



**Majon v Masibo & 8 others (Miscellaneous Application
14 of 2024) [2025] KEHC 3497 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS APPLICATION 14 OF 2024**

**AC MRIMA, J
MARCH 21, 2025**

BETWEEN

JOSHUA MAJON APPLICANT

AND

ABRAHAM WATILI MASIBO 1ST RESPONDENT

RICHARD PAUL HAMMOND 2ND RESPONDENT

JESSE WAFULA SAID 3RD RESPONDENT

TOM OMUSA ETUKATI 4TH RESPONDENT

ESNETA N. NANDEBE THOMAS 5TH RESPONDENT

CHRISTINE MAJANGA 6TH RESPONDENT

CHRISPO SUNGU 7TH RESPONDENT

THE REGISTRAR OF SOCIETIES 8TH RESPONDENT

THE HON. ATTORNEY GENERAL 9TH RESPONDENT

RULING

1. Joshua Majon, the Applicant herein, lodged the application by way of Notice of Motion dated 26th March 2024 seeking among other orders, astay of the order for cancellation of the certificate of Registration issued to the Congregation of Lord Jesus Christ Ministries pending the hearing and determination of the Application and the intended appeal.
2. In response to the application, Richard Paul Hammond, the 2nd Respondent herein, lodged the Notice of Preliminary Objection dated 20th May 2024. He sought to strike out the application in limine. The Objection was couched in the following terms: -



1. That the Application dated 26th March 2024 is incompetent as filed, bad in law, non-starter and offends the mandatory provisions of the Societies Act as the Applicant lacks locus standi to file the instant application.
2. That the Application dated 26th March 2024 is incompetent, misconceived, fatally defective and an abuse of the court process and the same should be dismissed with costs.
3. The objection was heard first. Parties filed and exchanged their respective written submissions. In his written submissions dated 8th July 2024, the 2nd Respondent only argued the second limb of objection. It was his case that under Order 42 Rule 6 of the Civil Procedure Rules, stay of execution is predicated upon the existence of an appeal. He argued that it is an appeal that forms the substratum of an application for stay of execution and if there is no appeal filed, then the application for stay of execution should have a prayer for the Court to grant the applicant leave to appeal against the Judgment or the ruling as the case may be.
4. He submitted that since the Applicant herein never filed an appeal against the Judgment of the trial Court, and has not annexed a Memorandum of Appeal in his application, and there is no prayer to appeal out of time, then the application for stay of execution is incompetent. He further submitted that the application was defective since the Applicant did not seek stay in the lower Court as required under Order 42 rule 1 of the Civil Procedure Rules. The 2nd Respondent argued that absent that mandatory step, an application filed directly to the appellate Court is improper. He submitted that the requirement of Order 42 Rule 1 of the Civil Procedure Rule is not a mere technicality that could be cured under Article 159(2)(d) of the Constitution.
5. Based on the foregoing, it was his case that this Court lacks jurisdiction to entertain the application since the Court was not properly moved. He relied in Abraham Lenuia -vs- Charles Katekeyo Nkaru (2016) eKLR to buttress his case.
6. In conclusion of his assault on the objection, the 1st Respondent submitted that to the extent the application is not anchored on a substantive suit, then the same is incompetent as drafted and the prayers sought cannot be granted. He prayed that the objection be allowed and the application be struck with costs.
7. The Applicant opposed the objection through written submissions dated 17th September 2024 and a Replying Affidavit deposed on 13th September 2024. He identified two issues for determination; namely; whether there is an appeal on record and whether it is mandatory to seek stay at the lower Court first.
8. On the first issue, it was the Applicant's case that there is indeed an appeal on record being HCCA E021 of 2024, Joshua Majon -vs- Abraham Watili Masibo & Others and as such, the objection fails. He also argued that the objection was not on a pure point of law.
9. Regarding the claim that he failed to seek the stay orders from the trial Court, the Applicant submitted that the operative part of Order 42(6) of the Civil Procedure Rules empowers both the High Court and the lower Court to entertain an application for stay of execution or proceedings pending appeal. The case of Patrick Kalaya Kulamba & Another -vs- Philip Kamosu and Roda Ndanu Philip (deceased) (2016) eKLR was relied upon where it was observed: -

.... 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 is called 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.

10. With the foregoing, the Applicant submitted that this Court had jurisdiction to entertain its application dated 26th March 2024.
11. From the perusal of the objection, the response, the submissions and the decisions referred to by the rival parties, two issues emerge for determination. They are: -
 - i. Whether the Preliminary Objection is proper in law.
 - ii. Depending on (i) above, whether the Preliminary Objection is merited.
12. On whether the preliminary objection is proper in law, the law on objections is settled. For a party to successfully argue it, the objection should be raising pure question[s] of law capable of disposing of a dispute at once. A Court seized of a preliminary objection must, therefore, ascertain that it is not caught up with factual issues that would necessitate the calling of evidence.
13. The foregoing nature of Preliminary Objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd (1969) E.A 696 pg. 700* where the Court observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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 the contract giving rise to the suit, to refer the dispute to arbitration.

...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 issues, and this improper practice should stop.
14. In *Civil Suit No. 85 of 1992, Oraro vs. Mbaja [2005] 1 KLR 141, Ojwang J, [as he then was]*, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors (supra)* and stated as follows on the operation of Preliminary Objections: -

.... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.
15. In *Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177*, it was observed that a Court in determining a Preliminary Objection can look the pleadings and other relevant documents, but it must abide by the principle that it must raise pure points of law. It was held: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to



purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

16. In this case, the 2nd Respondent abandoned its first limb of the preliminary objection. This Court will, therefore, focus on the second limb which both parties strenuously argued.
17. The thrust of the 2nd Respondent's case is on incompetence of the application as viewed against Order 42 Rule 6 of the of the Civil Procedure Rules. In *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, the Supreme Court spelt out the place of jurisdiction. It observed thus:

... jurisdiction is a pure question of law.....

18. In *Constitutional Application No. 2 of 2011, In the Matter of Interim Independent Electoral Commission (2011) eKLR* the Apex Court was emphatic that jurisdiction is a matter of law. In the case it observed;

.... Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid down in judicial precedent.

19. This Court is persuaded that the challenge on jurisdiction based on claimed incompetence of the application pursuant to Order 42 of the Civil Procedure Rules is a pure question law capable of disposing the suit at once. The first issue is, therefore, answered in the affirmative.
20. On whether the objection is merited, the thrust of the objection is twofold. One, that there is no appeal pending before this Court and further no leave has been sought to lodge an appeal out of time to be a basis of the application. Two, that the application was not initially made before the Court appealed from.
21. On the first limb, this Court has confirmed in the Court's Tracking System [CTS] that indeed the Applicant filed an appeal being HCCA E021 of 2024, *Joshua Majon -vs- Abraham Watili Masibo & Others*. The appeal is still current. The opposition is, hence, in vain.
22. Order 42 Rule 6 of the Civil Procedure Rules is central in this matter. The provision states as follows: -

6. Stay in case of appeal [Order 42, rule 6]

1. 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.
2. No order for stay of execution shall be made under sub rule (1) unless—



- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 3. Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 6. Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
23. From a reading of the above provision, two distinct components emerge. First is that the filing of an appeal does not operate as an automatic stay of execution or proceedings. A Court, properly so moved, has to make such a specific order. Secondly, on which Court the application for stay ought to be made in the first instance, the operative word is ‘may’. It, therefore, means that both Courts have requisite jurisdiction to entertain stay applications. In other words, a party is at liberty to file an application for stay in either Courts in the first instance. The submission that such an application must be first made before the Court appealed from is not founded in law.
24. Having found as much, the 2nd Respondent’s objection lacks any merit. In the premises, this Court declines the Notice of Preliminary Objection dated 20th May 2024 and is hereby dismissed with costs.
25. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Teti, Learned Counsel for the 2nd Respondent.

No appearance for, Learned Counsel for the Applicant.

Chemosop/Duke – Court Assistants.

