



**Safaricom Limited v Njuki & another (Miscellaneous Case
E053 of 2022) [2023] KEHC 1661 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CASE E053 OF 2022
LM NJUGUNA, J
MARCH 6, 2023**

BETWEEN

SAFARICOM LIMITED APPLICANT

AND

EPHANTUS MBOGO NJUKI 1ST RESPONDENT

INVESCO ASSURANCE CO. LTD 2ND RESPONDENT

RULING

1. The applications for determination before the court are dated 28/11/2022 and 9/12/2022 wherein the applicant has sought for orders as enumerated on the face of the applications.
2. The applications are premised on the grounds on their faces and are supported by the respective affidavits by the deponents.
3. In the application dated the 28/11/2022, the deponent Daniel Ndaba, a senior legal manager with the applicant, averred that he learnt of the ongoing Garnishee proceedings in Embu Civil Suit number E145 of 2021 on the 10/11/2021 when he received a call from M/S Rweya, the advocate for the applicant after the said advocate conversed with Mr. Njagi of Mugendi Karigi & Co. Advocates who was following up on a different matter.
4. That he perused the Garnishee Order Absolute which is for a total of kshs.5,778,887.24/= and it became apparent to him that the same was as a result of consolidation of taxed costs in other matters with E045/2021 to which the applicant had no knowledge of, being Embu CMCC numbers E178/2021, E035/2021 and E027 of 2021.
5. He contended that the email address to wit CRTService@safaricom.co.ke through which the service of the order and the application were effected, had been provided during Covid-19 pandemic, which email had been temporarily suspended following a slump in Covid 19 cases and therefore, he could



- not embark on checking through the email listing on the said email address to deduce whether any pleadings had ever been served during the period of August 2022. That he embarked on instructing the applicant Garnishee's Advocates to appeal the Garnishee Order Absolute issued on the 29/9/2022 as the trial court was functus official.
6. The deponent has stated that the notice of motion dated the 29th August 2022 that gave rise to the garnishee order absolute was heard and determined on the 29/9/2022 following which determination, contempt proceedings were initiated by virtue of the Decree Holders Application dated the 3/11/2022. That again, the said application was served upon the applicant using the same email address but none of the directors was served personally with the proceedings that gave rise to the directions issued on the 9/11/2022. It was his contention that the service of the order and the application was not done in accordance with order 5 Rule 3 of the Civil Procedure Rules which requires that service of processes on a company must be served on the secretary, Director or a Principal Officer of a corporation.
 7. The applicant therefore sought to stay execution of the Garnishee Order Absolute issued on the 29/9/2022 and proceedings in Embu Civil Case Number E0145/2021 pending the hearing and determination of the intended appeal and has argued that he has an arguable appeal as enunciated in the annexed draft memorandum of appeal.
 8. The 1st respondent filed a replying affidavit on the 2/12/2022 in which, the deponent, Morris M. Karigi advocate, who is on record has deponed that the application is unmerited, misconceived, bad in law, and a nonstarter, and it is an abuse of court process and purely meant to delay his inalienable right to the enjoyment of the fruits of the Garnishee Order Absolute. That the application is riddled with falsehoods, material non-disclosure of facts and deceit aimed at misleading the court into granting the reliefs sought in that; the applicant has duly acknowledged that the email address used to effect service of the garnishee application and the order has been used before, and is still in use and that no evidence has been adduced by the applicant to demonstrate that the email address have been deactivated.
 9. Further that, the applicant only suspended the email address as from the 25/11/2022 after service of other unrelated pleadings. That, the applicant is therefore estopped from denying service of the application and the resultant order and as such, the application should be dismissed as the same does not even conform to the requirements for stay of execution of decrees and garnishee orders absolute as envisaged by the Civil Procedure Act and the rules made thereunder. Further that, the applicant has not demonstrated what it stands to suffer should execution and the contempt of court proceedings proceed. To the contrary, it is the 1st respondent who will suffer prejudice if the orders sought herein are granted. Further that, the right of appeal must be balanced against the 1st respondent's equally weighty right to enjoy the fruits of the ruling delivered in his favour.
 10. In the application dated the 9/12/2022, the deponent reiterated the contents of the supporting affidavit to the application dated the 28/11/2022 and averred that on the 29/9/2022, the trial court upheld the enforcement of execution of Garnishee Order Absolute to the tune of Kshs.5,778,887.24/= without the participation of the applicant in the application dated the 29/8/2022 and without the knowledge of the applicant, a Garnishee Absolute was issued on the 29/9/2022 which order, the 1st respondent allegedly served upon the applicant via the same email to with CRTService@safraicom.co.ke.
 11. He stated that after the Decree Holder filed the notice of motion dated 3/11/2022 for contempt of court proceedings, the applicant moved to the High Court and filed the motion dated 28/11/2022 in which it sought several orders and the court issued orders dated 30/11/2022 staying the execution of Garnishee Order Absolute issued on 29/9/2022 in Embu E145/2021, which orders were later extended to 5/12/2022 and further to 6/2/2023. That the trial court was informed of the said order vide a



letter dated the 1/12/2022 but that notwithstanding, the trial court proceeded to deliver a ruling dated the 8/12/2022 upholding the contempt of court application dated the 3/11/2022 arising from the stayed Garnishee Order Absolute and proceeded to issue warrants of arrest against the Directors of the applicant.

12. The applicant has contended that the said ruling offended the interim orders issued by the superior court and it is only fair; just and equitable that the ruling and the warrants of arrest issued on the 8/12/2022 be stayed. That if the court does not grant the stay, the intended appeal shall be rendered nugatory and an academic exercise. Further that the enforcement of the trial court's ruling dated 8/12/2022 and the warrants of arrest, will diminish the authority of this honourable court. The applicant has pledged to abide by any terms that this honourable court may impose.
13. The application is opposed vide the 1st respondent's replying affidavit filed on 16/12/2022 in which Morris Karigi Advocate avers that the same is unmerited, misconceived, bad in law and an abuse of the court process. That the same is as overwhelming display of an attempt to mislead the court into granting the reliefs sought in that, the applicant totally misconstrued stay of execution of the Garnishee Order Absolute issued by this court Vis-à-vis the order of stay of proceedings that were sought in the application dated the 28/11/2022.
14. It was the 1st respondent's contention that the trial court had issued directions to the effect that the applicant does respond to the contempt of court application but it blatantly disregarded the court's direction yet, it acknowledged knowledge of the said directions in the affidavit sworn on the 28/11/2022. That the applicant is guilty of approbation and reprobation as they choose on when to acknowledge receipt of the trial court's directions and when not to abide by its directions which is a clear indication of the level of deceit. As such, it was contended that the applicant having been in contempt of court order has no audience before the court unless and until it purges the contempt and it has not demonstrated what it stands to suffer should the warrants of arrest be executed. But, to the contrary, the 1st respondent will continue to suffer prejudice as the trial court's ruling will be made a mockery by the applicant.
15. The applicant filed a further affidavit on the 25/1/2023 in which the counsel on record has deponed that the judgment /debtor has already made a proposal on liquidation of the decretal sum by installments and by the time the affidavit was filed, initial payments had been made "on a without prejudice basis". That the applicant has filed an application before the trial court seeking leave to appeal vide an application dated 23/12/2022 which was scheduled to come up for hearing on the 31/1/2023. She urged the court to allow both applications.
16. Parties filed submissions to both applications. In its submissions filed on the 23/12/2022 the applicant identified four (4) issues for determination to wit;
 - (1) Whether the directors of the applicant had knowledge of and/or proper notice of the terms of the Garnishee Order Absolute issued on the 29/9/2022.
 - (2) Whether the Directors of the applicant have an inalienable right to challenge the court orders.
 - (3) Whether the 1st respondent satisfied the principles underlying lifting of the veil of corporate personality.
 - (4) Whether the applicant intended appeal on the Garnishee Order Absolute issued on the September 29, 2022 has merit.
17. On the first issue, reliance was placed on the case of *Mengich t/a Mengich & Company Advocates & Another Vs Joseph Mabwai & 10 Others* (2018) eKLR. Reference was also made to an extract from a



book namely Contempt in Modern New Zealand, on the essential elements that must be proved to make a case for civil contempt as follows:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil cases which is higher than civil cases) that:

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.
- b. The defendant had knowledge of or proper notice of the terms of the order
- c. The defendant has acted in breach of the terms of the order and
- d. The defendant’s conduct was deliberate

39. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort. A high standard of proof applies whenever committal to prison for contempt is sought because contempt of court is quasi-criminal in nature and the orders sought have the potential of taking away the liberty of a citizen. Two principles emerge. The first is liberty: it is basic to our constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The essentials here include prove that a person has committed contempt and that the applicant has complied with all the statutory requirements governing the application.

40. The second reason is coherence: it is practically difficult, and may be impossible to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant’s motive, the court commits a contempt respondent to jail for rule of law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt.

42. The jurisdiction of the superior courts to convict recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, is importantly acting as a guardian of the public interest.

(16) Therefore, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders.



18. The applicant reiterated that its Directors had no knowledge of the Garnishee Order nisi issued on the 2/9/2022 and Garnishee Order Absolute issued on the 29/9/2022 and the notice of motion dated 31/11/2022 as well as the one dated the 25/11/2022 to which, it has sought leave to appeal against.
19. On the 2nd issue, it was submitted that it is imperative that the applicant must be allowed to contest the contempt of court orders against its directors. Reliance was placed on the case of *Mosepe vs Gaitbo* (Civil Cases E196/2021 (2022) KEHC 9848 (KLR) (CIV) (8 July 2022) (Ruling) Neutral citation: (2022) KEHC 9848 (KLR) to the effect that a person found to be in contempt of court orders ought to be granted audience before the court unless it can be established that such a party is in all manner out to demean the dignity of the court and undermine the rule of law. Further that, before such a party suffers the wrath of the court through the imposition of a penalty; he or she ought to be allowed to contest the orders, which found him/her guilty of contempt up to the last appealable court. On the 3rd issue, reliance was placed on the case of *Jauder Limited vs Bradley Limited* (Miscellaneous Application E202 of 2019 (2021) KEHC 127 (KLR) (Commercial and Tax) 30 September 2021 (Ruling) to the effect that, the mere fact that one is a director or shareholder of a corporation does not ipso facto, make the director or shareholder liable for the actions or omissions of the company unless the circumstances are such that the corporate veil of the company is lifted.
20. On the fourth issue, the applicant submitted that it has an arguable appeal considering that the high court had earlier issued stay order to last until the February 6, 2023 following the applicant's application dated 28/11/2022. Reliance was placed on the case of *Sifuna & Sifuna Advocates Vs Patrick Simiyu Khaemba* (2021) eKLR and that of *Elizabeth Kavere & Another Vs Lilian Atho and Another* (2020) eKLR. On its part the respondent submitted on two issues to wit:
 - a. Whether the court has jurisdiction to entertain the application dated the 9/12/2022.
 - b. Whether the applicant's Directors were in contempt of the trial court's orders.
21. On the first issue, the respondent submitted that the application seeking to stay execution is incompetent and that the court has no jurisdiction to entertain the same for the reason that contempt of court proceedings are sui generis in nature and the applicant ought to have appealed against the ruling by the trial court and not to bring the said application. Reliance was placed on the case of Samuel Kamau Macharia & Another Vs KCB & 2 others. The respondent contended that the jurisdiction of this court to entertain an application for stay of execution pending appeal is stipulated in order 42 of the *Civil Procedure Rules* and that in order to consider the application for stay, the order contemplates that an appeal must be in existence before such an application can be entertained. Such that the application is filed within the appeal. The respondent relied on the case of *Raymond M. Omboge vs Augustine Pye Maranga* Kisii HCCA no. 15/2010 to support his contention. Reference was also made to the case of *JKM Vs PWK* (2019) eKLR to support the same position.
22. On the 2nd issue, the respondent set out the test if a party is to succeed in an application for civil contempt and the elements that such a party has to prove namely;
 - a. Whether the terms of the court order were clear and unambiguous;
 - b. Knowledge of the terms of the order by the respondent;
 - c. Failure by the respondent to comply with the terms of the order.
23. The respondent stated that the applicant was duly served with the application for contempt as well as with the Garnishee Order Absolute and willfully chose not to abide by the said orders; as a consequence of which, the respondent initiated the contempt of court proceedings vide the application dated



- 3/11/2022 and which the applicant equally chose not to participate in. The respondent made reference to the case of *Shimmers Plaza Ltd Vs National Bank of Kenya Ltd* (2015) eKLR to the effect that the notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made or was notified of it by telephone, email or otherwise.
24. That the email address that was used to serve the applicant had been used to serve it on numerous occasions and it had duly appeared after being served on all the other occasions. That there is no evidence that has been adduced by the applicant that the email address therein had been deactivated and that they were unable to access the said email address. That service by electronic mail is now recognized as a competent form of service pursuant to the provisions of order 5 rule 22B of the *Civil Procedure Rules*. He urged the court to dismiss the application.
 25. On the application dated 28/11/2022 the applicant largely reiterated the submissions it made on the application dated 9/11/2022, the only new aspect being whether the applicant has satisfied the principles for extension of time to file an appeal, to which it relied on section 75(a) of the *Civil Procedure Act*. It was submitted that counsel for the applicant only got to learn about the issuance of the Garnishee Order Absolute on the 10/11/2022 and without delay, it approached this Honourable Court seeking to stay the orders that had been issued by the trial court which stay orders, were granted by the High Court. Reliance was placed on the cases of *Bolpak Trading Company Limited & 2 Others Vs Benson Masila Mutinda* (2015) eKLR and that of *Visra Stone Suppliers Company Limited Vs RSR Stone (2006) Limited* (2020) eKLR.
 26. Further, the applicant contended that given an opportunity, it will prove that there were no sufficient funds to satisfy the Garnishee Order Absolute. That the monies payable was to be sourced from the subject Mpesa Paybill Account and not via execution of warrants of Arrest against the Directors of the applicant. It urged the court to allow the application as it has sought leave to appeal the ruling of the trial court following the issuance of warrants of arrest.
 27. On its part, the 1st respondent submitted that the applicant has not explained the delay in filing the application dated the 28/11/2022 and relied on the case of *Dolphin Coaches LTD Vs Benson Kamau Migwi & Another* (2008) eKLR in which, the court declined to grant leave to the applicant to appeal stating that there was no attempt to explain the delay in filing the application for leave. Further reliance was made on the case of *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR on the guiding principles in an application for leave to appeal out of time. The respondent averred that the applicant has not satisfied any of the laid down criteria as enumerated above and therefore not deserving of the discretion of the court.
 28. It was further submitted that, orders for stay of execution cannot issue in a miscellaneous application without a substantive appeal and reliance was made on the case of *Seyari Brothers & Company (K) Limited Vs Albanus Mwangi Mwiza* (2021) eKLR wherein the court declined to grant stay of execution as there was no substantive appeal on record.
 29. The respondent argued that the applicant has not demonstrated that it has an arguable appeal with a high chance of success nor satisfied the pre-requisite conditions set out in order 42 rule 6 of the *Civil Procedure Rules*. Further that, the applicant has not demonstrated what substantial loss it would suffer if the warrants are executed and reliance was placed on the case of *Antoine Ndiaye Vs African Virtual University* (2015) eKLR on substantial loss. The court was urged to dismiss the application dated 28/11/2022.
 30. The court has carefully considered the two applications and the submissions made by the parties in support of their respective positions.



31. As stated by the applicant in its submissions filed on the 6/2/2023, the applicant filed the application dated 28/11/2022 seeking several orders as enunciated in that application. This court issued interim orders on the 30/11/2022 which were extended to 5/12/2022 and further to the 6/2/2022 which stayed the execution of the Garnishee Order Absolute issued on the 29/9/2022 in Embu CMCC number E145/2021 as consolidated as shown above. However, on the 8/12/2022 the trial court delivered a ruling dated even date upholding the contempt of court application dated the 3/11/2022 arising from the Garnishee Orders Absolute and issued warrants of arrest against all the Directors of the applicant.
32. That ruling by the trial court prompted the filing of the application dated the 9/12/2022.
33. A perusal of the two applications reveals that most of the prayers sought therein have been overtaken by events. In my considered view, the only three issues now pending before the court for determination are:
- i. Whether the court has jurisdiction to entertain the two applications.
 - ii. Whether the applicant should be granted leave to appeal out of time.
 - iii. Whether the applicant should be granted a stay of execution pending the hearing and determination of the intended appeal.
34. In his submissions filed on 12/1/2023, the respondent raised a fundamental issue of jurisdiction. The 1st respondent has argued that the court has no jurisdiction to entertain the application dated 9/12/2022 for the reason that contempt of court proceedings are sui generis in nature and the applicant ought to have appealed against the ruling of the trial court and not bring the current miscellaneous application that is totally unrelated to the ruling of the trial court. In this regard, I have gone through the applicant's submissions and I find that the counsel for the applicant did not address that issue which is very unfortunate. It is trite that where an issue of jurisdiction is raised by any party, the court should first address it before taking any further step in the matter. Consequently, I hereby proceed to address my mind to it.
35. In the case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others* (2012) eKLR the Supreme Court stated:
- “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 itself jurisdiction exceeding that which is conferred upon it by the law.”
36. As rightly submitted by the 1st respondent, the jurisdiction of this court to entertain an application for stay of execution pending appeal is stipulated in order 42 of the *Civil Procedure Rules*. The wording of the provision contemplates that an appeal must be in existence before an application for stay can be entertained. This court has perused the draft memorandum of appeal annexed to the application dated 28/11/2022. It seeks to challenge the Garnishee Orders Absolute that were issued by the trial court. There is no appeal before this court or even a draft memorandum of appeal challenging the decision of the trial court that adjudged the directors of the applicant guilty for contempt of court. As such, this court is persuaded by the submissions by the 1st respondent that it does not have jurisdiction to entertain the application dated 9/12/2022. See the case of Raymond M. Omboga Vs Augustine Pya Marange, Kisii HCCA No.15/2010 and that of *JKM Vs PNK* (2019) eKLR.
37. With regard to the application dated 28/11/2022, the court has noted that the applicant has admitted that leave has not been sought to appeal against the Garnishee Order Absolute that was issued by the



trial court but the application is pending before the trial court. This court is being urged to grant stay of execution pending an intended appeal and yet the trial court is yet to determine if leave is merited or not. It is trite that under section 75 of the Civil Procedure Act, leave to appeal is not automatic and the applicant is yet to convince the court that it deserves the order. As it stands now, the fate of that application is yet to be determined and this court cannot assume that the applicant will automatically be granted the leave sought. As such, it would be presumptuous for this court to grant stay of execution orders before the applicant is granted leave to appeal. In any event, and as the court has observed herein above, the applicant has not challenged the ruling delivered on the 8/12/2022 by the trial court. The Garnishee Order Absolute was overtaken by the ruling delivered on the 8/12/2022.

38. In the premises foregoing, the two applications are hereby struck out with costs to the 1st respondent.

39. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....Applicant

.....Respondents.

