

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. E006 OF 2026**

**JOSEPH MWANGI WAIRIRE T/A BUNGOMA**

**PRESTIGE SHUTTLE.....1<sup>ST</sup> APPELLANT**

**DAVID MUNGAI JIBU T/A**

**BUNGOMA PRESTIGE SHUTTLE.....2<sup>ND</sup>  
APPELLANT**

**GEOFFREY NJOROGE KAMAU T/A**

**BUNGOMA PRESTIGE SHUTTLE.....3<sup>RD</sup>  
APPELLANT**

**AUGUSTINE MURIITHI WANGOI T/A**

**BUNGOMA PRESTIGE SHUTTLE.....4<sup>TH</sup>  
APPELLANT**

**VERSUS**

**JOSKIES BUNGOMA LINE SHUTTELS**

**LIMITED.....RESPONDENT**

## **RULING**

1. The Appellants/Applicants have filed a Notice of Motion application dated 23<sup>rd</sup> January 2026 seeking the following prayers.
  - i) Spent.
  - ii) Spent.
  - iii) That pending hearing and determination of the appeal, there be a stay of execution of the orders of Hon. Benjamin Limo (PM) given on 2<sup>nd</sup> January 2026 in Siaya CMCC No. E001 of 2026 restraining the Appellants whether by themselves, relatives, friends, their agents, servants and/or other persons from branding the Public Service Motor vehicles operated, owned and managed by the Defendants/Respondents using similar and near similar colours and names as that of the Plaintiff/Applicant and in particular colour orange or shades of orange at the front with near similar name written in colour green at the front of the Defendants/Respondents' public service vehicles.
  - iv) That costs be provided for.
2. The application is supported by the grounds set out thereunder and the supporting affidavit of the 4<sup>th</sup> Appellant/Applicant sworn on even date. The Appellant/Applicant's gravamen is inter alia; that the Appellants were slapped with exparte orders by the trial court to the effect that they should not do any branding of

their vehicles from the date of the order; that they were cited for contempt of the said orders and upon appearing before the court they were ordered to remove the colours on their vehicles or be punished for contempt; that the said order are adverse, oppressive and have the effect of granting final orders in disguise as the same are also sought in the main suit on merit; that once the Appellants remove the branded colours, it shall not be cost-effective in the very likely event of winning the suit on merit; that the Appellants have been condemned unheard yet in their responses they do argue that the Respondent had no legal mandate in the business of Bungoma line shuttle and as such not entitled to the orders sought; that the colour complained of is not the exclusive property of the Respondent as they are cited by a number of public service vehicles and so exhibited; that it would be prudent in line with the rules of natural justice for parties to be heard on merit before such adverse orders are granted; that the interim *ex parte* orders are against the Appellants right to social security as they technically have the effect of ousting them out of business and or their source of income if unheard; that the Appellants have a right to a fair hearing as enshrined in the constitution; that unless the orders are granted, the Appellants risk being punished as contemnors for disobeying solemn orders given *ex parte*; that it is just that the proceedings of the lower court be stayed pending the hearing and determination of the appeal.

3. The application was opposed by the Respondent who filed a Notice of Preliminary Objection dated 29<sup>th</sup> January 2026 wherein it raised grounds inter alia; that the appeal and application offend provisions of Order 40 Rule 7 of the Civil Procedure Rules 2010 requiring a party dissatisfied with the issuance of ex parte temporary injunction to apply to the issuing court for the order to be discharged, or set aside by the court before appealing; that the appeal and application offend provisions of Section 75 of the Civil Procedure Act and Order 43 Rule 1(2) and (3) of the Civil Procedure Rules requiring a dissatisfied party to seek leave of the trial court to institute an appeal against an order made pursuant to Order 40 Rule 4 of the Civil Procedure Rules granting ex parte injunction like the order appealed from herein given on 2<sup>nd</sup> January 2026.
4. The application was canvassed by way of oral submissions.
5. Mr. Ochieng, learned counsel for the Respondent submitted that the Preliminary Objection is dated 29/1/2026 and seeks to have the appeal struck out with costs on two points of law inter alia; that under Order 40 Rule 7 Civil Procedure Rules a dissatisfied party where an ex parte injunction has been issued is to file an application before the same court for setting aside or variation of the same; that it is only after the same is determined that an Applicant may lodge an appeal; that it offends Section 75

of the Civil Procedure Act and Order 43 Rule 1(2) and (3) Civil Procedure Rules; that an appeal emanating from an order granting *ex parte* injunction only lies with the leave of court; that the same should be issued by trial court; that in the instant appeal, no such leave was sought or an application placed before the trial court; that the Applicants seek to set aside orders made on 26/1/2026 pending hearing of their application now pending in the trial court; that the Appellants should have first filed an application for setting aside of the *ex parte* order so that provisions of Order 43(1) and (u) kick in; that the Appellants should have exhausted the legal remedy and should not have rushed to this court on appeal; that Order 43 (1) (u) of the Civil Procedure Rules does not capture the provisions of Order 40(4) of the said Rules; that the court is urged to consider the provisions and find that the appeal is incompetent as the Appellants have not exhausted the available remedy and strike it out with costs.

6. M/s Omar, learned counsel for the Appellants/Applicants, opposed the Preliminary Objection. She submitted *inter alia*; that the same is misconceived since Order 40 of the Civil Procedure Rules is not couched in mandatory terms with the use of the word “may”; that there is no hard and fast rule that such applications should be made; that Order 43 talks of an appeal which lie as of right, see sub rule 1(u) which captures the issues clearly; that the appeal lies as a matter of right under Order 43 (1) (u) of the Civil

Procedure Rules; that the preliminary objection be dismissed with costs.

7. I have given due consideration to the application, rival affidavits and the oral submissions of learned counsels. It is not in dispute that the trial court issued the impugned orders dated 2/1/2026 to which the Appellants herein have lodged a Memorandum of Appeal dated 23/1/2026 and in which the Appellants' main contention is that the trial court issued final orders at *ex parte* stage without affording the Appellants an opportunity to put in a re-joinder and hence they were condemned unheard. It is also not in dispute that the trial court is currently hearing applications filed by the parties and which are scheduled for mention on 4/2/2026 to confirm compliance and for reservation of a ruling date. It is also not in dispute that the Appellants did not approach the trial court to set aside and/or vary the orders issued on 2/1/2026 but opted to approach the High Court directly on appeal. That being the position, the issue for determination is whether the preliminary objection dated 29/1/2026 has merit.

8. The legal threshold for a preliminary objection is well settled. Gikonyo J in *Catherine Kawira v Muriungi Kirigia* [2016] eKLR put it succinctly regarding a preliminary objection thus;

***“(5) I do not want to reinvent the wheel on the legal threshold for preliminary objection. It is***

***now a well settled principle that a preliminary objection should be a point of law that is straight-forward and not obscured in factual details for it to be proved. Again, it must be potent enough to decimate the entire suit or application. On this, I am content to cite the case of Mukisa Biscuit Manufacturing Company Limited V West End Distributors Limited (1969) EA 696 where it was stated as follows:***

***“So far as I’m aware, a preliminary objection consists for a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Example are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

9. From the foregoing, the Notice of Preliminary Objection raised by the Respondent appears in my view to have met the threshold as per the guiding principles in the Mukisa Biscuit Case (supra). Indeed, the Respondent has purely relied on a pure point of law as it has based its objection on the relevant provisions of the Civil Procedure Act and Rules

and that the same raised purely on matters of law without the need to investigate certain facts as the key issue is whether the Appellants' appeal against the impugned order is a matter of right or with the leave of the trial court.

10. The Respondent has placed reliance on Order 40 Rule 7 of the Civil Procedure Rule and contended that if the Appellants were dissatisfied with the *ex parte* order of injunction they were to approach the trial court and seek to set aside or vary the impugned order and that they can only approach this court after the same has been determined by the trial court. They further contended that the appeal and the application offend the provisions of Section 75 of the Civil Procedure Act and Order 43 Rule 1(2) and (3) of the Civil Procedure Rules which provides that appeals from an *ex parte* order of injunction only lie with the leave of the trial court. The Appellants on their part have maintained that the impugned order is appealable as of right. I find that the crux of the matter should be seen through the lens of Order 43 and 40 rule 7 of the Civil Procedure Rules and Section 75 of the Civil Procedure Act. Order 43 of the Civil Procedure Rules provides as follows:

- 1) An appeal shall lie as of right from the following orders and rules under the provisions of Section 75(1) (h) of the Act-
  - a) Order 1(parties)
  - b) Order 2 (pleadings generally)
  - c) Order 3 (frame and institution of suit)

- d) Order 4, rule 9 (return of plaint)
- e) Order 7, rule 12 (exclusion of counterclaim)
- f) Order 8 (amendment of pleadings)
- g) Order 10, rule 11 (setting aside judgment in default appearance)
- h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance)
- i) Order 15, rule 10,12 and 18 (sanctions against witnesses and parties in certain cases)
- j) Order 19 (affidavits)
- k) Order 22, rules 25,57, 61 (3) and 73 (orders in execution)
- l) Order 23, rule 7 (trial of claim of third person in attachment of debts)
- m) Order 24, rules 5,6, and 7 (legal representatives)
- n) Order 25, rule 5 (compromise of a suit)
- o) Order 26, rule 1 and 5 (2) (security for costs)
- p) Order 27, rule 3 and 10 (payment into court and tender)
- q) Order 28, rule 4 (orders in proceedings against the Government)
- r) Order 34 (interpleader)
- s) Order 36, rule 5,7, and 10 (summary procedure)
- t) Order 39, rule 2,4, and 6 (furnishing security)

- u) Order 40, rule 1,2,3,7 and 11 (temporary injunctions)
- v) Order 41, rule 1 and 4 (receivers)
- w) Order 42, rule 3,14,21, 23 and 35 (appeals)
- x) Order 45, rule 3 (application for review)
- y) Order 50, rule 6 (enlargement of time)
- z) Order 52, rules 4,5,6 and 7 (advocates)
- aa) Order 53 (judicial review orders)

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

(3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such orders.

(4) Save where otherwise, expressly provided in this rule, "order" include both an order granting the relief applied for and an order refusing such relief.

Further, under Section 75 of the Civil Procedure Act provides as follows:

**(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;**

**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.**

Again, Order 40 Rule 7 of the Civil Procedure Rules provides as follows:

***“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”***

11. From the foregoing key provisions of the Act and Rules, it is clear that under Order 40 Rule 7 CPR a dissatisfied party where an ex parte injunction has been issued is required to file an application before the same court for setting aside or variation of the same and that it is only after the same is determined that an Applicant may lodge an appeal. Further, under Section 75 of the Civil Procedure Act and Order 43 Rule 1(2) and (3) Civil Procedure Rules, an appeal emanating from an order granting ex parte injunction only lies with the leave of court and hence the same should be issued by trial court as it has the requisite jurisdiction at that stage to entertain applications by aggrieved parties. It is noted that the instant appeal, no such leave was sought or an application placed before the trial court in that regard and thus the Appellants should have first filed an application for setting aside of the ex parte order so that the provisions of Order 43(1) and (u) of the Civil Procedure Rules as contended by the Appellants kick in. It appears therefore that the Appellant should have exhausted the said remedy provided for and should not have rushed to this court on

appeal in the first place. It is thus clear that the appeal as presented is incompetent as the Appellants have not exhausted the available remedy and hence the same is amenable for striking out.

12. After a careful analysis of the rival submissions, it is clear that if the Appellants were aggrieved by the trial court's ex parte order, then the appropriate cause of action was to first approach the said court and seek to vary or set aside the said ex parte orders before moving to this court on appeal. Indeed, the trial court had the discretion to consider the ex parte application and make such orders as found to be expedient and that any of the aggrieved parties was at liberty to approach the same court and seek to convince it to vary or set aside the same if the said court is convinced so to do. It is also instructive that a right of appeal only lies where the law specifically provides for such a right to accrue and where none is automatic then a party seeking to appeal must obtain leave of the court and therefore where such a right does not lie automatically, a party can only invoke the provisions of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules to seek and obtain leave from the trial court to appeal to this court. That way, the parties would only approach the appellate court if aggrieved by the eventual orders. This is meant to bring order and hygiene regarding filing of applications as well as appeals. It is also instructive that as at present, the trial court is in the

process of determining the Appellants' application challenging the ex parte orders as well as disobedience of the said ex parte orders. In the event the trial court finds in favour of the Appellants, then the Appellants' appeal would be overtaken by events and become an academic exercise. It was unprocedural for the Appellants to rush on appeal as well as seek orders of stay of execution of the impugned order and then approaching the same trial court for similar orders without seeing the need to seek for an order of stay of proceedings in the lower court. It was appropriate for the Appellants to first approach the trial court and indicate to it that the ex parte orders were oppressive as they were issued ex parte without giving them an opportunity of being heard and that the trial court upon consideration would have made orders as is appropriate after which the Appellants could move to this court, if need be. Again, there is no prayer sought in the present application seeking for an order for stay of proceedings and that the Appellants have confirmed that they are still proceeding before the trial court. It can be seen that the Appellants have lodged a two-pronged approach akin to one playing lottery. I find this state of affairs to be quite untidy. It is in this regard, that I find the Respondent's Preliminary Objection has merit and must be allowed.

13. In view of the foregoing observations, it is my finding that the Respondent's Notice of Preliminary Objection dated 29<sup>th</sup> January 2026 has merit. The same is allowed with an

order that the Appellants' application dated 23<sup>rd</sup> January 2026 together with the Memorandum of Appeal dated 23<sup>rd</sup> January 2026 lack merit and are struck out with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Siaya on 5<sup>th</sup> day of February 2026.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**M/s Omar.....for Appellants/Applicants**

**Ochieng.....for Respondent**

**Maureen/Kimaiyo.....Court Assistant**