



**Chege & another v Beth Mobility LLP & 2 others (Appeal E096 of 2022)  
[2024] KEHC 7341 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
APPEAL E096 OF 2022  
FG MUGAMBI, J  
JUNE 14, 2024**

**BETWEEN**

**BEATRICE NJERI CHEGE ..... 1<sup>ST</sup> APPELLANT**

**TRIS MOTORCYCLES LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BETH MOBILITY LLP ..... 1<sup>ST</sup> RESPONDENT**

**QUESTWORKS MOTORLABS LLP ..... 2<sup>ND</sup> RESPONDENT**

**TUA INTERNATIONAL GROUP LTD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated 13<sup>th</sup> March 2023 is brought under the provisions of Section 80 of the *Civil Procedure Act* (Cap 21) and Order 45 Rule 2 of the *Civil Procedure Rules*. It seeks to review or vary the Orders of Honourable Lady Justice Dorah Chepkwony given on 28<sup>th</sup> February 2023 on the ground that the said ruling introduces an error or mistake apparent on the face of the record.
2. The background to the present proceedings is that the applicants herein filed an appeal against interlocutory orders issued on 13<sup>th</sup> July 2022 by the Milimani Principal Magistrate Mr. G. M. Gitonga, in Civil Case MCCOMSU E462 of 2022 (the parent suit).
3. It is not in dispute that the suit in the subordinate court is pending hearing and determination. It is also not disputed that the trial court issued orders attaching the assets of the applicants and freezing their bank accounts at the interlocutory stage. The applicants approached this Court on the basis that the orders were issued without hearing them and on the basis of contested affidavit evidence that had not been tested in cross examination.



4. Being an interlocutory appeal, the applicants argue that no judgment had been entered against the appellants and therefore no decree has ever issued from the subordinate court relating to the lower court matter. There is no monetary final decree to guide the Court on the security to be deposited as the dispute between the parties has not been heard or determined.
5. Upon filing the appeal herein, the appellants confirm that they filed an application dated 26<sup>th</sup> July 2022 seeking a stay of the orders issued by the subordinate court pending the hearing and determination of the appeal.
6. In a ruling delivered on 28<sup>th</sup> February 2023 this Honourable Court granted a conditional stay pending appeal, requiring the appellants to deposit the decretal amount in a joint interest earning amount in the name of both counsel for the parties within 30 days.
7. In addition, the subject ruling further directs the appellants/applicants to file and serve a Memorandum of Appeal within 30 days in default of which the stay orders will stand vacated, yet the said appeal had already been filed on 26<sup>th</sup> July 2022. For these reasons the applicants argue that the said orders are incapable of performance.
8. The application is opposed by the respondents who argue that the ruling delivered by this Court is sound as it grants the stay of execution orders on sound principles of law. The respondents argue that the order was for security for the due performance of a decree or order as may ultimately be binding on the applicant. Such an order was in tandem with the interlocutory orders that the applicants sought to appeal from predicated on the imperative need to safeguard the monies owed. These orders were issued by the lower court on account that the applicants were alienating their assets to frustrate any future recovery proceedings and the attached assets.
9. As far as the respondents are concerned, the decision of the trial court was an expression of a conclusive adjudication expressed in final determination of the matter in controversy with regards to security for the disputed sum. This was also in tandem with the definition of a decree in the *Civil Procedure Act* that a decree may be either preliminary or final.
10. The respondents further argue that the mistake or error apparent as alleged by the applicants requires an elaborate argument to be established and is therefore against the principles of review under Order 45 Rule 2.

### **Analysis and determination**

11. I have carefully considered the pleadings, submissions, evidence and authorities cited by the parties in support of their arguments.
12. The parameters for review of an order were set out by the Court of Appeal in *National Bank of Kenya Ltd V Ndungu Njau*, [1997] eKLR in the following terms:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”



13. The bone of contention in this matter is whether there was an error on the record when the Learned Judge directed that a decretal amount be deposited and a record of appeal be filed when there was in fact no final judgment or decree and when the record of appeal had in fact been filed already.
14. A decree is defined under Section 2 of the *Civil Procedure Act* as follows:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, ... A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”
15. I have carefully read through the reasoned ruling by the Learned Judge and nowhere does she refer to an interim decree issued by the lower court as suggested by the respondents, in connection to the orders of this Court security be deposited in court. In fact, the closest that the Learned Judge comes to mentioning the issue of security is with regards to satisfaction of the final judgment of the Court. At paragraph 42 of the ruling she states as follows:

“However, the appellant has made no mention of the willingness to provide security for the due performance of the decree, which is always regarded as a demonstration of good faith by a party seeking to stay orders which are likely to impede on the other party’s rights to enjoy fruits of its judgment.”
16. The ruling of 28<sup>th</sup> February 2023 allowed the application of 26<sup>th</sup> July 2022 on two conditions:
  - “(a) The Appellants do deposit the decretal amount in a joint interest earning account of both counsel for the parties within 30 days from today.
  - (b) The Applicant to file and serve Memorandum of Appeal and or in the alternative be at liberty to seek to be enjoined in the pending appeals in respect of the subject matter, if at all, within 30 days from today. Failure to comply with Order (a) and (b) above will render the stay orders issued herein vacated.”
17. Clearly, the ruling anticipated a full monetary decree, indicating that the Learned Judge was not addressing the interlocutory decree issued by the lower court. The lower court’s decree was not solely monetary but also included orders to attach the applicants’ assets.
18. To compound the issue further, there is also no way of telling the amount of such security to be deposited noting my immediate sentiments. This leaves me with no doubt that the reference to deposit of security can only have been an inadvertent error. Furthermore, it is also clear that the Learned Judge proceeded on the assumption that the record of appeal had not been filed in the matter which is not the case as submitted by the applicants.
19. For the reasons that I have stated I am of the view that the applicants are entitled to an order of review. The applicants pray for an order of status quo to be granted pending the hearing and determination of the Appeal herein. I am of the opinion that this is a reasonable prayer under the circumstances that would alleviate the hardships as would be out of proportion to any suffering that the respondents might undergo while waiting for the applicant’s appeal to be heard and determined.



## **Disposition**

20. In conclusion the application dated 13<sup>th</sup> March 2023 is allowed. The ruling of this Court dated 28<sup>th</sup> February 2023 is hereby reviewed staying the execution of the interlocutory orders issued on 13<sup>th</sup> July 2022 by the Milimani Principal Magistrate Mr. G. M. Gitonga, in Civil Case MCCOMSU E462 of 2022 to the extent that the requirement for deposit of security in form of the decretal amount and filing of the memorandum of appeal are hereby set aside.
21. For the avoidance of doubt status quo as at the date of this ruling shall be maintained pending the hearing and determination of the appeal herein.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2024.**

**F. MUGAMBI**

**JUDGE**

