



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khaemba & another v Cooperative Bank of Kenya Limited & another (Civil Appeal 5 of 2018) [2021] KEHC 64 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 64 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL 5 OF 2018  
MW MUIGAI, J  
SEPTEMBER 16, 2021**

**BETWEEN**

**JOHN SIMIYU KHAEMBA ..... 1<sup>ST</sup> APPELLANT**

**SUSAN KAVULUNZE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**COOPERATIVE BANK OF KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**R.M. NGURU T/A NGURU AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**NOTICE OF MOTION**

1. The Applicant filed a Notice of Motion Application dated 8th December 2020 for orders that; -

1. There be a stay of execution of the orders issued on 25th November 2020 pending the inter-partes hearing and determination of this Application.
2. The orders issued on 25th November 2020 be set aside for having been issued without jurisdiction and in breach of natural justice.

Which Application was supported by the sworn Affidavit of Elissa Otemba dated 8th December 2020 and premised on the grounds that; -

- a. The 1st Respondent's Counsel was served with an order seemingly issued on 25th November 2020 in the presence of the Appellant's Counsel only.
- b. The 1st Respondent was never served with any application whatsoever that would justify the issuance of the substantive orders and in the absence of a formal application,



the issuance of the orders of 25th November 2020 was without jurisdiction and thus a nullity.

- c. Further, the orders were issued based on non-disclosure of material facts as shown below;
  - i. The Appellants based their request on the fact that the suit in the subordinate court (Milimani CMCC No. 7839 of 2017) had been concluded.
  - ii. The Appellant's did not inform the court that judgment in the suit was issued without the 1st Respondent ever being served with a hearing notice.
  - iii. The Appellants did not inform the court that the 1st Respondent had filed an application dated 12th November 2020 seeking to set aside the judgment. The Application was served on the Appellant's Counsel on 25th November 2020.
- d. Given the non-disclosure above, the orders issued should not be allowed to stand and it is vital that the sums remain in the joint interest earning account pending conclusion of the Application before the subordinate court.
- e. If the 1st Respondent's Application does not succeed, the Appellants will still have access to the funds plus the interest that continues to accrue. They therefore stand to suffer no prejudice whatsoever.

#### REPLYING AFFIDAVIT

2. The Application was opposed vide the sworn Affidavit of Marren Adunga dated 18th January 2021 and deposed that; -
  1. During a Mention on 18th November 2020 both parties were present and the Respondent informed the Court that CMCC No. 7839 John Simiyu Khaemba & Another versus Cooperative Bank of Kenya Limited had terminated in favor of the Respondents hence made an oral application seeking an order for release of the sums deposited in term of the Ruling of 5th May 2020.
  2. The Court directed the Appellants in the presence of Ms. Muriranja holding brief for Mr. Billy Kongere to file in court and further serve on the Applicant a copy of the judgment of CMCC No. 7839 of 2017 and details of the joint interest earning account.
  3. The Appellants lodged the documents and information aforementioned with the Court on 24th November 2020 and served the same on the Applicant's advocates.
  4. On 25th November,2020, the Applicant failed to attend court as directed in the Court Order of 18th November 2020 despite having sufficient notice and knowledge of the same. There being no objection to the documents and information presented to the Court, and the Court having verified the same granted the Orders of 25th November 2020.



5. The Applicant's basis for challenging the jurisdiction of this Court is unjustified as there is no mandatory requirement in law to move the Court vide a formal application unless the Court before which the oral application is made deems it necessary to file a formal application.
6. The allegation that the Applicant was not served with a hearing notice of the application pending before the lower court the application is yet to be determined on merit.
7. The Application to set aside the judgment of the lower court dated 15th September 2020 was filed on 12th November 2020 as expressly admitted by the Applicant in the instant Application. On 18th November 2020 when parties appeared before this court, the Applicant conveniently failed to inform the court of the existence of their own Application.
8. The Respondent was served with the Application via the law firm's email on 25th November 2020 and became aware of the same at 10:21am long after the matter had been dealt with and Orders issued.
9. Further, there is no longer an appeal pending before this court and the lower court has not set aside the judgment of 15th September 2020, therefore the amount for conditional stay pending appeal should be released as ordered on 25th November 2020.
10. Evidence was presented before the Court that the 1st Appellant is a cancer patient who requires money for his treatment and defiance of this Court's order is prejudicial to the Appellant's treatment.

#### APPELLANTS' SUBMISSIONS

3. The Appellants submitted that they disagree with the contention that the Court could not issue the impugned orders on 25th November 2020 for the simple reason that the Court gave very clear and precise directions in the presence of the advocates for both parties on 18th November 2020 as to what would take place on the 25th November 2020. The purpose of the mention for 25th November 2020 was concise and communicated in advance to the parties.
4. Further, that the law is that a party must be given an opportunity to be heard. The Court directed the 1st Respondent to tender its objections to the Appellants' request if any on the said 25th November 2020, gave the 1st Respondent an opportunity to be heard and the 1st Respondent chose not to exercise the right to be heard as they failed to attend Court.
5. With regard to the issue that the court could not issue the orders sought when no formal application had been made to warrant the issue of the order; the Appellants submitted that the Court has the discretion and jurisdiction to give orders and directions suo moto where the circumstances so dictate.
6. On whether there was material non-disclosure on the part of the Appellants, the Appellants submitted that they have proved beyond a balance of probability that they did not know of the Application filed by the 1st Respondent until 25th November 2020 10:21am when they were served with the Application.
7. In addition, the Appellants submitted that the failure by the 1st Respondent to attend court was not an excusable mistake and was deliberate to circumvent the directions of the court orders of 18th



November 2020 and further to delay the course of justice. They relied on the case of *Shah v Mbogo & Another* (1967) EA 470 where the Court of Appeal for Eastern Africa held as follows: -

“IV. Applying the principle that the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”

#### 1ST RESPONDENT’S SUBMISSIONS

8. The Respondent submitted that no formal application was made before the order was granted. Order 51 Rule 1 *Civil Procedure Rules, 2010* provides;

All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

9. Where the Rules anticipate oral applications, they expressly provide so and what was before the court was not an oral application but a letter meant to adduce evidence to support the Appellants’ quest for the order. The epistolary jurisdiction invoked by the Appellants is not recognized by the Civil Procedure Act. It is a jurisdiction reserved for constitutional litigation.
10. It was the Respondent’s further submission that the Appellants knew that an application had been filed to challenge the judgment of the lower court entered without the 1st Respondent’s participation. This was a material fact that was not disclosed to the court and the orders obtained upon non-disclosure of material facts are for setting aside.
11. The 1st Defendant relied on the case of *Anthony Milimu Lubullelah Advocates vs Patrick Mukiri Kabundu & 3 others*, C.A. no 165 of 2008 [2019] eKLR that observed;

It is not denied, as rightly reflected in the order extracted therein, that the orders of 31st August 2004, were made during a mention. Further, it is not disputed that the Appellant (as well as other Counsel who acted for the Plaintiffs) were not invited to attend the mention;

12. The C.A. referred to *Rahab Wanjiku vs Esso Kenya Ltd* [1995-1998] EA 332 as follows;

We have no doubt that where a matter is fixed for mention, as was in this case, the learned Judge had no business determining on the date, substantive issues in the matter. He can only do so, which is not the case here, if parties agree and of course after complied with elementary procedure of hearing what submissions Counsel may wish to make on behalf of the parties, which he did not do and moreover had no good reason for adopting such procedure which is repugnant to the administration of justice.....

#### DETERMINATION

13. The Court considered the pleadings and the submissions by the parties the issue for determination is whether the orders issued on 25th November 2020 should be set aside for want of jurisdiction.
14. On 18th November 2020, both parties were present in court and the Appellant made an oral application for the release of the Kshs.1, 600, 000 on the ground that the matter in the lower court, which was the subject of the said deposit, had been determined in favor of the Appellant. This court directed that the order to release the amount would not be granted until the details of the deposit and



account details including the judgment were provided in the court and gave a further mention date on 25th November 2020.

15. On 25th November 2020, the Appellant was present in court while the 1st Respondent was absent. This Court gave the Order for the amount of Kshs.1, 600, 000 to be released to the depositor. This was done upon the fulfilment of the conditions set by the Court which were; until the details of the deposit, judgment and account details are provided in the court. There was no objection raised by the 1st Respondent due to its absence in court yet the mention date was given in court in the presence of both parties.
16. Applying the legal position herein the case of *Anthony Milimu Lubullelah Advocates vs Patrick Mukiri Kabundu & 3 Others*, C.A. no 165 of 2008 [2019] eKLR (*supra*), the mention of 18th November, 2020 both parties were represented by their respective Counsel. The Appellant's advocate made the application for release of deposited funds. The Court gave conditions to be complied with before grant of orders and granted further mention date of 25th November 2020. On the said date, the Appellant's advocate was the only one present and produced the relevant documents. The Defendant/ advocate did not attend nor in the instant application explain reason(s) for non-attendance.
17. The above order was issued upon the Court confirming that the judgment of the lower court in Civil Suit No. 7839 of 2017 had been entered in the Appellant's favor as well as the details of the deposit and the account.
18. The 1st Respondent filed the present Application and sought that the orders issued on 25th November 2020 be set aside for having been issued without jurisdiction and in breach of natural justice. The Respondent relied on the ground that no formal application was made before the order was granted and also argued that Order 51 Rule 1 CPR provides that all applications to the court shall be by motion. In the case of *Musa Kimengich Kimuge v Beth Wangari Njoroge* [2015] eKLR the court dealt with a similar issue and stated that; -

“Technically, applications need to be made formally, unless the rules allow for an oral application to be made. But Article 159 (2) (d) of the *Constitution of Kenya, 2010*, provides that "justice shall be administered without undue regard to procedural technicalities..." In other words, the court should not be too stringent on procedural technicalities at the expense of doing justice to the litigants. There may be instances where the Court may feel that pursuing a technical rule of procedure would lead to an injustice.”
19. This settles the 1st Respondent's argument that it was never served with any application whatsoever that would justify the issuance of the substantive orders and in the absence of a formal application, the issuance of the orders of 25th November 2020 was without jurisdiction and thus a nullity.
20. The Court had jurisdiction to address the request for release of funds as made by the Appellant in the presence of the 1st Defendant on 18th November, 2020.
21. The Court exercises judicial discretion in the matter because, the amount sought to be released was pursuant to stay of execution pending appeal. The appeal was not filed. Therefore, the Court documents to confirm the party who paid and how much was paid the amount. Secondly, the Court sought judgment of Trial Court that matter was determined.
22. In addition to the above, both parties were present in court on 18th November 2020, when directions were issued directing the 1st Respondent to tender its objections to the Appellants' request if any on the said 25th November 2020. on the same date, the 1st Respondent failed to show up in court for



the mention. The Court finds the 1st Respondent had an opportunity to be heard and chose not to exercise the right to be heard.

23. Further, it was the 1st Respondent's argument that the orders were issued based on non-disclosure of material fact that the Appellants did not inform the court that the 1st Respondent had filed an application dated 12th November 2020 seeking to set aside the judgment. The Appellants sought to have the money deposited in the escrow account released.
24. The Court by Ruling of 19th November 2018 by Hon. LJ R.Ngetich granted orders that stay of execution was granted pending hearing and determination of the intended appeal and on condition Ksh 3,000,000/- was deposited in Court within 45 days.
25. The Court by Ruling of 25th February 2019 varied the orders to deposit of Ksh 1,000,000/- in an interest earning account of advocates for parties on record. The balance of Ksh 2,000,000/- be paid be paid at Ksh 500,000/- into the Account each month. The record of Appeal was to be filed and served by June 2019.
26. On 5th June 2020, vide Ruling, the Court dismissed the Appellant's application of review of Ruling of 25th February 2019.
27. On 18th November 2020, the parties Counsel were present, the Appellant's advocate informed the Court that the matter before the Trial Court was determined in the Appellant's favor and sought release of Ksh 1.6m deposited by the Appellants.
28. The 1st Defendant through Counsel sought the request sought an application to be filed. The Court took the view that since the Application for stay of execution pending appeal was dismissed by Ruling of 5th June 2020, there was no dispute for the Court to determine/no appeal was filed from the Trial Court.
29. The Court ordered production the said Judgment/Ruling and details of the joint account on 25th November 2020. The Appellant complied and the court granted the order and produced letters of 17th November 2020 & 24th November 2020 and Trial Court Judgment. The 1st Defendant failed to attend and no reasons were advanced for the Court to consider. Therefore, since there was no appeal filed, Ksh1.6 is released to the Depositor.
30. It is this court which gave the order for the deposit of the money as security. The Appellants had the right to make such an application for release of funds deposited pending appeal in this Court which the deposited amount was not subject to. The application could not wait for the determination of the subsequent application before the Trial Court. That application will be heard on its own merit.

#### DISPOSITION

31. In light of the above facts, the Court Orders issued on 25th November 2020 are upheld and the Application dated 8th December 2020 is hereby dismissed.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

Mr Apole Hb For Mr Kongere For 1st Defendant –PRESENT

COURT ASSISTANT-TUPET

