**Kenya National Highways Authority v Socio Dairy and Farm Produce Ltd (Environment and Land Appeal E021 of 2024) [2024] KEELC 6007 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6007 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT AND LAND APPEAL E021 OF 2024**

**FO NYAGAKA, J**

**SEPTEMBER 20, 2024**

**BETWEEN**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT**

**AND**

**SOCIO DAIRY AND FARM PRODUCE LTD ..... RESPONDENT**

**RULING**

1. The reason why courts should be extremely vigilant and deal firmly and decisively against forum shopping is to avoid the breakdown of the rule of law which is not only a constitutional value in Kenya but a cardinal principle of life which holds society together. After all, the rule of law which is exemplified by loving genuine obedience to the law of God which He refers to as righteousness and (which brings about) justice is the foundation of the Government of God who is the Ruler of the universe (See, Psalms 97:2 - for believers in the Holy Bible). Satan the anarchist derogated from that rule of law, wanted to do forum shopping in terms of alternative obedience, and led to the misery and suffering man and all creatures experience in the current world, including war both in heaven and on earth upon being hurled to the earth (Revelation 12:7).

2. It is for this reason that parties should not purport to confer jurisdiction to a court if the law has not done so, or forum shop where jurisdiction exists but the law obligates them to be in the specific one they do not wish to be. This court has laid this reasoning as a background for the instant application for the reason given immediately hereinafter.

3. The Appellant submitted in support of the application before this court that the reason it filed the same in this court and not in the trial court was that it (Appellant) was of the view and held the fear that the the court was biased. It explained that the 'founded' fear was that it had moved the trial court to set aside the interlocutory judgment entered against it so that it could be permitted to file a defence and be heard on the merits thereof. However, on 28/08/2024 the court dismissed the application and

fixed the suit for judgment on 23/09/2024. The Appellant read bias, and, as I may put it, "'abandoned' the court to its own devices and 'rushed' to this one for 'safety.'"

4. It is on those premises that this Court points out at the outset that this Court point out that this step was at best forum shopping. It is worthy of note that even where a party is of the view that the court is biased there are procedural steps provided by law that the party is supposed to take.

5. One cardinal point is that any court that has jurisdiction to hear and determine a dispute has a duty to sit. Similarly, parties who present any matter before that (any) court have a duty to submit to the jurisdiction of the court. Even when and where they are of the view that the jurisdiction of the court ousted by law, they have a duty to appear before the court and present their argument about the ouster of the jurisdiction by way of raising a preliminary objection at the earliest instance possible so that the court determines it. And where the party is of the view that the court that has jurisdiction but is conflicted, or in any way biased or incapable of performing its judicial function, the party has the legal obligation to point it to the same court as soon as it becomes apparent that it is the position. At that point, the court has the duty to sit and determine the issue before proceeding with the matter further. It is not open for a party to imagine that the court is biased or have such information about biasness and walk away to another court or forum, while leaving the court with the matter squarely before it. Upon this, this court now proceeds to determine the instant application.

6. In this matter the Appellant filed the instant application on 13/09/2024 the same date it filed a Memorandum of Appeal. The application was brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 42 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules, Article 159 of *the Constitution* of Kenya, 2010 and any other enabling provisions of the law. It is needless to say that the phrase "any other enabling provisions of the law" is at best meaningless because if there is any such provision which in the opinion of the applicant is applicable it should cite it. There is no need to raise a red flag that is not in existence. And in regard to Order 42 Rule 2 the provision is clear that it deals with grounds that may be taken on appeal: the instant appeal is not yet ready for hearing; it is not being argued either.

7. Besides, the other provisions cited are irrelevant for purposes of the instant application. This Court needs not spend time explaining the irrelevance. Suffice it to say that Order 51 Rule 10(2) of the Civil Procedure Rules provides that "No application shall be defeated on a technicality or for want of form that does not affect the substance of the application." This Court considers citing wrong provisions herein as a technicality which may be cured by Article 159(2)(d) of *the Constitution*. But the Court does not see how the Article can form the basis of the instant application.

8. The relevant provision is Order 42 Rule 6 of the Civil Procedure Rules in so far as the Applicant seeks to stay the delivery of the judgment by the trial Court. Furthermore, this Court does not make meaning of the prayer of "arrest the judgment scheduled to be delivered..." in so far as the order sought in this Court is applicable. Bryan A. Garner (2019). Blacks Law Dictionary, 11th Edition, Thompson Reuters, St. Paul, MN, P. 136 defines "arrest of judgment" as follows,

> "The staying of a judgment after its entry, esp. a court's refusal to render or enforce a judgment because of a defect apparent from the record.
>
> At common law courts have the power to arrest judgment for intrinsic causes appearing on the record as and when the verdict differs materially from the pleadings or when the case alleged in the pleadings is legally insufficient. Today, this type of defect must typically be objected before the trial or before the judgment is entered so that the motion in arrests of judgment has been largely superseded.

Also termed as allocutus.

"An arrest of judgment under common law was the technical term describing the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record that rendered the judgment invalid." U.S. v Sisson, 399 U.S. 267, 280-81, 90 S.Ct. 2117, 2125(1970).""".

9. It is clear then that this Court being not the trial court cannot arrest the judgment of another Court. It can only stay the delivery of such a judgment if it has jurisdiction to do so and an application brought before it merits grant thereof.

10. Further, the Applicant seeks an order of setting aside the Ruling by the Honourable learned trial magistrate and substituting it with an order allowing the said application. It seeks this prayer in the interlocutory application stage of the appeal which has been filed. Worthy of note is that the instant application is supposed to be determined to pave way for the hearing of the appeal. Therefore, if the Court grants the prayer sought, what will the Appeal be about? Won't the Court have determined the same at the interlocutory stage? If the Court dismisses the Application, won't it have determined the appeal and therefore rendered it otiose, so must so that it urging the appeal would be res judicata? It will, and that would be an absurdity.

11. The finding above goes to pointing out the ever-present cry by this Court that the drafting pleadings by learned many a learned counsel in this country is greatly wanting (see. James Ndung'u Kero v Chief Land Registrar, Director of Survey & Attorney General (Environment & Land Case E046 of 2021) [2022] KEELC 1446 (KLR) (16 February 2022) (Ruling), and many more).

12. There is an appalling paucity of well drafted and pointed pleadings! This Court wonders what shall be done to stem out this problem because many clients lose cases on this simple but important issue yet they could be having good cases. Law schools, please do something! Law Society of Kenya, please do something! There is need for brothers and sisters in their nascent stage in the legal profession in this country to be nurtured by seniors and the profession. One cure is to have them undergo post-admission trainings of apprenticeship under seasoned seniors. The law needs to be amended and cater for this. This legal practice requires supervised on-the-job training, otherwise clients will continue to suffer.

13. The Appellant sought the following orders:

    1. ...spent.

    2. That that it is Honorable Court be pleased to arrest the judgement scheduled to be delivered on 23rd September 2024.

    3. That this Honorable Court be pleased to set aside their ruling by Honorable S.K. Mutai dismissing the application dated 18th March 2024 and substitute it with an order allowing the Application.

    4. ...spent.

    5. That the Applicant be allowed to leave to file and serve its statement of defence.

    6. The costs of this application being the cause.

14. The application works based on a number of grounds summarized immediately hereinafter. That judgment in Kitale CMCC ELC 159 of 2023 is scheduled for delivery on the 23/09/2023. The proceedings were conducted ex parte, resulting in an interlocutory judgment being rendered against the Appellant. As soon as the Applicant became aware of the decision they proceeded to file an

Application to set aside the judgment and get orders allowing their application for leave to file their defense out of time. The court issued directions of on the filing of submissions but they were never communicated to the Applicants. Consequently, the court delivered a ruling dismissing the application dated 18/03/2024. In its Ruling, the court disallowed the application on the grounds that the attached draft defense raised no triable issues.

15. It is their contention, therefore, that the trial court misdirected itself in dismissing the Applicant's application and condemning them without affording them an opportunity to be heard. The Applicants demonstrated to the trial court their diligent efforts to take steps in through liaising with the learned counsel for the Respondents. Unfortunately to date the Applicants advocates on record have never had audience before the trial court despite logging into the court platforms through the links provided for both the cause list. It was only on 09/09/2024 when learned counsel for their Appellant learnt that contrary to information relayed by the respective registry staff the trial court never conducts matters virtually.

16. The Applicant extensively explained the trial court the reasons behind their failure to defense in time and the efforts to rectify the same or attend court but this was futile. The Applicant's counsel had been communicating with the advocates of the Respondent. However, not even once did they mention that the court sits physically (sic) and attendances were purely in person. Notwithstanding this, the failure to file their defense within the stipulated timelines is not fatal. It's curable by dint of Order 50 Rules 6 and 7 of the Civil Procedure Rules. The court has discretion to exercise to avoid injustice being caused by inadvertent or excusable error on the part of the litigants. The trial magistrate ought to have found the Defendants a necessary party in the proceedings and allowed them to file their Defence out of time.

17. The other grounds were that by dismissing the application dated 18/03/2024 the trial court did not exercise its discretion fairly and judiciously. By not allowing the defendant an opportunities to defend their case against the Respondent it into results to a huge and incurable miscarriage of justice that cannot be compensated through damages, while on the other hand, the Respondent stand to suffer no prejudice of the orders are issued in favour of the Appellant to file their defense. Equity, fairness and public interest duty that the application be allowed.

18. The application was supported by an affidavit sworn by one, Ian Mudavadi, on the 12/09/2024. It basically reiterated the contents of the grounds in support of the application. He annexed a number of documents IM-1 a copy of the e-mail of the court, being kitalelecmcc@gmail.com. He then explained that on 19/01/2024 the Appellant filed a Memorandum of Appearance which he marked IM-2. He deponed further that subsequent to that it filed their statement of defence dated 31/01/2024 through the said email on 02/02/2024, but they did not get a response. He deposed the further that by 22/01/2024, the e-filing system of the court had not been implemented in Kitale and therefore that is why they relied on their e-mail address to file documents. The E-filing system was launched on 14/03/2024 (sic) when they learned that interlocutory judgment had been entered. They made an application dated 18/03/2024 to set aside the judgment. He annexed a copy of the application as IM-4. The court delivered a ruling on 26/08/2024, dismissing the application. He annexed a copy of the ruling as IM-5. Then he annexed as IM-6 copies of screenshots of text conversations between one of the representatives of the Applicants advocates and their representatives of the Respondents from Mobile Advocates, showing the steps they had taken about this matter and to demonstrate. He prayed that the Application be allowed.

19. Before the application could be heard the Court analyzed the application at the ex parte stage when it was presented, and called upon the parties to address it as to whether the court has jurisdiction to determine the Application pursuant to Order 42, Rule 6 of the Civil Procedure Rules.

20. When the parties made oral submissions on the issue on 17/09/2024 about the said inquiry, learned counsel for the Appellant argued that the reason why the Appellant did not file a similar application as the instant one before the trial court before it would file it in this Court was it was of the view that the court was biased.

21. Learned counsel for the Applicants argues that by the Appellant not filing a similar Application before the trial court it purported to give this court jurisdiction which it did not have. They argued further that the Applicant could only challenge the decision of 26/08/2024 by way of an appeal which had not been filed (however, this Court notes that the instant appeal is against the Ruling). Further, the application was an abuse of the process of the court as the trial court had not been rendered functus officio by the trial court delivering judgment hence this Court lacked jurisdiction to determine this matter. The instant application was a waste of time. The court dismissed the application.

22. The Court finds that the submission that the Appellant should have waited for the trial court to render itself on the judgment before moving this Court through the instant application or by appeal was a misunderstanding of the law. The correct position is that if the Appellant was aggrieved by any decision of the trial court, even at the interlocutory stage, and the Law permitted it to appeal directly or with leave of the court and it obtained the leave, it needed not to wait for the court to deliver the judgment. But the argument that the trial court was not functus officio could have made since if the Respondent argued that under Order 42 Rule 6 of the Civil Procedure Rules, the first point of call for an application of stay of execution of an order or decree, or proceedings in the trial court, is the trial court itself. This comes out clearly through the explanation of the finding of this Court as given below.

23. This turns the Court to considering the provisions and import of Order 42 Rule 6 of the Civil Procedure Rules. It is beyond question that the instant Application is in relation to an Appeal preferred against a decision of a subordinate Court as established under Article 169 of *the Constitution* of Kenya. In such circumstances the rules on stay of execution or proceedings are those under the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, 2010, as the Rules are amended in 2020.

24. The relevant provisions in the Rules in regard to appeals are Order 42 of the Rules. In particular, Order 42 Rule 6(1) provides that:

> "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."

25. This Court has, for reason of emphasis, underlined the relevant phrases in the provision in relation to the instant Application. From the Rule, an Appellant aggrieved by an order or decree of a subordinate Court from which he/she has appealed has to apply in that court first before moving the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one to a Court subordinate to the Superior Court). This would entitle him/her to move the Superior Court for stay of proceedings or execution which can either set new terms or set aside the order of the lower court. The step is not optional but compulsory.

26. Only upon fulfilment of that step shall the Superior Court be seized of jurisdiction to handle an application for stay of proceedings or execution. This is clearly provided for in the sub-Rule that "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."

27. An Appellant must never side-step the subordinate court on this important aspect and attempt to move the Appellant for orders he/she should have sought formally in that court and succeed. To do so would be akin to forum shopping and a direct call for a breakdown of the rule of law as explained above. This is because laws are enacted for the proper ordering. It would be a dark day for judges and judicial officers to encourage infractions of the law that they themselves took oath to uphold. Thus, in NICHOLAS KIPTOO ARAP KORIR SALAT VS. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013] EKLR Kiage JA of the Court of Appeal held:

> " I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

28. Also, in Vipingo Ridge Limited V Swalehe Ngonge Mpitta [2021] EKLR the learned judge held:-

> " A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.
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> 12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other."

29. Additionally, in Pius Mbithi & Another V Daniel Mutiria & Another [2017] EKLR, it was held:

> " I read and understand the rule to dictate that the first port of call by an application for stay pending appeal is the trial court and that once it considers and determines the application then an aggrieved party has the liberty to approach this court and have the orders so issued set aside. 17. Put in the context of the matter before me it is clear that the trial court has not been afforded the opportunity to hear and determine any application for stay. That being the position, and being a court of law applying the law was enacted, this court must tell the applicant that the law is for all to be observed and not be side-stepped. I am in no doubt that the application seeking stay before this court as the appellate court is prematurely made and does not lie."

30. Furthermore, the Court has been clear about the importance of procedural steps. Thus, in Mwangi V Mokaya (environment and Land Appeal 17 of 2022) [2022] KEELC 14835 (KLR) (17 November 2022) (Ruling) this Court held that:

> "A plain grammatical or textual reading of this terminology reading of the text above, particularly, the underlined phrase is to the effect that a party is not permitted to skip the must important point as the first point of call: the respective trial magistrate or judge against whose order or judgment an appeal is preferred. After he or she has moved the Court and his Application is granted or not, depending on how he views the decision, then he/she will file another application in the Court appealed to. It is upon this step having been taken that the application for stay of proceedings in the trial can be considered by the appellate Court. Absent of this step, the application filed for stay of execution or proceedings directly to the appealed to is improper."

31. In the instant Application, it has not been denied or even submitted on to the contrary that the Appellant did not move the trial court first for its determination on whether or not it was to grant an order of stay of enforcement of the orders of the trial court as made on 26/08/2024. On the contrary learned counsel admitted to the infraction. She tried to explain it by laying imaginary blame on the trial court. Missing such a step means that the instant Application was made contrary to the requirements of Order 42 Rule 6(1) of the Civil Procedure Rules. It means further that as the Respondent argued, the Application cannot stand: this Court does not have jurisdiction to determine the Application before exhaustion of the necessary steps in the subordinate court. Thus, the application is premature, incompetent and bad in law.

32. The upshot is that this Court need not consider the merits or otherwise of an Application that is incurably defectively incompetent. The Court therefore proceeds to strike it out with costs to the Respondent.

33. Since the above is the finding of the Court, in the interest of justice this Court issues a conditional order of stay of the delivery of the judgment of the trial Court scheduled for 23/09/2024 to the effect that the learned trial magistrate is ordered to stay the delivery thereof for fourteen (14) days only in order for the Appellant to move the court for appropriate orders, but in the event of the Appellant failing to move that court these orders shall lapse automatically and the trial court shall be at liberty to proceed.

34. Additionally, and in order for this Court to consider the instant appeal in terms of Order 42 Rules 2 and 11 of the Civil Procedure Rules, 2010, the Appellant is directed to file the order appealed from within the next 14 days of this order and move this Court within that period to consider the Appeal accordingly.

35. To facilitate the compliance with the direction given in paragraph *33* above, and facilitating the typing of proceedings for purposes of appeal, if sought, this Court directs further that this Ruling be served by the Deputy Registrar on the trial Magistrate, Hon. S. K. Mutai, SPM, at the earliest possible instance before the delivery of the intended judgment.

36. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM THIS 20TH DAY OF SEPTEMBER, 2024.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE.**

In the presence of:

Ms. Bala..... holding brief for Ms. Kaloki for the Appellant

Ms. Ngeywo..... for the Respondent