



City Star Shuttle Limited v Mutinda & 2 others (Miscellaneous Application 228 of 2022) [2023] KEHC 2364 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 228 OF 2022
DKN MAGARE, J
MARCH 13, 2023**

BETWEEN

CITY STAR SHUTTLE LIMITED APPLICANT

AND

MWONI MUTINDA AKA LILIAN MUTINDA 1ST RESPONDENT

AMBROSE MOKUA NDERITU 2ND RESPONDENT

ECONOMIC DEVELOPMENT AND MANAGEMENT LIMITED 3RD RESPONDENT

RULING

“Promise me, son, not to do the things I’ve done Walk away from trouble if you can It won’t mean you’re weak if you turn the other cheek I hope you’re old enough to understand Son, you don’t have to fight to be a man”¹

1. This is one of those cross pollinating applications, where unless carefully considered, will lead to miscarriage of justice. The application, were it made in the right place and time, could have different results.
2. This is not a usual application for stay. It is an application spanning time and space. It seeks leave to appeal out of time in one Ruling and seeking to stay another decree. The main reason is that they have filed a declaratory matter and require to have the same deemed to have subsumed the primary suit.
3. There was however, a primary appeal being Mombasa HCCA 33 OF 2017 between the same parties filed on February 20, 2017. An application for stay was filed in that matter and concluded. The appeal was dismissed on February 21, 2020.

¹ Kenny Rogers' “Coward of the County” Lyrics



4. There was a declaratory suit filed vide Mombasa CMCC 748 of 2017, where a decree was passed in favour of the applicant. When unable to execute against the applicant's insurers, the applicant took out warrants against the applicant. This resulted in an application for stay and injunction against the respondent. The application was dismissed on 1/7/2022, hence this application.
5. The application seeks the following orders: -
 - i. The Application herein be certified urgent and be heard ex parte hearing in the first instance.
 - ii. The court be pleased to grant leave to appeal out of time against the Ruling and order made by the Hon. Mutuku (CM) on 1st July, 2022 in Mombasa Civil Suit No. 1816 of 2015- Mwoni Mutinda aka Lillian Mutinda v City Star Shuttle Limited, Ambrose Mokuia Nderitu and Economic Development and Management Limited.
 - iii. There be a stay of execution of the decree of Chief Magistrates Court at Mombasa in Civil Suit No. 1816 of 2015 Mwoni Mutinda aka Lilian Mutinda v City Star Shuttle Limited, Ambrose Mokuia Nderitu and Economic Development and management limited, passed on the January 23, 2017 and any consequential orders against the Appellant pending the hearing and determination of this application.
 - iv. There be a stay of execution of the decree of Chief Magistrate's Court at Mombasa in Civil Suit No. 1816 of 2015 Mwoni Mutinda aka Lilian Mutinda Versus City Star Shuttle Limited, Ambrose Mokuia Nderitu and Economic Development and Management Limited passed on the January 23, 2017 and any consequential orders against the Appellant pending the hearing and determination of the intended appeal.
 - v. The Costs of this application be provided for.
6. The application was opposed by the respondent who state that the same is *res judicata* and untenable. Parties filed comprehensive submissions, albeit late. I have considered them. I note that the parties do not address the core issue herein, that is: -
 - a. The Mombasa CMCC 1816 of 2015 -Mwoni Mutinda aka Lilian Mutinda v City Star Shuttle Limited, Ambrose Mokuia Nderitu and Economic Development and Management Limited decided on 23/1/ 2017
 - b. Any possible appeal against that decree ought have been filed 23/2/2017.
 - c. There is either no appeal against that decree or it is not subject of this application.
 - d. The Application resulting in the Ruling of July 1, 2022 is on stay pending Appeal.
 - e. The primary appeal is not annexed herein.
7. The application for stay is usually brought under Order 42 Rule 6(1). It states as follows: -

“Stay in case of appeal.

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.”(emphasis mine)

8. The court handling the stay Application has original jurisdiction. The operative words in order 42 Rule 6(1) are, as underlined above.
9. The worst thing about that application, it was an application for stay and injunction, pending nothing. Nothing was awaited. The applicant simply wanted an injunction restraining the plaintiff/Respondent from executing a lawful decree of the court.
10. Ipso facto, once an application for stay pending appeal from a judgment and decree is allowed or refused, the applicant does not appeal against it. A fresh application is made in the appeal file. An appeal does not lie from refusal to grant stay of execution. The Appeal should be from the main Decree or other order within the meaning of section 79G of the *Civil Procedure Act*, which provides as doth: -

“Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

11. Order 43 Rules 2 and 3 provides matters where an appeal is of right and where leave of the court is necessary. Before deciding whether there are reasons for extension of time, it is necessary to establish whether there is a right of appeal.
12. The right of appeal will be distinguished in two aspects. Where there is no right of appeal but leave may be granted and where the order is not appealable by virtue of the inbuilt mechanism in the law.
13. An application for stay from the main decree can be made either in the Primary file in the lower court or in the Appeal file. There is no provision for one decree staying another decree. Even in cases where declaratory suits are made, the primary decree remains alive and kicking. Consequently, stay must be predicated on an appeal from the decree of the court.
14. Although expressed to be under Order 40 Rule 1, the injunction is not anchored on any suit or application.
15. An order under order 42 rule 6 is not appealable independently. This is for a good reason. If we allow the Application for pending the Appeal from the application for Stay, what will be heard in that appeal?
16. I note that, the Decree that is sought to be stayed was passed on January 23, 2017. This is 6 years ago. I have endeavoured to understand the raison d'être of the application, in vain. There are no grounds for warrant of the extension of time.
17. Whether the Ruling of July 1, 2022 was given in the presence of parties, or in absence of parties does not change the fact that no appeal lies from an order of stay as the Applicant has a right to make a fresh application in the appeal. That is done in strict compliance of order 42 Rule 6(2), which provides as doth: -

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.

18. If on the other hand stay is not predicated on any appeal, the same is without jurisdiction. No court can issue stay in such circumstances. The order refusing stay is not appealable. There is thus no need to extent time to appeal. Such an appeal will be a nullity as it is base in vacuo. The question in my mind is whether, there was an appeal from the original decree. This is not disclosed. If there was, then why take 6 years to make this kind of application.?
19. If there is no appeal from the decree, then there can be no jurisdiction to stay the decree. To compound matters, under Order 43 Rule 2, there is no Right of Appeal from an Application for Stay. This requires that leave to appeal be sought independent of leave to appeal out of time. Such leave was not sought. Even if it were sought, there is a right to bring a fresh application in the Appellate court. Not any appeal but an appeal from the judgment and decree that is sought to be stayed.
20. There is something else disturbing in this matter. The order sought to be appealed from is dated 1/7/2022. However, the decree sought to be stayed was issued on 23/1/2017. The question then can this court, while dealing with an appeal from an order, stay a decree from which there is no appeal or for which is not the subject matter of the application? I don't think so. The court has no jurisdiction to use an appeal from one order to stay another decree, in absence of special circumstances, like res judicata, cross decrees, interpleader proceedings and the like.
21. I note that there is no application to stay the Ruling given on 1/7/2022. This is rightly so, since the order of dismissal is of a negative kind. The problem arises, then whither the nexus between this application to appeal out of time and the original decree.
22. What will happen if we actually extend time and allow the appeal. What will the appeals be from? Is it from the impugned Ruling or from the decree in 2017?
23. In *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Asike Makhandia, J (as he then was) stated thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”
24. The court further proceeded as doth in *Raymond M Omboga v Austine Pyan Maranga (supra)*: -

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against.”



25. Justice Mugure Thande, sitting in Mombasa, in *Abubaker Mohamed Al Amin v Firdaus Siwa Somo* [2018] eKLR, while agreeing with justice Asike Makhandia's statement above, stated as follows: -

“I concur, the court cannot order stay of execution of an order or decree against which no appeal has been filed. The struck out appeal in no appeal at all. In the absence of an appeal for the Court to consider, the arguments that the appeal will be rendered nugatory and that the same has high chances of success are mere statements which are of no persuasive value. Indeed any attempt by this Court to entertain the Application is tantamount to the Court arrogating to itself jurisdiction not conferred upon it by law. I am fortified in this by the holding in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Supreme Court had this to say concerning the jurisdiction of a Court:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

26. Without a right of Appeal, there is no basis for the application for stay and extension of time. There is absolutely nothing to stay. To make matters worse, the appeal relates to a different decree from the order intended to be appealed from.
27. The decree in the primary suit has not been appealed against in these proceedings. This application ought to be in that Appeal, if not already done. The court can only stay, a decree or order that has been appealed from. In this case, the order of 1/7/2022. Given as aforesaid, it is a negative order, then there is nothing to stay. The original decree cannot be stayed in an appeal again stay.
28. Hon Lady Justice Olga Sewe, put this beautifully in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others* [2016] eKLR,

“there is nothing that the Applicants have lost by virtue of the mere fact of dismissal of their application, the issue of substantial loss would not arise. Accordingly, I fully endorse the viewpoint expressed by Kimaru, J, in the case of *Stephen Somek Takwenyi & another v David Mbuthia Githee (supra)* that

“The court has the inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent the abuse of the process of the court. In the civilized legal process, it is the machinery used in the court of law to vindicate a man's right or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which the abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue...there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty is to intervene and stop the proceedings, or put an end to it.”

29. I agree with nothing useful to add. The application is an abuse of the court process. There is nothing in that order of the, is appealable. The applicant should or should have pursued proper channels to appeal



against the decree. The decree of the court is alive and kicking. Unless appealed against and properly set aside by a higher court, it is executable.

30. The application is thus dead on arrival. It has no legs to stand. To save it from the ignominy of its own weight, it is truly right and just to have the same dismissed. The only viable appeal is no. 33 of 2017, which was in ny case dismissed
31. Before I depart from this ruling I need to add a few comments. I am concerned that the Respondent has also not brought this matter to conclusion by way of execution of the decree. The pendency of an unexecuted decree 6 years down the line does not reflect positively on our image.
32. In order to expedite execution and close the primary file, that is Mombasa CMCC No. 1816 of 2015 Mwoni Mutinda aka Lillian Mutinda v City Star Shuttle Limited, Ambrose Mokuu Nderitu and Economic Development and Management Limited should be placed before the trial court on 26/3/2023 to issue necessary orders for execution to facilitate closure of the file.
33. The application therefore lacks merit; and is accordingly dismissed with costs of Ksh 20,000 to the respondent. The applicant should pay the same within 30 days, failing which execution do issue. The file be closed.

Determination

34. Consequently, I make the following orders: -
 - a. I decline the application for leave to appeal out of time against the ruling and order made by the Hon. Mutuku (CM) on July 1, 2022 in Mombasa Civil Suit No. 1816 of 2015 Mwoni Mutinda aka Lillian Mutinda v City Star Shuttle Limited, Ambrose Mokuu Nderitu and Economic Development and Management Limited.
 - b. The entire application dated is dismissed in limine for lack of merit.
 - c. The respondent to have costs of Ksh 20,000/= payable in 30 days, in default execution do issue.
 - d. In order to expedite closure of the primary suit, that is, Mombasa CMCC No. 1816 of 2015 - Mwoni Mutinda aka Lillian Mutinda v City Star Shuttle Limited, Ambrose Mokuu Nderitu and Economic Development and Management Limited, the said file should be placed before the trial court on 28/3/2023 to issue necessary orders for execution.
 - e. It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of March, 2023. Judgment delivered through Microsoft Teams Online Platform.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

No Appearance for the Applicant

John Githome for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

