



**Neo Kenya Commuters v Gaitho (Miscellaneous Civil Application
E105 of 2023) [2024] KEHC 219 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E105 OF 2023**

**CW MEOLI, J
JANUARY 19, 2024**

BETWEEN

NEO KENYA COMMUTERS APPLICANT

AND

JAMES NGANGA GAITHO RESPONDENT

RULING

1. For determination is the Notice of Motion dated 28th February 2023 (the Motion) filed by Neo Kenya Commuters (hereafter the Applicant) seeking leave to file an appeal out of time as against the judgment delivered by the trial court on 11th November 2022 in Milimani SCCC No. E723 of 2021 in favour of James Nganga Gaitho (hereafter the Respondent) and stay of execution of the aforesaid judgment, pending the hearing and determination of the intended appeal. A further prayer sought that the Applicant be allowed to furnish security in respect of the decretal sum by way of a bank guarantee.
2. The Motion is expressed to be brought inter alia under Sections 3A, 79G & 95 of the *Civil Procedure Act* (CPA) and Order 22, Rule 22; Order 42, Rules 4, 6 and 7; and Order 51, Rules 1 and 3 of the *Civil Procedure Rules* (CPR). And premised on the grounds on the face of the Motion as amplified in the initial supporting affidavit sworn by Douglas Njiru Kuria, a Director of the Applicant, on 27th February, 2023 but which affidavit was subsequently withdrawn and substituted by the affidavit sworn by the aforesaid deponent on 29th May, 2023.
3. The deponent averred that at the time of delivery of the impugned judgment, the Applicant was represented by a different firm of advocates, namely AKO & Co. Advocates (the former advocates) but that it has since appointed the firm of Kimondo Gachoka Advocates (the current advocates) to act for it, in place of the former advocates. The deponent averred further that the delay in lodging an appeal was unintentional and that the intended appeal is arguable.



4. Regarding the prayer for stay of execution, it was the deponent's assertion that unless the same is granted, the intended appeal will be rendered nugatory since the Respondent has already, albeit illegally instructed Bemac Auctioneers (the auctioneers) to attach and sell the motor vehicle registration number KCL 288 (the subject motor vehicle) belonging to the Applicant. It was also his assertion that the Applicant was ready and willing to provide a bank guarantee as security for the due performance of the decree.
5. The Respondent opposed the Motion by swearing a replying affidavit on 21st June, 2023. Therein, he deposed that the Motion is a mere afterthought and intended to frustrate the execution process. The Respondent further deposed that no reasonable explanation has been given for the delay in filing the appeal since delivery of the judgment and that the intended appeal does not contain any arguable grounds. It was similarly his averment that the Applicant has not met the threshold required for granting stay of execution and hence the order.
6. The Motion was canvassed by way of brief oral arguments. On the one part, counsel for the Applicant anchored her arguments on Section 79G of the *CPA* and the decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417 and explained that the delay in filing the appeal in good time was occasioned by the fact that the suit was being handled by a different firm of advocates and that as soon as the current advocates came on record by way of a consent, they moved swiftly to file the Motion. Counsel contended that half the decretal sum had since been deposited into court and therefore prayed for release of the subject motor vehicle to the Applicant. It was counsel's final submission that substantial loss has been demonstrated and urged the court to grant the substantive orders sought in the Motion.
7. Counsel for the Respondent in opening her submissions contended that the affidavit supporting the Motion was incompetent, having been commissioned by a firm of advocates as opposed to an individual advocate, contrary to Section 4(1) of the *Oaths and Statutory Declarations Act*. The advocate further reiterated that no arguable appeal is demonstrated. Regarding stay, it was the advocate's contention that the conditions set out under Order 42, Rule 6 of the *CPR* have not been satisfied here. The court was urged to strike out the Motion on those grounds.
8. From the record, it had been agreed by consent of the parties during the hearing, that the subject motor vehicle be released to the Applicant on the condition that the Applicant deposits into court within 21 days the sum of Kshs. 404,307/- making up the total sum held as security. It was equally agreed by consent that the Applicant was to pay the auctioneer's charges upon taxation of the same.
9. The Court has considered the rival affidavit material coupled with the oral arguments made. The court is of the view that the motion turns on the competency of the affidavit sworn by Douglas Njiru Kuria on 29th May, 2023 supporting the Motion. Section 4(1) of the *Oaths and Statutory Declarations Act* Cap. 15 Laws of Kenya, provides as follows:

“ A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”



10. The Respondent urged that the supporting affidavit ought to be struck out for having been incompetently commissioned. From its perusal thereof, the court observed that the jurat of the said supporting affidavit bears the stamp of Orege J & Associates, a firm of advocates as opposed to an individual Commissioner for Oaths. This despite the Applicant having withdrawn the initial similarly commissioned affidavit and presenting the subject affidavit as a substitute. The purport of the above-cited provision of the law requires no elaboration; it contemplates the commissioning of oaths by an individual commissioner, not a firm of advocates. The Respondent's objection that the said affidavit was not properly commissioned and is therefore defective has merit. The affidavit is liable to be struck out.
11. This being the second time that the Applicant has sworn a defective affidavit in support of its motion, the court can do no more than find the Notice of Motion dated 28th February 2023 incompetent and strike it out with costs to the Respondent. It is so ordered.

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

C.MEOLI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

For the Applicant: Ms. Mugo

For the Respondent: Ms. Kamau h/b for Mr. Kibiku

C/A: Carol

