



Abdi Isaac Omar t/a Sabrin Shop v Highrise Commodities Limited (Civil Suit E278 of 2023) [2023] KEHC 23062 (KLR) (2 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E278 OF 2023
DKN MAGARE, J
OCTOBER 2, 2023**

BETWEEN

ABDI ISAAC OMAR T/A SABRIN SHOP APPLICANT

AND

HIGHRISE COMMODITIES LIMITED RESPONDENT

RULING

1. This matter is coming up for directions on the Notice of Motion dated 3/10/2023. I have perused the file. The same seeks the following orders:-
 - a. The Application be certified as urgent and service thereof be dispensed with in the first instance(sic)
 - b. The Court be pleased to order stay further proceedings(sic) in Mombasa Principal magistrate’s civil case no. E819 of 2022 pending hearing and determination of this Application.
 - c. The Court be pleased to allow the Applicant file an Appeal to this court against the Judgment of Hon G Sogomo (PM) delivered on 29/9/2023 in Mombasa principal magistrate’s civil case no. E 819 of 2022 directing the Applicant to pay Kshs. 9,954,200 together with costs and interest.
 - d. Spent
 - e. Costs.
2. I am aware that for stay pending appeal, there needs to be an appeal. order 42 rule 6 of the [Civil Procedure Rules](#) provides as doth: -
 - “6. Stay in case of appeal [Order 42, rule 6.]



- (1) 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.
- “(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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in sub rule (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.

3. On the other hand, an Appeal is described in order 42 rule, 1 of the [Civil Procedure Rules](#), the law provides are doth: -

“1. Form of appeal –

- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

4. In case of matters requiring leave to appeal. Section 75(1) of the [Civil Procedure Act](#) provides as doth: -

“75. Orders from which appeal lies



- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) an order under section 64; (Compensation for arrest, attachment or injunction on insufficient grounds)
 - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.”

5. An Applicant should seek leave to Appeal from any other order with the leave of the Court making such order. If the leave is declined, then and only then will this Court be moved. The Application appears to relate to a Judgment to which no leave is required. Be it as it may, the Applicant is climbing a wrong tree and from a wrong position.
6. In the circumstances, the Application is not tenable. The Application seeks for leave to appeal from the decision of the lower court given on 29/9/2023. It is the court appealed from that issues such an order. Time has not run out and the application can be made in that Court. Leave may not be necessary if it is Judgment of the court.
7. This Court lacks jurisdiction to issue orders in vacuo. In the case of Owners of the *Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA stated as doth: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to



the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

8. The orders sought cannot be issued on a miscellaneous application. Issuing any order on such an incompetent application will be a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

9. The Application herein is an edifice built on nothing. There is no appeal or anything waiting to be done. Nothing can be added on it. To save the Application from the ignominy of its own incompetence the court must act judiciously and strike it out.

10. In the case of *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR, the Honourable Court, Justice R.C.N KULOBA, as then he was, observed that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

11. The above position is an elucidation of the need to have judgment debtors pay up. It is only when they have met the requirements for grant of stay that stay can be granted.

12. In the case of *Equity Bank Ltd –vs- Taiga Adams Company Ltd* [2006] eKLR, it was held that: -

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others.*”



13. In this particular case, there is no appeal. The application is sought in a misc. application. This is not an appeal. The Court below has not been moved properly and this Court's jurisdiction has equally not been invoked.
14. The Application made is a mongrel which has no future except to meet a well- deserved sudden death. There is nothing to go to inter partes hearing. I will not waste judicial time answering unasked questions.
15. The consequence is that the application dated 3/10/2023 is fatally defective and untenable in law that there is no need to serve.
16. I therefore make the following orders: -
 - a. The entire application dated 3/10/2023 is struck out in limine with no order as to costs.
 - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 2ND DAY OF OCTOBER 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance by parties

