



REPUBLIC OF KENYA



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**Julius v Kitembui (Suing as the Legal Representative of the Estate of Joseph Kitembui Musyoka)
(Civil Appeal E516 of 2021) [2023] KEHC 21359 (KLR) (Civ) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21359 (KLR)

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

CIVIL

CIVIL APPEAL E516 OF 2021

CW MEOLI, J

AUGUST 3, 2023

BETWEEN

JOHN MWITI JULIUS APPLICANT

AND

DANIEL MUSYOKA KITEMBUI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH
KITEMBUI MUSYOKA**

RULING

1. The live prayers in the motion dated August 20, 2021 by John Mwiti Julius (hereafter the applicant) are: -
 - “3. That pending the hearing and determination of the appeal inter-partes, or for further orders of the court, this honorable court be pleased to grant the applicant herein interim stay of execution of warrants of attachment dated August 17, 2021.
 4. That the honorable court be pleased to cancel, set aside, recall, lift and/or quash the illegal warrants of attachment issued against the applicant herein and restitute the same to the appellant.
 - 5 ...
 6. That pending the hearing and determination of the appeal interpartes ...this honorable court be pleased to extend interim orders of stay of execution of judgment ...in Milimani in civil suit No 931 of 2018.



7. That the application further seeks a declaration that the execution and proceedings to enforce the judgment and decree by the Honorable Resident Magistrate S.G Gitonga in Milimani Civil Suit No 931 of 2018 be declared a nullity.
 8. That further the applicant herein further seeks to vary the conditions for stay and prays that the honorable court do deem the memorandum of appeal as properly filed and duly filed on time.
 9. That further the applicant herein further seeks to vary the conditions for stay and prays that the honorable court do deem the deposit of Kshs 3,060,000/- as sufficient security, for a condition for stay, and that the balance of Kshs 114,337.50/- be held in abeyance pending the hearing and determination of the appeal.
 10. That further, the applicant herein further seeks to vary the conditions for stay and prays that the honorable court do deem the deposit of Kshs 3060,000/- as sufficient security , for a condition of stay , and the that the balance of Kshs 114, 337.50 be held in abeyance, pending hearing and determination of the appeal.
 11. That the honorable court be pleased to enlarge time within which to deposit the balance of Kshs 114,337.50/-.” (sic).
2. The motion is expressed to be brought under section 1A, 3 and 3A of the [Civil Procedure Act](#), Order 42 rules 6, and order 51 rule 1 of the [Civil Procedure Rules](#). On grounds, among others that, Daniel Musyoka Kitiembui (hereafter the respondent) has commenced execution proceedings in respect of the judgment in Milimani CMCC No 931 of 2018 whereas the applicant has partially complied with the stay conditions issued by the court, and he is apprehensive that he will suffer “irreparable loss and damage” should the court fail to intervene and grant the orders sought.
 3. The motion is supported by two affidavits, one sworn by the applicant, who asserts to be the registered owner of motor vehicle KAZ 748J, insured by Directline Assurance Company Limited, at whose instance this claim is being defended, and the second affidavit sworn by Michelle Sagini, counsel having conduct of the matter on behalf of the applicant. The gist of applicant’s affidavit is that by a ruling delivered on June 30, 2021 this court allowed his motion for leave to appeal out of time and stay of execution on condition that the entire decretal sum be deposited in a joint interest earning account, or alternatively, that a bank guarantee for the entire decretal sum be furnished within 60 days of the ruling. He further deposes that due to hard economic times, he managed to raise part of the decretal sum, that is, Kshs 3,060,000/- leaving a balance of Kshs 114,337.50/-. He pleads for extension of time to fully comply.
 4. The deponent further states that despite his efforts above, the respondent has commenced execution proceedings, causing apprehension that if the prayers sought are denied, the respondent will proceed to attach and sell his motor vehicle which is his only source of income, thus exposing him to “irreparable loss and damage.” He proposes, in the alternative, that the court ought to deem the sum of Kshs 3,060,000/- already deposited as sufficient security and that the balance be held in abeyance pending determination of the appeal. Finally, he asserts to have an arguable appeal which will be rendered nugatory if the motion is not allowed.



5. Counsel for the applicant on her part swore that upon taking over the matter from a former colleague she noted that the memorandum of appeal was not filed within 14 days as ordered by the court and that she had proceeded to file the instant motion. She further states that the memorandum of appeal raises triable issues, and the court ought not to visit the failures of the erstwhile counsel on the applicant. That the partial compliance had been communicated to the respondent's counsel who was however adamant to proceed with execution, creating apprehension that the applicant may suffer "irreparable loss" if the court does not intervene.
6. The respondent by his replying affidavit took the view that the motion is fatally defective, and the appeal is incompetent having been filed out of time without leave of the court and as such, the court lacks jurisdiction to entertain the matter; that the applicant ought to have filed the motion for extension of time in Misc Application No E447 of 2020 wherein the court had granted conditional stay of execution and leave to file an appeal out of time on June 30, 2021. That the failure to comply with the said order meant that the stay order automatically lapsed. The respondent avers that no sufficient reasons have been given by the applicant for default and that the delay is prejudicial to the estate of the deceased. The respondent thus urged the court to strike out both the motion and appeal with costs.
7. Parties took directions to canvass the motion by way of written submissions. Only the applicant complied.
8. Counsel for the applicant submitted that the respondent was in disobedience of the court orders on stay issued on June 30, 2021 and ought to be held in contempt for instructing auctioneers to attach the applicants' property during the time limit granted by the court for deposit of the entire decretal sum in a joint interest account. It was further submitted that the time granted by the court for purposes of compliance lapsed before the applicant could deposit the balance of the decretal sum, necessitating the instant motion and that delay in compliance was further compounded by the respondent's illegal proclamation.
9. While placing reliance on the provisions of section 63(e) & 95 of the *Civil Procedure Act* and order 42 rule 6 & order 50 rule 6 of the *Civil Procedure Rules*, counsel submitted that the court has the discretion to enlarge time for compliance and extension of the stay order issued on June 30, 2021 pending hearing and determination of the appeal. On the question of substantial loss, counsel while calling to aid the decisions in *G.N Muema p/a (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR, *Amal Hauliers Limited v Abdulnasir Abukar Hassan* [2017] eKLR and *Butt v Rent Restriction Tribunal* [1982] KLR 417 counsel submitted that the applicant stands to suffer financial loss and the appeal rendered nugatory if stay is not granted, as he has already deposited a substantial amount of the decretal sum. That there was no evidence of the respondent's means to refund the decretal sum. Counsel argued that the applicant has already furnished a substantial amount of the decretal sum as security and the court ought to issue an order that sums so deposited suffice as security.
10. The court has considered the rival affidavit material and the applicant's submissions. Before proceeding any further, it would be apt to outline the history of the matter. This court *vide* its ruling delivered on February 24, 2022 declined to determine the instant motion but instead directed that the same be placed before Chitembwe, J for directions in view of his ruling delivered on June 30, 2021 in Nairobi Misc application No E447 of 2020. The motion, however, could not be placed before Chitembwe, J, as ordered because the said judge was no longer sitting in the civil division. Hence the instant matter reverted once more to this court.
11. This court, having taken the liberty of perusing the ruling of Chitembwe, J delivered on June 30, 2021 in Nairobi Misc application No E447 of 2020 deems it appropriate to set out some pertinent facts.



At the outset, it appears the applicant, being aggrieved with the decision of the trial court in Nairobi Milimani in civil suit No 931 of 2018 desired to appeal the but the statutory timeline within which to appeal had lapsed. The applicant therefore moved the court *vide* Nairobi Misc application No E447 of 2020 seeking; -

2. That this honourable court be pleased to grant leave to the applicant to appeal out of time against the judgment of the Honourable S.G Gitonga (Mrs) Resident Magistrate in Milimani Commercial Courts CMCC No 931 of 2018 delivered on November 1, 2019.
3. That this honourable court be pleased to stay execution of the judgment and decree in Milimani Commercial Courts CMCC No 931 of 2018 delivered on November 1, 2019 pending the hearing and determination of the application herein.
4. That the costs of this application abide the outcome of the intended appeal.” (sic)

12. By the court’s ruling delivered on June 30, 2021 Chitembwe, J. allowed the applicant’s motion and ordered that; -

“In the circumstances, I do find the application dated October 27, 2020 merited and the same is granted in the following terms:-

1. The applicant to file and serve his memorandum of appeal within 14 days from the date of this ruling.
2. The applicant to either deposit the entire decretal sum in a joint interest earning account of counsel for both parties or provide a bank guarantee for the entire decretal sum within sixty (60) days hereof.
3. The costs of the application shall abide the outcome of the appeal.” (sic)

13. Coming back to this court’s ruling delivered in the instant matter on February 24, 2022, the court in directing that the matter be placed before Chitembwe, J. for consideration, stated; -

“Considering the above, and for the sake of good order, the court will decline to determine the motion dated August 20, 2021 but will instead direct that the matter be listed on March 3, 2022 before Chitembwe J for his directions and /or orders. In the meantime, and in the interest of justice, the court noting that the applicant has asserted to have already deposited a substantial portion of the decretal sum, will order that there be an interim order to stay execution of the judgment of the lower court. The said order will last until March 3, 2022. The applicant is directed to serve evidence of the deposit upon the respondent by that date.”

14. By dint of Chitembwe J’s ruling in Nairobi Misc application No E447 of 2020 the applicant was to file the instant appeal on or before the July 14, 2021 and to deposit the entire decretal sum of Kshs 3,174,337.50/- in a joint interest earning account of counsel for both parties or provide a bank guarantee for the same on or before August 29, 2021. Further by dint of this court’s ruling on February 24, 2021 the applicant was to serve evidence of compliance with order for deposit on or before March 3, 2022.



15. The respondent’s objection to the instant motion was three (3) pronged, firstly that the motion is fatally defective and the appeal is incompetent as it has been filed out of time without leave of the court and as such the court lacks jurisdiction to entertain the matter; secondly, that the applicant ought to have filed the motion for extension of time in Misc. Application No E447 of 2020 wherein the court had granted conditional stay of execution and leave to file an appeal out of time on June 30, 2021; and thirdly that the failure to comply with the said order meant that the stay order automatically lapsed.
16. This court having taken the liberty of reviewing history contained in the Case Tracking System (CTS) in respect of both causes notes as follows. The instant appeal was filed on August 20, 2021, which is some thirty-seven (37) days from when the appeal ought to have been filed. Further, no material demonstrates compliance with the order on security by Chitembwe J and by this court. By filing the instant motion, the applicant has attempted to explain delay in filing the instant appeal by blaming it on mistake of counsel while asserting partial compliance of Chitembwe, J’s order on security to the extent that he was only able to raise KShs 3,060,000/- and that the same ought to be deemed as sufficient security in the circumstance. Evidently, the applicant has muddled the situation by presenting the instant motion and constructively seeking various reliefs that ought to have been sought in Nairobi Misc application No E447 of 2020. It would have been neater to apply in the latter cause.
17. While both causes are related to the same subject, the court is of the view that the prayer (8) of the motion seeking to vary the order on the time granted for filing appeal ought to have been made in the miscellaneous cause rather than in this appeal, or if sought here, to expressly seek enlargement of time, not merely that the “court do deem the memorandum of appeal as properly filed and duly filed on time” (sic) as the prayer states. The prayer is accordingly struck out.
18. On a plain reading of order 42 rule 6(1) of the *Civil Procedure Rules* (CPR), that an order to stay execution pending appeal presupposes the existence of an appeal. 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* which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. 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).
19. It would seem therefore that the invocation of the jurisdiction of this court under order 42 rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (see order 42 rule 1 of the *Civil Procedure Rules*). Until the memorandum of appeal is filed, the court may be acting in vacuo by considering the applicant’s prayer for stay of execution pending a non-existent appeal. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia v James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (deceased))* [2017] eKLR concurred and adopted the foregoing reasoning.
20. Earlier, the Court of Appeal in the case of *Equity Bank v Westlink MBO Limited* [2013] eKLR while commenting on rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to order 42 rule 6 (1) of the *Civil Procedure Rules*, and on order 42 rule 6 (6) of *Civil Procedure Rules*, left



no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a notice of intended appeal. (See also *Balozi Housing Co-operative Society Limited v Captain Francis E. K Hinga* [2012] eKLR).

21. Order 42 rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, pursuant to Chitembwe, J's ruling in Nairobi Misc Application No E447 of 2020, the applicant was required to file the instant appeal on or before the July 14, 2021. The appeal was filed on August 20, 2021 some thirty-seven (37) days late, rendering the appeal incompetent. Hence, there is no basis upon which this court could exercise its appellate jurisdiction by entertaining the prayers seeking to stay execution or relating to stay of execution. The prayer is incompetent. As earlier observed, any prayer seeking to vary orders related to or for extension of time for compliance of orders made in Nairobi Misc Application No E447 of 2020 ought to have been made in that cause.
22. In closing, the court must express its displeasure with the conduct of the applicant in this matter. They have dissipated valuable court time through misconceived applications. Earlier, they filed Nairobi Misc Application No E447 of 2020 wherein appropriate reliefs were granted, but they failed to duly comply with the orders of the court. They have now wrongly moved this court by instant motion. The applicant's plea of mistake by counsel in the instant matter cannot be used to excuse the first failure to file the appeal on time and the second failure to bring an appropriate application in the appropriate cause. Not to mention the non-compliance with orders to furnish security. In *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR, the court though considering a slightly different issue, observing that; -

“... The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision.”
23. In the result, the entire motion dated August 20, 2021 and the memorandum of appeal are both struck out with costs to the respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: N/A

For the Respondent: N/A

C/A: Carol

