



**Kensilver Services Limited v Mugambi & another (Civil Appeal  
E973 of 2023) [2024] KEHC 8733 (KLR) (Civ) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8733 (KLR)

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

**CIVIL**

**CIVIL APPEAL E973 OF 2023**

**CW MEOLI, J**

**JULY 8, 2024**

**BETWEEN**

**KENSILVER SERVICES LIMITED ..... APPELLANT**

**AND**

**AGNESS KANARIO MUGAMBI ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN MWANIKI T/A ANFIELD AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two applications for determination. The first is the Notice of Motion dated 21<sup>st</sup> September, 2023 (hereafter the first application) brought by Kensilver Services Limited (hereafter the Applicant) supported by the grounds laid out on its face and the depositions in the affidavit of the Applicant's CEO Gerald Mwangi Theuri. Seeking to stay execution of the decree issued by the trial court on 29<sup>th</sup> November, 2022 in Milimani CMCC No. 1398 of 2018 (the suit) pending the hearing and determination of the appeal against the ruling delivered on 18<sup>th</sup> September, 2023. The first application is expressed to be brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* (CPA); Order 42, Rule 6 (1) and (2), and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR).
2. The deponent to the supporting affidavit stated that the Applicant instituted objection proceedings in the suit, giving rise to the decree in favour of Agness Kanario Mugambi (hereafter the 1<sup>st</sup> Respondent), for the sum of Kshs. 3,512,507.88 issued against Kensilver Express Limited (hereafter the judgment debtor) and which judgment debtor is an entity separate and distinct from the Applicant. That the objection was dismissed by the lower vide the ruling delivered on 18<sup>th</sup> September 2023 which is the subject of the present appeal.
3. The deponent stated that has 1<sup>st</sup> Respondent has commenced the execution process by issuing instructions to Anfield Auctioneers (hereafter the 2<sup>nd</sup> Respondent) and that the Applicant is



apprehensive that it will suffer loss unless the stay order sought is granted, because it is and its transport business operations are likely to be paralyzed. In addition to being compelled to satisfy a decree against the judgment debtor and not the Applicant.

4. The 1<sup>st</sup> Respondent resisted the first application by swearing a replying affidavit on 25<sup>th</sup> September, 2023 stating that pursuant to leave granted on 28<sup>th</sup> August, 2017, she filed the suit out of time against the judgment debtor, and Family Bank (the 2<sup>nd</sup> defendant) and effected due service upon the defendants on 10<sup>th</sup> May, 2018. That upon obtaining interlocutory judgment against the former on 5<sup>th</sup> June, 2018 a consent was recorded to set aside the interlocutory judgement on terms; that hearing of the suit proceeded *ex parte* on 28<sup>th</sup> July, 2022 leading to judgment on 29<sup>th</sup> November, 2022; that the resultant decree was thereafter served upon the judgment debtor as well as its insurer; and the insurer of the Applicant herein but the Applicant's representative protested that it was not the judgment debtor in the suit. That the Applicant's application dated 22<sup>nd</sup> December, 2022 challenging the execution was dismissed by the trial court on 19<sup>th</sup> September, 2023, triggering the present appeal.
5. That despite having been granted leave to file an appeal out of time on 30<sup>th</sup> June, 2023 vide High Court Commercial Miscellaneous Application No. E004 of 2023, the judgment debtor failed to file the record of appeal within the stipulated timelines and or to comply with an additional order requiring it to deposit half the decretal sum in a joint interest earning account.
6. According to the 1<sup>st</sup> Respondent, the records from the National Transport Safety Authority (NTSA) show that the motor vehicle registration number KAZ 040R (the subject motor vehicle) which was involved in the accident resulting in the suit belongs to the Applicant and hence the action by the 2<sup>nd</sup> Respondent to proclaim and attach the various motor vehicles belonging to the Applicant was proper and lawful, since the attached properties belong both to the said Applicant as well as the judgment debtor in the suit. The 1<sup>st</sup> Respondent reiterated that the judgment debtor and the Applicant are one and the same entity, and Gideon Ngaruiya Gathuru was the sole shareholder and director of both entities.
7. She equally stated that the first application has been brought with the sole purpose of defeating the ends of justice, adding that she stands to be greatly prejudiced if the stay order sought is granted since she lost her husband in the accident which prompted the filing of the suit.
8. The Notice of Motion dated 1<sup>st</sup> November, 2023 constitutes the second application, similarly brought by the Applicant herein and anchored on the grounds set out on its body and the facts deponed to in the affidavit of Gerald Theuri. Here, the Applicant sought for an order to review of the *ex parte* order earlier made by the court on 22<sup>nd</sup> September, 2022 requiring the Applicant to deposit a sum of KShs. 2,700,000/- in court; and a further order to the effect that the stay order granted in High Court Commercial Miscellaneous Application No. E004 of 2023 do extend to the Applicant's assets and properties. The second application is expressed to be brought under Sections 1A, 1B, 3 and 3A of the CPA; and Orders 45 and 51 of the CPR.
9. In his supporting affidavit, the abovementioned deponent deposed that on 22<sup>nd</sup> September, 2022 this court granted an interim order for a stay on the condition that the Applicant deposits the sum of KShs. 2,700,000/- in court within 45 days thereof. He deposed that the Applicant was in the process of complying with the above condition, when its representatives discovered that the judgment debtor had obtained an order for a stay of execution of the judgment in the suit, in High Court Commercial Miscellaneous Application No. E004 of 2023 and had fully complied with the conditions set in granting the stay. That in the circumstances, there is no legal basis upon which the Applicant should be required to deposit any monies in court, since it is merely an objector to the execution process. That



it is therefore in the interest of justice that the orders of 22<sup>nd</sup> September, 2022 be reviewed in order to safeguard the subject matter of the dispute and to prevent the appeal from being rendered nugatory.

10. To oppose the second application, the 1<sup>st</sup> Respondent swore a replying affidavit on 17<sup>th</sup> November, 2023 echoing her earlier averments made in response to the first application, save to add that the Applicant was initially granted a conditional stay of execution but failed to comply with the conditions set out by the court and later filed the second application, which application does not meet the threshold for a review. She further restated that the judgment debtor and the Applicant are one and the same entity.
11. The 1<sup>st</sup> Respondent similarly stated that upon bringing the second application, the Applicant subsequently filed an application dated 4<sup>th</sup> November, 2023 before the lower court also seeking a stay of execution and an order for release of the attached goods, both of which were granted, with the said application being fixed for further directions on 29<sup>th</sup> November, 2023. She equally stated that the Applicant lodged the objection proceedings before the trial court with the sole purpose of defeating the ends of justice, adding that she stands to be greatly prejudiced if the orders sought in the second application are granted.
12. The Applicant rejoined with a further affidavit likewise sworn by Gerald Mwangi Theuri on 21<sup>st</sup> November, 2023 stating inter alia, that the decree sought to be executed against the Applicant and the judgment debtor is one and the same. He further confirmed the averments made by the 1<sup>st</sup> Respondent regarding High Court Commercial Miscellaneous Application No. E004 of 2023, save to state that the judgment debtor did in fact comply with the conditions for stay by depositing half the decretal sum in a joint interest earning account on 21<sup>st</sup> July, 2023. That at the time of filing the first application, the Applicant was unaware that a stay order had been issued in the above-referenced High Court Commercial Miscellaneous Application No. E004 of 2023 thereby necessitating the second application. That the above constitutes discovery of new material and further, that the order of 22<sup>nd</sup> September, 2022 was made by mistake since a stay had already been granted in the above-cited matter.
13. The parties filed and exchanged written submissions on the two (2) applications. Submitting on the first application, counsel for the Applicant anchored his submissions on Order 42, Rule 6(2) of the [CPR](#) on the conditions to be satisfied in an application seeking a stay of execution. On the condition of substantial loss, counsel cited the decisions rendered in [Jumilla Attarwala & Another v Hussein Abdulaziz & Another](#) [2015] eKLR; [Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another](#) [2015] eKLR; and [Amal Hauliers Limited v Abdulnasir Abukar Hassan](#) [2017] eKLR to argue that where it has been demonstrated that the decretal sum may not be refunded in the event of a successful appeal, substantial loss has been established. Counsel further asserted that whether or not to grant an order for a stay of execution lies purely with the discretion of the courts. In that respect, the Applicant's counsel submitted that the Applicant will suffer substantial loss as its tools of trade and motor vehicles are at risk of being attached and sold off. Regarding the condition of provision of security for the due performance of the decree, the Applicant's counsel submitted that the same has partially been complied with, with the Applicant depositing a sum of Kshs. 1,750,000/- in court on 18<sup>th</sup> December, 2023. That the Applicant is thus entitled to a grant of the stay of execution order sought in the first application.
14. Regarding the application seeking review of the order made on 22<sup>nd</sup> September 2023, the Applicant through its counsel anchored its submissions on Section 80 of the [CPA](#) and Order 45, Rule 1 of the [CPR](#) which set out the conditions pertinent to a review. Counsel therefore proceeded to echo the averments made in support of the second application; namely that there was a mistake on the face of the record since at the time of issuance of the subject order by this court, and unknown to the court,



an order for a stay of execution had already been made in High Court Commercial Miscellaneous Application No. E004 of 2023 and the conditions thereof had fully been complied with as at 21<sup>st</sup> July, 2023. This constituting the discovery of new evidence/material which would necessitate a review. In the end, counsel urged the court to review the order of 22<sup>nd</sup> September, 2023 and upon doing so, to order that the sum of Kshs. 1,750,000/- previously deposited in court by the Applicant, be refunded.

15. On the part of the 1<sup>st</sup> Respondent, her counsel anchored his submissions on the above-cited Order 42, Rule 6(2) of the CPR as well as the decision in Tassam Logistics Ltd v David Macharia & another [2018] eKLR. To the effect that in an application seeking to stay execution, substantial loss must be demonstrated, as well as the conditions that the application was brought without unreasonable delay and that security has been offered for the due performance of the decree in question. In that respect, counsel argued that assertion relating to substantial loss to be suffered by the Applicant does not hold water, based on the premise that the Applicant and the judgment debtor are one and the same entity, and that the subject motor vehicle which was involved in the accident triggering the suit, belonged to the Applicant at all material times. Besides, the judgment debtor subsequently changed its name to the Applicant and further transferred its assets and properties to the Applicant. Citing the case of Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR counsel argued that this court ought to equally consider the position of the 1<sup>st</sup> Respondent as the decree holder entitled to enjoy the fruits of her judgment. That in the premises, the court should decline to grant a stay of execution.
16. Concerning the second application, it was the submission by counsel for the 1<sup>st</sup> Respondent, that an order for review can only be sought and granted upon meeting the threshold set out in Section 80 of the CPA and Order 45 of the CPR, citing for support the case of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR. Regarding the ground of discovery of new and important evidence, counsel contended that the mere discovery thereof does not constitute sufficient ground for review, and it must be shown that such material or evidence was not within the knowledge of the applying party, even after exercising due diligence. Reliance was placed on the decision in Evan Bwire v Andrew Aginda-Civil Appeal No. 147 of 2006. That in any event, the order of 22<sup>nd</sup> September, 2023 was issued in favour of the Applicant and it cannot therefore be heard to now seek a review thereof. Consequently, the court was urged to dismiss both the first and second applications, with costs.
17. The 2<sup>nd</sup> Respondent notably did not participate at the hearing of the two applications.
18. The court has considered the material placed before it in respect of the two motions. 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). The applicable provision is Order 42, Rule 6 of the CPR which stipulates 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. Although the parties expended their energy in canvassing the substance of the motions before the court, the motions turn on a different matter that touches on the jurisdiction of the Court. It is evident on a plain reading of Order 42 Rule 6(1) of the [CPR](#) that an order to stay execution pending appeal presupposes the existence of an appeal and the filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#). Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the [Civil Procedure Rules](#) that states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

20. Equally, Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) states:-

“Notwithstanding anything contained in subrule (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.” (Emphasis added).

21. Under Section 75 (1) (h) of the [Civil Procedure Act](#) an appeal lies as of right from any order made under rules from which an appeal is expressly allowed by rules. Order 43 of the [Civil Procedure Rules](#) amplifies this provision. It is trite that the question whether an appeal lies as of right or by leave goes to the jurisdiction of the appellate court to entertain an appeal before it. I associate myself with the sentiments of Sewe J, in [Edith Wairimu Njoroge v Brooks Holdings Co. Ltd](#) [2018] e KLR that where an appeal does not lie as of right from an order but only with leave, such leave “was a prerequisite to the assumption of jurisdiction by this court on appeal.” In [Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others](#) [2013] e KLR the Court of Appeal held that the right of appeal goes to the appellate court’s jurisdiction, is a fundamental matter and that a question regarding the absence of statutory conferment of such right is not a mere technicality.

22. The same court held in [Peter Nyaga Muvake -v- Joseph Mutunga](#) [2015] eKLR, Civil Appeal No. (Nairobi) 86 of 2015 that:

“Without leave of the High Court, the Appellant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the [Civil Procedure Act](#) and Order 43 of the [Civil Procedure Rules](#); the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

23. Undisputedly, the appeal herein arises from objection proceedings brought by the Applicant in the lower court pursuant to Order 22 Rules 51 to 54 of the [Civil Procedure Rules](#). Under Order 43 Rule 1 (k) an appeal does not lie as of right from orders made under these Rules, but with leave, which leave



according to Order 43 Rule 1 (3) of the Civil Procedure Rules, must in the first instance, be sought either orally before the court making the order to be appealed from, or within 14 days.

24. No such leave has been invoked or demonstrated by the Applicant as having been obtained prior to the filing of the appeal herein. Thus, the appeal is incompetent and incapable of supporting the two motions before the court. The court's appellate jurisdiction has not been properly invoked, therefore. Besides, the second motion to the court's mind was concerned with the review of interim *ex parte* orders issued on the first motion and if premised on a competent appeal would be spent.

In the result, the court finds that the appeal before it is incompetent and strikes out the first and second motions with costs to the first Respondent. The Applicant is directed to regularize the appeal within 21 days, failing which it will equally stand as struck out with costs to the 1<sup>st</sup> Respondent.

**RULING DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Mr. Chege

For the 1<sup>st</sup> Respondent: Ms. Odero

C/A: Erick

