



Njenga v Masto Holdings Limited & 4 others; The Co-Operative Bank Of Kenya (Interested Party) (Application E020 of 2024) [2024] KESC 60 (KLR) (18 October 2024) (Ruling)

Neutral citation: [2024] KESC 60 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION E020 OF 2024

MK KOOME, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

OCTOBER 18, 2024

BETWEEN

JUDITH WANJIRU NJENGA APPLICANT

AND

MASTO HOLDINGS LIMITED 1ST RESPONDENT

PM NG'ANG'A 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

AND

THE CO-OPERATIVE BANK OF KENYA INTERESTED PARTY

(Being application for conservatory orders in the form of stay of execution and injunction against the Judgment of the Court of Appeal in Nairobi delivered on 26th April, 2024 in Civil Appeal No. 632 of 2019 (Tuiyott, Achode & Gachoka JJ.A) pending the determination of an application for grant of leave and certification to appeal)

The Supreme Court has no jurisdiction to determine an interlocutory application not based on an existing petition or reference.

The applicant sought conservatory orders from the Supreme Court to stay her eviction from L.R. No. 209/522/2, her matrimonial home of over 50 years, following a Court of Appeal judgment that revoked her title in favor of the 1st respondent. The dispute stemmed from allegations of a fraudulent charge and sale of the property. The Supreme Court dismissed the application for lack of jurisdiction under rule 31(2) of the Supreme Court Rules, 2020, holding that interlocutory applications require an existing petition. Each party was directed to bear its costs.

Reported by John Ribia



Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to determine interlocutory applications - where an interlocutory application was not supported by an existing petition - whether the Supreme Court had the jurisdiction to determine an interlocutory application that was not based on an existing petition or reference - Supreme Court Act (cap 9B) sections 3, 3A, 15B, and 23A; Supreme Court Rules (cap 9B subleg) rules 31(2) and 32

Brief facts

The applicant sought conservatory orders in the form of a stay of execution and an injunction against a Court of Appeal judgment. The judgment revoked her title to the suit land, ordered the rectification of the register in favor of the 1st respondent, and directed her eviction. The property in question was her matrimonial home for over 50 years, was allegedly charged to the interested party (Co-operative Bank of Kenya) and fraudulently sold to the 1st respondent. The Environment and Land Court had ruled in her favor, but the Court of Appeal overturned this decision.

The applicant argued that the Court of Appeal erred in its assessment of the evidence, particularly regarding the validity of the charge instrument and the statutory power of sale. She cited her age (80 years) and long-term occupation of the property, claiming that eviction would cause irreparable harm. She invoked the Supreme Court's inherent jurisdiction to grant status quo orders to prevent a miscarriage of justice while awaiting the determination of her certification application to appeal.

Issues

Whether the Supreme Court had the jurisdiction to determine an interlocutory application that was not based on an existing petition or reference.

Held

1. Under section 23A of the Supreme Court Act, the court had jurisdiction to issue an order for stay of execution, an injunction, stay of further proceedings or any other conservatory or interim orders, on such terms as the court may deem fit. An applicant must satisfy the court that the appeal was arguable and was not frivolous; that unless the orders of stay were granted, the appeal will be rendered nugatory; and thirdly, it was in the public interest that the order of stay be granted.
2. No interlocutory application could be brought before a petition of appeal or reference was lodged. An interlocutory application must be based on an existing petition or reference. Without a substantive appeal to anchor the applicant's motion, the court was bereft of jurisdiction to grant the orders sought.
3. The applicant rather than file a proper application under the relevant rules before the Court of Appeal, erroneously sought stay of execution before the Deputy Registrar of the Court of Appeal when the parties appeared for settlement of terms.
4. While the court appreciated and understood the applicant's circumstances, the court lacked the requisite jurisdiction to grant the orders sought.

Application allowed.

Orders

- i. *The applicant's Notice of Motion dated June 19, 2024 and filed on June 25, 2024 was dismissed.*
- ii. *Each Party was to bear their costs.*

Citations

Cases

Kenya

1. *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* (Application 50 of 2014; [2015] KESC 23 (KLR)) — (Explained)
2. *Board of Governors, Moi High School, Kabarak & another v Bell & 2 others* (Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated); [2013] KESC 12 (KLR)) — (Explained)



3. *Deynes Muriithi, Alexander Muchemi, Anna Cherono Konuche, Paul Kariba Kibiku & Kimani Waweru & 28 Others v Law Society of Kenya & Registrar of the High Court* (Civil Application 12 of 2015; [2016] KESC 13 (KLR)) — (Explained)
4. *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021; [2023] KESC 30 (KLR)) — (Explained)
5. *Mbugua alias George Boniface Nyanja v Iqbal (Personal representative of the Estate of the Late Ghulam Rasool Jammohamed)* (Miscellaneous Application 7 (E011) of 2021; [2021] KESC 41 (KLR)) — (Explained)
6. *Munya v Dickson Mwenda Kithinji, Independent Electoral And Boundaries Commission & Fredrick Njeru Kamundi County Returning Officer, Meru County* (Petition 2 of 2014; [2014] KESC 49 (KLR)) — (Explained)
7. *National Land Commission v Tom Ojienda & Associates & 2 others* (Application E051 of 2023; [2024] KESC 16 (KLR)) — (Explained)
8. *Thuo & another v Kenya Railways Corporation & another* (Civil Application 10 of 2017; [2018] KESC 8 (KLR)) — (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 47, 48, 50, 163(4)(b) — (Interpreted)
2. Registration of Titles Act (repealed) (cap 281) section 23(1) — (Interpreted)
3. Supreme Court Act (cap 9B) sections 3, 3A, 15B, 23A — (Interpreted)
4. Supreme Court Rules (cap 9B subleg) rule 31(2); 32 — (Interpreted)

India

Transfer of Property Act section 69 (B) (2) — (Interpreted)

Advocates

Mr Mbichire for the applicant

Dr Muthomi Thiankolu for the 1st respondent

Mr William Muthee for the interested party

RULING

Representation:

Mr. Mbichire for the Applicant

(Mbichire & Company Advocates)

Dr. Muthomi Thiankolu for the 1st Respondent

(Muthomi & Karanja Advocates)

Mr. William Muthee for the Interested Party

(TripleOK Law LLP Advocates)

1. Upon reading the Motion dated June 19, 2024 and filed on June 25, 2024 by the applicant, pursuant to articles 47, 48, 50, 163(4)(b) of the [Constitution](#), section 3, 3A and 23A of the [Supreme Court Act](#), rule 32 of the [Supreme Court Rules](#), 2020 seeking the following orders:
 1. That this Honourable Court be pleased to grant a stay of execution of the Judgment of the Court of Appeal at Nairobi delivered on the April 26, 2024 by Honourable Justices F Tuiyott,



L. Achode and M Gachoka JJ A in Civil Appeal No 632 of 2019 Mastro Holdings Ltd v Judith Njenga & 4 others pending the determination of the Certification Application filed in Civil Application SUP No E010 of 2024 before the Court of Appeal;

2. That this Honourable Court be pleased to issue a temporary injunction restraining the 1st respondent, its members, its agents, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with the suit property namely LR No 209/522/2 pending the determination of the Certification Application filed in Civil Application SUP No E010 of 2024 before the Court of Appeal;
 3. That this Honourable Court be pleased to grant such other appropriate relief as it deems fit to give effect to the orders sought herein; and
 4. That costs of this application be provided for; and
2. Upon perusing the grounds on the face of the application, the supporting affidavit by Judith Wanjiru Njenga sworn on June 19, 2024 and written submissions of even date wherein the applicant contends that she has been the registered proprietor of LR 209/522/2 (hereinafter the “suit property”) which has been the subject matter of several suits between herself, the 1st respondent and the interested party herein on allegations that the suit property was charged to the interested party and sold to the 1st respondent; she contends that the suit property comprises her matrimonial home to which she holds an original title; that the 1st respondent produced a fraudulent copy of title and which has never been verified by lands office or supported by any search nor was the original copy produced in court. After a protracted court battle before the Environment and Land Court, the Court (Bor J) found in favour of the applicant issuing a permanent injunction against the 1st respondent stopping him from harassing, evicting, trespassing upon or in any manner interfering with the suit property; upon appeal by the 1st respondent, the Court of Appeal overruled the trial court and revoked the applicant’s title, ordered for rectification of the register in favour of the 1st respondent, issued a permanent injunction against the applicant and ordered for the applicant’s eviction to be enforced by the OCS Central Police Station; the Court of Appeal granted the applicant reprieve of sixty (60) days from the date of the judgment to vacate the land, failing which she would be evicted.
3. Further, aggrieved by the decision of the Court of Appeal, the applicant lodged an application on May 17, 2024 seeking leave to appeal and certification to appeal under article 163(4)(b) of the Constitution, which application was heard on June 11, 2024 and ruling reserved for November 8, 2024; that her application seeking stay of execution and/or status quo was rejected by the Court of Appeal on account of lack of jurisdiction; that should her application for certification and eventual decision by this Court be successful, it would amount to an act in futility as the 1st respondent would have proceeded with her eviction from the suit property; that her application before this court is merited as her intended appeal is arguable urging that the Court of Appeal disregarded any attempt to interrogate the issues of validity of the instrument of charge that gave rise to the statutory power of sale and ended up validating a charge that was not registered against the title; the Court of Appeal further failed to rule as regards the operational parts of the transfer of a proprietary right or interest in property under the provisions of section 23(1) of the Registration of Titles Act and whether the provisions of section 69 (B) (2) of the Indian Transfer of Property Act are absolute and afford protection to a ‘purchaser’ even where there was a flawed process followed in the exercise of a statutory power of sale.
4. Moreover, the applicant adds that the decision by the Court of Appeal was in conflict with the dicta in the decision by this court in Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR); that due to the date given for the ruling on certification, she is left exposed to eviction pursuant to the orders in the Judgment of the Court



of Appeal as the sixty(60) days granted in the judgment expired on June 25, 2024; she adds that she is aged 80 years old and has been in occupation of the suit property for over 50 years (since 1974) and without the stay of execution she will be forcefully evicted which will cause her irreparable harm that cannot be compensated by any form of damages.

5. Additionally, the applicant acknowledges that the rules of this court, in particular, rule 31(2) of the *Supreme Court Rules*, 2020, do not permit applications to be brought before a petition is lodged; she, however, urges that this court is her saving grace to help her maintain her home and preserve the suit property; she implores the court to exercise its jurisdiction to grant conservatory status quo orders under its inherent powers to prevent a miscarriage of justice and preserve the subject matter of the intended appeal; she cites the cases of *Deynes Muriithi & 4 others v Law Society of Kenya & another* [2016] e KLR and *Board of Governors, Moi High School, Kabarak & another v Bell & 2 others* (Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated)) [2013] KESC 12 (KLR) to bolster her plea; and
6. Upon perusing the response by the 1st respondent by way of preliminary objection dated July 3, 2024 anchored on sections 15B and 23A of the *Supreme Court Act* and rules 31(2) and 32 of the *Supreme Court Rules*, 2020 and submissions dated July 5, 2024; citing the decisions in *National Land Commission v Tom Ojienda & Associates & 2 others* [2024] KESC 16 (KLR) and *Mbugua alia George Boniface Nyanja v Iqbal (Personal representative of the Estate of the Late Ghulan Rasool Janmohamed)* [2024] KESC 41 (KLR) the 1st respondent argues that the court has no jurisdiction on account of the applicant's motion being premature or unripe to the extent that the applicant's right to appeal to this Court has yet to crystallize as her application for certification or leave to appeal is still pending before the Court of Appeal; interlocutory applications in appeals to the Supreme Court can only be filed within an existing appeal; therefore the question of whether the applicant has met the legal threshold for grant of stay of execution or any other relief is equally premature or unripe; it is also argued that the two decisions the applicant relies on being *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] e KLR and *Deynes Muriithi & 4 others v Law Society of Kenya & another* [2016] e KLR are irrelevant and distinguishable as they relate to cases involving appeals as of right under article 163(4)(a) of the *Constitution*; while the case of *Board of Governors, Moi High School, Kabaraka & another v Malcolm Bell* [2013] eKLR is equally irrelevant and distinguishable as the applicant therein had already secured certification and timeously filed their Petition and Record of Appeal; this court is urged to dismiss or strike out the application, with costs; and
7. Upon perusing the preliminary objection dated July 2, 2024 and written submissions dated July 4, 2024 by the interested party in opposition to the application and on similar grounds as those advanced by the 1st respondent;
8. Having considered the totality of the applications, responses and rival arguments by the parties, We Now Opine as follows:
 - i. Guided by the provisions of section 23A of the *Supreme Court Act*, this Court has jurisdiction to issue an order for stay of execution, an injunction, stay of further proceedings or any other conservatory or interim orders, on such terms as the Court may deem fit. It is well established following our decision in the case of *Gatirau Peter Munya v Dickson Mwenda & 2 others*, SC Application No 5 of 2014, [2017] eKLR that an applicant must satisfy the Court that the appeal is arguable and is not frivolous; that unless the orders of stay are granted, the appeal will be rendered nugatory; and thirdly, it is in the public interest that the order of stay be granted.
 - ii. However, appreciating what we stated in *Aviation & Allied Workers Union Kenya v. Kenya Airways & others*; SC Application No. 50 of 2014, [2015] eKLR that where a court's



jurisdiction, is objected to by any party to the proceedings, such an objection must be dealt with as a preliminary issue, before the meritorious determination of any cause. We must therefore evaluate whether the instant application has met the set jurisdictional threshold.

- iii. Noting that in the cases of *James Mbatia Thuo & Ephantus Mwangi v Kenya Railways Corporation & Attorney General of Kenya*, SC Civil Application No. 10 of 2017 [2018] eKLR and *Boniface Mbugua v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed)*, SC Misc. Application No. 7 (E011) of 2021 [2021] eKLR this court held that interlocutory applications have no legal basis in the absence of an appeal accompanied by a memorandum of appeal. We further note that this judicial pronouncement is now enacted in the *Supreme Court Rules*, 2020 in which rule 31(2) provides that: “an interlocutory application shall not be originated before a petition of appeal or a reference is filed with the court.”
 - iv. For the above reason, no interlocutory application can be brought before a petition of appeal or reference is lodged. Put another way, an interlocutory application must be based on an existing petition or Reference. We are thus inclined to agree with the 1st respondent and interested party that without a substantive appeal to anchor the applicant’s motion, this Court is bereft of jurisdiction to grant the orders sought.
 - v. Further, the applicant states that she had sought conservatory orders of stay of execution before the Court of Appeal but the same was denied due to a lack of jurisdiction. However, having perused the record, we note that the applicant, though represented by counsel, rather than file a proper application under the relevant rules before the Court of Appeal, erroneously sought stay of execution before the Deputy Registrar of the Court of Appeal when the parties appeared for settlement of terms. We say no more on the issue.
 - vi. Consequently, while we appreciate and understand the applicant’s circumstances, the court lacks the requisite jurisdiction to grant the orders sought.
9. Accordingly, and for the reasons aforesaid we make the following orders:
- i. The applicant’s Notice of Motion dated June 19, 2024 and filed on June 25, 2024 be and is hereby dismissed;
 - ii. Each Party shall bear their costs of the Application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024.

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M.K. KOOME CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

