costs.

Applicants' submission.

9. In opposition to the Respondents Preliminary Objection and after giving a brief history of the matter in question the Applicants submitted that pursuant to the hearing and determination of Kilgoris PMCC ELC No. 9 of 2018 on the 10th December 2019 in favour of the of the Respondents herein, and being dissatisfied with the decision of the trial court, they had mounted their Appeal before the Narok Environment and Land Court via Narok ELC No. 4 of 2020 which matter was transferred to the present court.

10. That they had subsequently filed a Notice of Motion seeking for orders of stay of execution of the decree of the subordinate court before the same court which application was heard and dismissed. That by virtue of the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules, they had filed a subsequent application seeking the same relief before this court which application was now the basis of the Preliminary Objection herein.

11. That the impugned application seeking stay of execution of judgment and Decree pending appeal, and being a second application before the court to which an Appeal had been mounted, had been made timelessly with due promptitude and without unreasonable delay.

12. That the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules did not bar an Applicant/Appellant, whose application for stay of execution pending hearing and determination of an Appeal had been refused by the subordinate court, from mounting a similar application to the Appellate Court.

13. The Appellant/Applicant relied on the decided case in **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** to submit that the improper raising of points by way of Preliminary Objection did nothing but to unnecessarily increase costs and to waste precious judicial time in adjudicating upon matters that ought not to arise in the first place.

14. The Applicants further submitted that the doctrine of res judicata as provided for under Section 7 of the Civil Procedure Act forbid a subsequent court from hearing and entertaining a similar suit/dispute which had hitherto been heard and finally disposed of by a court of competent jurisdiction. However the fact that a subordinate court had entered a judgment or ruling did not bar an Appellate Court from attending to and/or hearing an Appeal and/or a relevant application provided for under the law which was the mandate granted to this court by virtue of the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules. The Applicants relied on the decided case of **Independent and Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR** to buttress their submissions and to further submit that the Preliminary Objection raised was filed to defeat and/or delay the conclusion of the subject matter having been founded on a misconceived and misapprehension of the law and therefore same ought to be dismissed with costs.

Determination.

15. I have considered the Respondent's application on a point of Preliminary Objection to the effect that the suit should be struck out for reasons that by virtue of the provisions of Sections 7 of the Civil Procedure Act, the court lacked jurisdiction to hear and determine the application for being res judicata. That the current application, dated the 25th August 2020 in which the Applicants had sought for stay of execution orders pending the filing of an Appeal had been heard and determined by the trial court. That Secondly that the application was sub judice by virtue of the provisions of Section 6 of the Civil Procedure Act.

16. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

> *"----a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".*
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> In the same case Sir Charles Newbold, P. stated:
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> *"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".*

17. The matters for determination hereto is whether the said Preliminary Objection has merit and should be upheld.

18. Section 6 of the Civil Procedure Act provides

> *'No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

19. The issue of this matter being sub-judice has been raised by the Respondent in his Preliminary Objection to the effect that there was

pending its determination an application filed on the 3rd August 2020 before the Kilgoris Court which application had been brought under the provisions of Section 34 of the Civil Procedure Act and therefore the present application was sub judice to that effect.

20. The court notes that there was no evidence annexed thereto in support of the said allegation and neither did the Respondent submit on this point in their written submission. The allegation therefore remains as such, an allegation and the court leaves this issue at that.

21. I shall now turn on the issue as to whether the application before the court dated the 25th August 2020 in which the Applicants have sought for stay of execution orders pending an appeal, is res judicata having been heard and determined by the trial court.

22. Section 7 of the Civil Procedure Act provides:

> *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

23. The provisions upon which the application was made are under Order 42 Rule 6(1) of the Civil Procedure Rules which provide as follows:

> *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

24. The wordings of the said provision of the law are clear to the effect that the High Court, read Environment and Land court, has jurisdiction to entertain an application for stay whether or not the same has already been heard by the subordinate court and dismissed.

25. In the case of **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** it was held by **Meoli, J** that:

> ***'Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty…to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof…***
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> ***So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court's original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.***
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> ***Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.***
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> ***I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).***
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> ***It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.***
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> ***In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established."***

26. The Court of Appeal has delivered itself on the application of Order 42 Rule 6 (1) of the Civil Procedure Rules in both its original and appellate jurisdictions in several decisions, while considering its own Rule 5(2)(b) which is essentially at *pari materia* with Order 42 Rule 6 (1) of the Civil Procedure Rules.

27. In the case of **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR**, the court of Appeal had held that:

> ***'It is trite law that in dealing with (Rule 5 (2) (b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction'***

28. In the case of **Gurbux Singh Suiri & Anor. –vs- Royal Credit Ltd.[1995] eKLR** while expounding on its reflection in its dictum in the **Stanley Munga Githunguri v Jimba Credit Corporation Ltd (No 2)[1988] eKLR**, the Court of Appeal held as follows:-

> ***"In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction…But because of the existence of Rule 5 2 (b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression 'independent original jurisdiction' is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as "we have to apply our minds*** *de novo* ***or it is not an appeal from the learned Judge's discretion to ours."***

29. Having found as herein above and in considering that the decisions of the Court of Appeal are binding to this court, I find that the Preliminary Objection dated the 22nd September 2020 lacks merit and is herein dismissed with costs.

Dated and delivered via Microsoft Teams this 29th day of April 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE