



**Muiiri Coffee Estate Limited v Kenya Commercial Bank Limited & 3 others
(Civil Application 3 of 2018) [2022] KECA 572 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 572 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 3 OF 2018
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
APRIL 28, 2022**

BETWEEN

MUIRI COFFEE ESTATE LIMITED APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT

BENJOH AMALGAMATED LIMITED 2ND RESPONDENT

BIDII KENYA LIMITED 3RD RESPONDENT

DAVID G. KARIUKI T/A WATTS ENTERPRISES 4TH RESPONDENT

*(Being an application for stay pending the hearing and determination
of an intended appeal from the Ruling of the High Court of Kenya (J. B.
Havelock, J.) dated 12th February, 2014 in Milimani HCCC No. 505 of 2008)*

RULING

1. This is a notice of motion application dated 10th January 2018, brought pursuant to Rule 5 (2) (b) of the [Court of Appeal Rules](#) 2010, Sections 3 and 3A of the [Appellate Jurisdiction Act](#). The applicant seeks the following prayers:

- “ 1. Spent.
2. That pending the hearing and determination of the Applicant’s Intended Appeal from the decision of the Hon Justice Havelock delivered on 12th February 2014 in HCCC No.505 of 2008; [Muiiri Coffee Estate Ltd vs Kenya Commercial Bank Ltd & 2 others](#) by which he allowed a Notice of Motion dated 26th September,2013 by Bidii Kenya Limited, this Honourable Court be pleased to Order;



- a) A stay of execution of the Orders of the Hon. Justice Havelock made on 12th February 2014 in HCCC No.505 of 2008; *Muiri Coffee Estate Ltd vs Kenya Commercial Bank Ltd & 2 others* which allowed the Notice of Motion dated 26th September 2013 by Bidii Kenya Limited and
 - b) A stay of any further proceedings in HCCC No.505 of 2008; [*Muiri Coffee Estate Ltd vs Kenya Commercial Bank Ltd & 2 others*](#);
3. That this Honourable Court be pleased to grant any other orders that it deems fit and just.”
2. The application is supported by the grounds on the face of the Motion and the supporting affidavit of Ngengi Muigai, the applicant’s Director, sworn on 10th January, 2018. In it, it is averred that the suit was dismissed by this Court on 26th April, 2013 by an order made in Civil Appeal No. 100 consolidated with Civil Appeal No.106 of 2010 - [*Kenya Commercial Bank Limited vs. Muiri Cofee Estate Limited & 3 Others*](#).
3. The applicant being aggrieved by the said decision filed a Petition of Appeal No. 35 of 2017 at the Supreme Court which was struck out on 19th May, 2016. Notwithstanding that HCCC No. 505 of 2008; [*Muiri Coffee Estate Ltd vs. Kenya Commercial Bank Ltd & 2 Others*](#) stood dismissed by a Judgment of this Court dated 26th April, 2013 the 4th Respondent filed a motion application before the High Court in the dismissed suit, heard by Havelock, J. (as he then was) who through a ruling dated 12th February 2014 issued adverse orders of vacant possession and eviction against the applicant herein.
4. The applicant was aggrieved and filed a notice of appeal dated 13th February, 2014 on which the application under consideration is anchored.
5. When the matter came up for virtual hearing on the 21st February, 2022, the appellant represented by learned counsel, Mr. Kithinji Marete relied on his written submissions orally highlighted by counsel. The 4th respondent represented by learned counsel, Miss. Sharon Lipwop, also relied on the 4th respondent’s written submissions dated 18th June, 2021 also orally highlighted.
6. Mr. Marete submits that due to the impugned orders for vacant possession being coached as an order for eviction, the learned Judge granted the 4th Respondent a right of eviction and possession over the suit property when no court had issued such an order in favour of the 4th respondent. Neither had any been sought by way of a suit or counterclaim in any court of law. The applicant therefore stands to suffer irreparable loss and damage should it be evicted from the suit property pursuant to the said order before the intended appeal is heard and finally determined.
7. The 4th respondent opposed the application through a replying affidavit sworn by a director, Rahul Dilesh Bid. Counsel for the 4th Respondent Miss Lipwop submits that the applicant had filed a similar application dated 18th March, 2014 in Civil Application Nai No. 50 of 2014(UR 37/2014) [*Muiri Coffee Estate Limited v Kenya Commercial Bank Limited & 2 others*](#) seeking stay of execution pending the lodging, hearing, and determination of an intended appeal from the ruling and order of Havelock, J. the very relief the applicant now seeks from this Court in the application under consideration. Due to the applicant’s advocates nonattendance, that application was dismissed by this Court on 25th March, 2015. According to the 4th respondent, the filing of the application under consideration is not only an abuse of the court process but also in contravention of Rule 56(3) and (4) of this [*Court’s Rules*](#). In the



premises, this Court has no jurisdiction to hear the application and it should strike out the application and down its tools.

8. Turning to the merits of the application, the 4th respondent submits that without prejudice to the position taken above by the 4th respondent, the application is without merit. It is the 4th respondent's position that there is no arguable appeal arising from the applicant's draft memorandum of appeal as in the 4th respondent's opinion, the applicant's contention on want of jurisdiction in the High Court to grant the impugned orders is misconceived as the court had consequential jurisdiction to hear the applications for enforcement. Counsel relies on the case of *Leisure Lodges Limited v Japhet S. Asige & 2 Others* [2018] eKLR and *Mombasa Bricks & Tiles Limited & 5 Others v Arvind Shah & 7 Others* [2017] eKLR in support of its assertion that the intended appeal does not raise any arguable appeal.
9. The 4th respondent also submits that the application was filed 4 years after the delivery of the ruling by Havelock, J. The same was therefore brought after an inordinate delay in respect of which no explanation has been proffered. The appellant has also failed to demonstrate how the appeal will be rendered nugatory should it ultimately succeed when it is undisputed that the suit property was transferred to the 4th Respondent on 8th August, 2008. The applicant, therefore, has no proprietary interest in the same capable of being protected by the intended relief. The orders sought if granted will therefore be in vain in the circumstances. Counsel relied on *Mary Kavosa Kafeero & Another v Sukhdev Singh Laly* [2021] eKLR to buttress the above position.
10. We have considered this application in light of the rival pleadings and submissions and legal authorities relied upon by the rival parties in support of their opposing positions herein.
11. Our invitation to intervene on behalf of the applicant has substantively been anchored on Rule 5(2) (b) of the *Court of Appeal Rules*. Our mandate to intervene on behalf of a party under the said Rule lies where there is proof that the application under consideration is anchored on a notice of appeal. There is a notice of appeal in place dated 13th February, 2014 on which the application is anchored. We are therefore properly seized of this matter.
12. Turning to the threshold for granting relief of this nature, the approach we take and which we fully adopt is that taken in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR in it, this Court summarized law and principles applicable to determination of applications of this nature, which we fully adopt.
13. From the above exposition, it is explicit that in order for an applicant to succeed in an application of this nature, there should be demonstration first that the appeal is arguable; and secondly that if the relief sought is not granted, the appeal will be rendered nugatory.
14. Having firstly stated above that we are properly seized of the application under consideration by reason of the existence on record of a notice of appeal dated 13th February, 2014, and secondly, having set out the applicable principles on the threshold for the determination of an application of this nature, we now proceed to determine the application. However, before we delve into the merits of the application, we find it prudent to address the preliminary objection raised by the 4th respondent touching on want of jurisdiction in this Court to deal with the merits of the application under consideration deposed at paragraphs 4 – 7 of the 4th respondent's replying affidavit and replicated in paragraphs 4, 5, 6 and 7 of the 4th respondent's written submissions dated 18th June, 2021 already highlighted above.
15. The 4th respondent's replying affidavit was sworn by Rahul Delish Bid a director of the 4th respondent on 25th August, 2018. We have not traced on the record any further affidavit filed by the applicant controverting the above 4th respondent's above assertions. Neither have we traced any complaint in



the applicant's written submissions dated 21st February, 2022 nor orally in court that the applicant is a stranger to the 4th respondent's assertions either in their replying affidavit or their written submissions.

16. The position with regard to want of jurisdiction or otherwise is now crystallized. We fully adopt the position taken by this Court in the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR on the threshold for sustaining a plea of want of jurisdiction namely:

By jurisdiction is meant the authority which a court has 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. 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;"

17. In light of the above crystallized legal position, we are precluded in law to pronounce ourselves on the merits of the application under consideration until we are satisfied that our invitation to pronounce ourselves thereon is well founded both on the facts and in law.

18. In the absence of any facts to the contrary, the position we take is that indeed there was an earlier application filed by the applicant seeking the same relief which was dismissed for want of prosecution. The proper procedure the applicant ought to have taken is that set out in Rule 56(3) & (4) of this *Court's Rules*. It provides:

" 56

- 3) Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.
- 4) An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision"

In light of the above provision, coupled with the applicant's silence on the 4th respondent's assertion on this issue, our hands are tied. We cannot proceed further. We have to down our tools.

19. The upshot of the totality of the above assessment and reasoning is that the application before us is incompetent. It is accordingly struck out for want of jurisdiction with costs to the 4th respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

