



**Juja Coffee Exporters Limited v National Bank of Kenya Limited & another  
(Commercial Case 69 of 2017) [2024] KEHC 16984 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 16984 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE 69 OF 2017**

**F WANGARI, J**

**MAY 2, 2024**

**BETWEEN**

**JUJA COFFEE EXPORTERS LIMITED ..... PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**AWEYS MOHAMED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in relation to the Notice of Motion brought under Certificate of Urgency and dated 8/3/2024, and seeks for the following orders: -
  - a. Spent;
  - b. Spent;
  - c. There be an interim order of injunction restraining the 1<sup>st</sup> Defendant, its agents, employees or servants from selling, whether by public auction or private treaty, transferring or in any other way interfering with the Plaintiff's ownership of all and any of the parcels of land known as Title Number Mombasa/Block I/146, Mombasa/Block I/167, Mombasa/Block I/190, Mombasa/Block I/198 and MN/I/5208 pending the hearing and determination of the intended appeal to the Court of Appeal.
  - d. The time for lodging a Notice of Appeal against the ruling delivered on 1/12/2023 be extended for such a period as the court deems fit and the Notice of Appeal dated 22/2/2024 be deemed as validly filed within the extended time.
  - e. The costs of the application be in the cause.



2. The application is based on grounds that the Applicant's counsel was instructed to file an appeal against the ruling dated 1/1/2/2023 but failed to do so on time and blamed it on human error on the part of the Applicant's advocate. Further, the 1<sup>st</sup> Defendant is said to have offered the suit properties for sale under private treaty without the authority of the Applicant.
3. The 1<sup>st</sup> Defendant responded to the application by filing the Replying Affidavit dated 13/3/2024. It was stated that the application was fatally defective as it sought for prayers that are incapable of being granted. Further, the application was res judicata. The 1<sup>st</sup> Defendant relied on the ruling of this court dated 1/12/2023 dismissing the Applicant's previous applications seeking for injunction orders against the 1<sup>st</sup> Defendant.
4. The 1<sup>st</sup> Defendant further deponed that it was just exercising its statutory power of sale, hence nothing stops it from selling the suit properties. It prayed that the application be dismissed with costs.
5. Directions were taken to have the application disposed by way of written submissions. Only the Applicant complied. The Applicant's submissions are dated 19/4/2024.

### **Analysis and Determination**

6. I have considered the application, submissions, the authorities cited as well as the law and I discern the following issues for determination: -
  - a. Whether the prayers sought in the application are merited;
  - b. If the answer to (a) above is in the affirmative, what orders ought to issue?
  - c. What is the order as to costs?
7. The Applicant sought for leave to appeal out of time. It was deponed that the Applicant's counsel was instructed on time but failed to do so, citing human mistake on the advocate's part.
8. In the case of *CFC Stanbic Limited versus John Maina Gitbaiga & another* [2013] eKLR, the Court of Appeal held as follows-
 

“On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of *Lee G Muthoga V Habib Zurich Finance (k) Ltd & Another*, Civil Application No. Nai 236 Of 2009, where this Court held:

“It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight.” In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”
9. The mistake of the counsel for the Applicant should not be visited upon the party. In addition to this, it was held in the case of *Nicholas Kiptoo arap Salat v IEBC & 7 others* [2014] eKLR, the granting of extension of time is discretionary as it is an equitable remedy.
10. As stated in my ruling dated 1/12/2023, this is an old matter that needs to be disposed of and out of our system. However, considering that there are 5 properties that are at stake of being sold, I find no reason to deny the applicant from being heard in the court of appeal. If the appeal is unsuccessful,



there shall be no other remedy available for the Applicant but to have the 1<sup>st</sup> Defendant exercise its statutory power of sale.

11. In respect to the prayer for orders of injunction pending hearing and determination of the intended appeal, the Applicant is seeking for stay of execution of the ruling dated 1/12/2023 which allowed the 1<sup>st</sup> Defendant to proceed with the sale of the Applicant's properties. However, the departure with the said ruling of the court is that it has been deponed that the 1<sup>st</sup> Defendant seeks to sell the suit property via private treaty without the consent of the Applicant.
12. The Applicant's equity of redemption has not been extinguished, and consent of the Applicant or leave of the court to have the suit properties sold by way of private treaty would ensure that the interests of the Applicant are also put into consideration, which includes selling the property at market value. On this ground, I allow the application for stay of execution pending hearing and determination of the appeal.
13. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is, that costs must follow the event unless the court, for some good reasons, orders otherwise. I exercise the court's discretion and grant no orders as to costs.
14. The applications dated 8/3/2024 is allowed as hereunder;
  - a. Leave to appeal out of time is hereby granted and the Notice of Appeal dated 22/2/2024 is deemed as properly filed.
  - b. That stay of execution (by way of sale of suit property though public auction or private treaty) is hereby granted pending hearing and determination of the appeal.
  - c. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF MAY, 2024.**

**F. WANGARI**

**JUDGE**

In the presence of:

Mr. Gikandi Advocate for the Applicant

Mr. Kariuki Advocate for the 1<sup>st</sup> Defendant/Respondent,

N/A for the 2<sup>nd</sup> Defendant

Mr. Barille, Court Assistant

