



**Apa Insurance Limited v Mutunga & another (Civil Appeal
E1003 of 2022) [2024] KEHC 213 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1003 OF 2022

CW MEOLI, J

JANUARY 19, 2024

BETWEEN

APA INSURANCE LIMITED APPELLANT

AND

DR WILLY MUTUNGA 1ST RESPONDENT

GRACE BARBARA NGELE MADOKA 2ND RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 28th January, 2023 (the Motion) brought by APA Insurance Limited (hereafter the Applicant) seeking an order to stay execution of the judgment in favour of Dr. Willy Mutunga and Grace Barbara Ngele Madoka (hereafter the 1st and 2nd Respondents/ Respondents) delivered by the Small Claims Court on 25th November, 2022 in SCCCOM No. E5346 of 2022, pending the hearing and determination of the present appeal. The motion is supported by the grounds set out on its body and the depositions in the affidavit of Ruth Mbalelo, Legal Officer at the Applicant Company.
1. The gist thereof is that the trial court awarded the sum of Kshs. 1,000,000/- to the Respondents upon finding that the Applicant was bound to satisfy the Respondents' claim, and that the Applicant being aggrieved by the said judgment, is desirous of challenging it on appeal. The deponent also stated that the appeal is arguable and has reasonable chances of success, adding that unless stay of execution is granted, the Applicant will suffer substantial loss arising from the imminent threat of execution by the Respondents. Which event would render the appeal nugatory. The deponent further expressed the Applicant's readiness and willingness to provide security by way of a suitable bank guarantee, for the due performance of the decree.



2. The 1st and 2nd Respondents resisted the Motion by way of the notice of preliminary objection dated 15th March, 2023 to the following effect:

“The Respondents shall at the first hearing of the Appellant’s Application for Stay dated 28th January, 2023, take an Objection in limine to the Appeal on the following grounds:

 - a. That this Honourable Court lacks jurisdiction to determine the Appeal-Section 38 of the *Small Claims Court Act*, 2016 clearly stipulates that appeals from the Small Claims Court to the High Court must be on matters of law, only.

All the grounds of appeal in the Memorandum of Appeal dated 9th December, 2022 and served upon the Respondents on 16th February, 2023 raise matters of fact.
 - b. The Appeal is inherently bad in law.”
3. The 2nd Respondent further swore a replying affidavit on 16th March, 2022 stating inter alia, that the appeal does not raise any arguable grounds by dint of Section 38 of the *Small Claims Court Act*. She further stated that the appeal is intended to hinder the Respondents from enjoying the fruits of their judgment and that no substantial loss has been demonstrated by the Applicant. In the alternative, the Respondent averred that should the court be inclined to grant a stay, it should impose a condition requiring the Applicant to deposit the entire decretal sum into a joint interest earning account and reject the proposal by the Applicant to provide a bank guarantee for the decretal amount.
4. When the parties attended court for the hearing, it was agreed by consent that the Motion and the preliminary objection be heard and determined together. It was further agreed that the parties would rely on their respective affidavit material in respect of the Motion, whilst putting in written submissions on the preliminary objection.
5. Submitting in support of the preliminary objection, the Respondents’ counsel anchored her submissions on the decisions in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR as well as cases cited in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR in arguing that the grounds of appeal in the Applicant’s memorandum of appeal contain issues of fact pertaining to whether Jose Bonnifacio Rodrigues (hereafter the deceased) on whose behalf the claim was filed, suffered from a pre-existing condition, and hence the High Court did not have jurisdiction to entertain such appeal.
6. The Applicant opposed the preliminary objection whilst simultaneously defending the instant Motion and appeal. In her submissions, the Applicant’s counsel relied on the oft cited case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 regarding the definition and principles undergirding preliminary objections. Here citing the decisions rendered in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR and *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Ltd* [2015] eKLR regarding what constitutes a matter or question of law. Counsel submitted that in the present instance, the appeal raises issues of law including the issue whether the trial court correctly evaluated the evidence before it in arriving at its finding. Consequently, counsel urged the court to dismiss the preliminary objection with costs.
7. The court has considered the grounds laid out on the body of the Motion, the depositions in the rival affidavits in respect of the Motion, the preliminary objection, and the submissions in respect of the preliminary objection.



8. The court will first address its mind to the preliminary objection whose grounds have already been set out. In the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court defined a preliminary objection in the following manner:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

10. The essence of the Respondents’ preliminary objection is a challenge to the jurisdiction of this court to entertain the instant Motion and the appeal, pursuant to the provisions of Section 38 of the *Small Claims Court Act*. A challenge to jurisdiction constitutes a pertinent issue of law. The legal principle being that jurisdiction is everything and that without it, a court cannot perform any further action in a matter.

11. The foregoing was reaffirmed by the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. 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.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their



consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words: -

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

12. Section 38 of the *Small Claims Act* (supra) upon which the Respondents’ preliminary objection is premised provides that:
 1. “A person aggrieved by the decision, or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 2. An appeal from any decision or order referred to in subsection (1) shall be final”.
13. It is clear therefrom that appeals against the decisions rendered by the Small Claims Court lie with the High Court and are restricted to matters of law. This begs the question whether the present appeal raises pure matters of law.
14. From its perusal of the record and without necessarily going into the merits of the suit and appeal, the court observed that the claim before the trial court was lodged by the Respondents in their capacity as personal representatives of the estate of the deceased, and against the Applicant, arising out of an insurance policy contract which existed between the Applicant and the deceased at all material times. Upon hearing the parties, the trial court found that the Applicant had failed to prove the existence of a chronic condition preceding the death of the deceased, and consequently found it liable to pay the outstanding sums arising out of the contract.
15. From the court’s further perusal of the record and in particular the memorandum of appeal containing six (6) grounds of appeal, it is apparent that grounds 1 to 4 in particular sought to challenge the trial court’s analysis and determination on the subject of whether the deceased had a pre-existing condition, whilst grounds 5 and 6 concern themselves with whether the trial court arrived at a reasonable finding that the Applicant was in breach of contract, and therefore liable to honor the insurance claim to the tune of Kshs. 2,500,000/- respectively.
16. Upon considering the foregoing, the court is of the view that the first five (5) grounds of the appeal above largely address factual matters, primarily, the question pertaining to whether the deceased had a pre-existing condition at the time of his death as opposed to matters of law. Consequently, and



pursuant to a clear reading and interpretation of Section 38 (supra), no appeal can lie with the High Court against a decision by the Small Claims Court on such matters.

17. In view of all the foregoing, the court is inclined to partially allow notice of preliminary objection in respect of grounds 1 to 5 of the appeal, only. The grounds are liable for striking out. As concerns grounds 5 and 6 of the appeal however, the court is convinced that these constitute matters of law and therefore declines to have them struck out.

18. Now turning to the merits of the Motion seeking to stay execution pending the appeal, it is trite law that the courts have discretionary power to grant an order for a stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See [Butt v Rent Restriction Tribunal](#) (supra). In that regard, Order 42, Rule 6 of the CPR states that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (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”.

19. Concerning the first condition touching on whether the Motion has been brought without unreasonable delay, it is noteworthy that the lower court’s judgment was delivered on 25th November, 2022 whereas the instant Motion was filed sometime around 28th January, 2023. The court is satisfied that the delay of close to two (2) months is not unreasonable.

20. The second condition for consideration here is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. The relevance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal case in the renowned case of [Kenya Shell Ltd v Kibiru & Another](#) [1986] KLR 410 when it held that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

21. The Court held concerning substantial loss that:

“1.



2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
22. The decision of Platt Ag JA, in the Shell case, in the court’s humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:
- “The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”
23. The learned Judge continued to observe that:
- “It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
24. Earlier on, Hancox JA in his ruling observed that:
- “It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson -Vs- Church* (No 2) (1879) 12ChD 454 at page 458 where he said: -‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.’”
25. The court considered the averments by the Applicant on the manner in which it stands to suffer substantial loss, alongside the rival arguments by the Respondents on the matter. It is the ordinary course of principle for a successful party to be granted the privilege of enjoying the fruits of his or her



judgment. The court noted that save for asserting that execution is imminent, the Applicant did not tender any material to demonstrate how it stands to suffer substantial loss if the stay order is denied. Without this evidence, it is difficult to see how the appeal herein will be rendered nugatory if the stay prayer is declined and why the Respondents should be denied the enjoyment of the fruits their judgment.

26. Execution in satisfaction of a decree is a legal process sanctioned by the law, and the mere fact of execution is not, *ex facie*, evidence of substantial loss. Thus, it is not enough for the Applicant to allege that the appeal will be rendered nugatory unless the stay order is granted. In the premises, the court is not satisfied that substantial loss has been demonstrated here to warrant the issuance of a stay order. Upon arriving at this finding, the court does not deem it necessary to consider the third condition which is the provision of security.
27. In view of the foregoing, the court makes the following orders:
 - a. The notice of preliminary objection dated 15th March, 2023 partially succeeds. Consequently, grounds 1 to 4 of the memorandum of appeal dated 9th December 2022 are hereby struck out with costs to the Respondents.
 - b. The Notice of Motion dated 28th January 2023 is hereby dismissed with costs to the 1st and 2nd Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of-

For the Applicant: Mr. Ochieng

For the Respondent: Ms. Mulei

C/A: Carol

