



**Kakoka v Ong’udi & 2 others (Civil Appeal E063 of 2022)
[2023] KEHC 4046 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E063 OF 2022**

**OA SEWE, J
MAY 4, 2023**

BETWEEN

KATHI NO KAKOKA APPELLANT

AND

DOUGLAS EMMANUEL ONG’UDI 1ST RESPONDENT

ROSELINE AKELO ADUOR 2ND RESPONDENT

KATHI NO KAKOKA BUS SERVICE 3RD RESPONDENT

RULING

1. Before the Court for ruling is the Appellant’s Notice of Motion dated 27th April 2022 and filed on 28th April 2022 under Sections 3, 3A, 63(e) and 79 of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules*. The Appellant thereby moved the Court for the following orders: -
 - (a) Spent
 - (b) That the Court be pleased to halt the transfer of Motor Vehicle Registration Number KCF 390Y by Five Eleven Traders Auctioneers/National Transport & Safety Authority/stop any further dealings pending the hearing and determination of this application (spent);
 - (c) That the Court be pleased to grant a stay of execution pending the hearing and determination of the Appeal;
 - (d) That the Court be pleased to halt the transfer of motor vehicle registration number KCF 390Y by Five Eleven Traders Auctioneers/National Transport & Safety Authority/stop any further dealings pending the hearing and determination of the Appeal;
 - (e) That the Court be pleased to grant any other relief it may deem fit and expedient to grant in the circumstances; and



- (f) That costs of the application be provided for.
2. The application was premised on the grounds that the appellant had filed an application dated 11th March 2022 seeking to stop attachment and sale its motor vehicle registration number KCF 390Y, in respect of which a ruling was delivered via email on 14th March 2022; that the ruling was against the appellant, on the ground that it failed to serve the Notice of Objection and its objection application within 7 days of filing, as required by Order 22 Rule 51(3) of the Civil Procedure Rules. The appellant further averred that since the ruling was delivered via email on 14th April 2022, its counsel was unable to orally seek leave of the lower court to appeal.
 3. Thus, the appellant filed an application dated 19th April 2022 for temporary injunction against execution by way of the attachment of the suit motor vehicle and an order was issued on 21st April 2022 pending inter partes hearing of the application. The appellant further averred that, notwithstanding service of the order, the Auctioneer proceeded to sell the suit motor vehicle on 21st April 2022. Accordingly, the appellant filed the instant Appeal and sought, by way of the Notice of Motion dated 27th April 2022, that the transfer be halted pending the hearing of the application and ultimately the Appeal.
 4. In response, the 1st and 2nd respondents filed a Preliminary Objection on the grounds that:
 - (a) The appellant's Notice of Motion dated 27th April 2022 does not comply with the provisions of Order 42 Rule 6(2)(b), (4) and (6) of the Civil Procedure Rules; and
 - (b) That the application is brought under the wrong provisions of the law, namely, Section 79 of the Civil Procedure Act.
 5. In addition, the 1st and 2nd respondents filed a Replying Affidavit sworn by Douglas Emmanuel Ong'udi, (the 1st Respondent) on 13th May, 2022; in which it was averred that the appellant's application had been overtaken by events as the suit motor vehicle had already been sold on 19th April 2022 and a vesting order issued by the trial court on 27th April 2022 in favour of Florence Kagure Mchira. Hence, the 1st respondent averred that, if anything, the appellant ought to have filed a suit against the said Florence Kagure Mchira instead. He added that there is a similar application pending before the lower court dated 19th April 2022 which is yet to be determined. Copies thereof were annexed to the Replying Affidavit as Annexure DEO-4.
 6. In response to the Replying Affidavit, a Further Affidavit was filed herein by the appellant on 20th September 2022, sworn by one of the its directors, Mr. Boniface Mutunga Kaleli. Mr. Kaleli reiterated the appellant's assertion that the entire object of the appeal will be defeated and rendered nugatory unless the orders sought herein are granted. He added that the Record of Appeal is ready and that the parties are only awaiting directions to enable filing.
 7. Directions were thereafter given on 15th June 2022 that the application be canvassed by way of written submissions; and that the Preliminary Objection be treated as a response to the application. Thus, counsel for the appellant, Mr. Bench, relied on his written submissions dated 28th June 2022. He faulted the Auctioneers for selling the objector's motor vehicle through technicalities. He further submitted that the appellant is a separate legal entity; and therefore ought not to be called upon to bear the burden of the non-existent judgment debtor. He relied on *Kaloba Enterprises Ltd v Shamsudin Hussein Varvani & Another [2014]* eKLR and *Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited [2016]* eKLR to buttress his arguments on concept of separate corporate personality.



8. On security, counsel urged the Court to note that the subject motor vehicle does not belong to the 3rd respondent and yet the 1st and 2nd respondents have continued to persist in their unlawful execution process despite the evidence of ownership presented by the appellant. He urged the Court to use its discretion in the circumstances and make orders that would meet the ends of justice, including an order condemning the respondents to pay costs of the instant application.
9. On behalf of the 1st and 2nd respondents, written submissions were filed by Mr. Makau on 9th September 2022. He reiterated the respondents' assertion that the subject motor vehicle was auctioned on 19th April 2022 and a Vesting Order issued in favour of one Florence Kagure Mchira, who has since caused the motor vehicle to be registered in her name. He submitted therefore that the orders prayed for by the appellant are not available as the same have been overtaken by events. He relied on *Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others*, Civil Application No. 20 of 1994, for the proposition that an injunction ought not to issue where the action sought to be restrained has already taken place, as equity does not act in vain.
10. [10] Counsel further submitted that the appellant has shown no intention of providing security as required under Order 42 Rule 6(1)(b) of the *Civil Procedure Rules*; and to support this argument, Mr. Makau relied on *Mwaura Kiruga t/a Limit Enterprises v Kenya Bus Services & 4 Others [2015]* eKLR, *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019]* eKLR and *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates [2014]* eKLR as to the purpose of security.
11. Mr. Makau further urged the Court to find that the Appeal is incompetent for lack of authority of the Board of Directors of the appellant company to institute these proceedings. In this regard, counsel relied on *Affordable Homes Africa Limited v Ian Henderson & 2 Others*, HCCC No. 524 of 2004 and *Petition No. 600 of 2013: East African Portland Cement Ltd v The Capital Markets Authority & 5 Others*. Lastly, counsel submitted that the application is incompetent because leave was not sought or obtained by M/s Bench & Co. Advocates to come on record in place of the previous counsel, M/s J.M. Tamata & Co. Advocates.
12. I have given careful consideration to the application, the averments set out in the parties' respective affidavits as well as the written submissions filed by learned counsel. Starting with the two preliminary objections raised by Mr. Makau, I have looked at the documents annexed to the Replying Affidavit with a view of ascertaining whether or not the applicant's counsel is properly on record. They show that the appellant's application before the lower court was filed by the firm of Bench & Company Advocates. That is the same firm acting in this matter for the applicant. Accordingly, I have no hesitation in dismissing Mr. Makau's argument as to the alleged contravention of Order 9 Rules 9 and 10 of the *Civil Procedure Rules*.
13. As to whether authority to file this appeal was obtained from the Board or members of the applicant company, it is instructive that in *Bugerere Coffee Growers Ltd v Sebaduka & Another [1970] EA 147*, it was held that:

“When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings.”
14. Similarly, in *Affordable Homes Africa Ltd v Henderson & 2 Others [2004]* eKLR, it was held that:

“... As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its



shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty...It is common ground that in the instant suit, there was no authority from the Board of Directors to institute this suit...in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."

15. In the premises, the question to pose is whether, in the circumstances hereof, the authority of the appellant's Board of Directors or members was a prerequisite to the filing of the appeal. In my view, there is no such requirement, granted that the appeal arose from objection proceedings held before the lower court. It is not in every case that that authority of the board is required. Indeed, Order 4 Rule 1(4) of the *Civil Procedure Rules* expressly makes specific mention of situations "...where the Plaintiff is a corporation..." there appears to be no indication, either in that provision or elsewhere in the Rules, that such a requirement is applicable to a corporate defendant or a corporate objector to execution proceedings; granted the strict timelines for such proceedings.

16. Accordingly, in *Saraf Limited v Augusto Arduin [2016]* eKLR the Court of Appeal made held:

"...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (see *Solomon & Solomon [1897] AC 22 (H. L.)*) Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors..."

17. On the merits of the application, I note from prayers 3 and 4 of the Notice of Motion dated 27th April 2022 that, in addition to stay of execution, the applicant prayed for orders in the nature of a temporary injunction pending appeal. In this respect, Order 42 Rule 6(6) of the *Civil Procedure Rules* provides that:

"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."

18. And, in *Giella v Cassman Brown & Co Ltd [1973] EA 358*, the applicable principles were set out as follow:

"First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. Accordingly, the issues that emerge for determination herein are:

- (a) Whether the appellant through its Notice of Motion dated 27th April 2022 the appellant has met the laid down threshold for granting of orders of temporary injunction pending appeal or stay of execution; and
- (b) Who will bear the Costs of the application?

20. However, I am not oblivious to the peculiarity of this case since its quite evident from the 1st and 2nd Respondents averments and annexures that the suit motor vehicle was auctioned on 19th April 2022 per a copy of the Auctioneer’s returns marked DEO-2 and a Vesting Order issued. Whether or not the Vesting Order was issued in disregard of the order of injunction is a different matter altogether. What is manifest is that the action sought to be restrained has already taken place and therefore cannot be forestalled by an order of injunction at this point in time. Thus, I am in agreement with the position taken in *Habiba Ali Mursal & 4 Others V Mariam Noor Abdi [2018]* eKLR, in which similar facts played out, that: -

“On the issue as to whether an injunction should be issued, there is nothing to restrain as the respondent has already demolished the walls of the building. According to the photographs annexed to the application for contempt which I shall shortly herein after deal with, the walls of the building have already been demolished and all windows removed. The entire building has been fenced and sealed using iron sheets. The applicants are not in the premises. The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one’s right. It is never meant to prevent what has already occurred. It will therefore be futile to grant injunctive orders. I will therefore decline to grant any orders in the notice of motion dated 11th October, 2018 save for an order that the respondent shall meet the costs of this application. It is so ordered.”

21. Likewise, in the case of *Moses M Wairimu & 24 Others V Kenya Power & Lighting Co Ltd & Another [2020]* eKLR, the Court held as follows:

“On whether they will suffer injury which will not be compensated, there is no doubt that the structures which they were seeking to protect have already been demolished. If the Applicants will succeed to show that their buildings were unlawfully brought down, they will always be compensated in monetary terms. An injunction cannot therefore be granted and in any case an injunction cannot issue to prevent what has already happened.”

22. Needless to underscore the fact that the grant of an order of injunction being an equitable remedy, is governed by the general principles of equity; one of which is that “Equity does not act in vain.” In the case of *Eric V. J. Makokha & 4 others v Lawrence Sagini & 2 others [1994]* eKLR, for instance, the court stated: -

“An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So, its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, “Equity, like nature, will do nothing in vain”. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot



be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”

23. In the light of the forgoing, and after careful consideration of the pleadings and evidence presented herein, I find that Prayer 4, seeking injunctive orders pending the hearing of the Appeal filed on 28th April 2022, has been overtaken by events; and that granting the prayer would be a futile exercise. Likewise, prayer 3 of the appellant’s application seeking stay of execution pending the hearing and determination of the Appeal is untenable; the same having been overtaken by events.
24. Consequently, I find that the appellant’s Notice of Motion dated 27th April 2022 is devoid of merits. The application is hereby dismissed with no order as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF MAY 2023

OLGA SEWE

JUDGE

