



**Flamingo Towers Limited & another v Homeland Media Group Ltd (Environment and Land Appeal E081 of 2021) [2023] KEELC 16151 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16151 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E081 OF 2021  
JA MOGENI, J  
FEBRUARY 28, 2023**

**BETWEEN**

**FLAMINGO TOWERS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**CITISCAPES VALUERS & ESTATE AGENTS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HOMELAND MEDIA GROUP LTD ..... RESPONDENT**

**RULING**

1. There are two (2) Applications for the Court's determination. One application dated October 7, 2022 was filed by the 1<sup>st</sup> Appellant and another dated October 26, 2022 was filed by the Respondent. The 1<sup>st</sup> Appellant's Application is supported by the affidavit of Samuel Warugu Kimotho sworn on October 7, 2022 and the Respondent's Application is supported by the affidavit of Joe Musyimi Mutambi sworn on October 26, 2022. Both Applications are opposed. The Appellant's Application dated October 7, 2022 is opposed by the Respondent through the Replying Affidavit sworn by Joe Musyimi Mutambi on October 21, 2022 and the Respondent's Application dated October 26, 2022 is opposed through the Grounds of Opposition dated November 7, 2022.

**1<sup>st</sup> Application**

2. The 1<sup>st</sup> Appellant filed a Notice of motion dated October 7, 2022 brought under Section 1A, 1B & 3A, 38 and 63(B) of *Civil Procedure Act* and Order 22 Rule 36 of the *Civil Procedure Rules 2010*. The 1<sup>st</sup> appellant/applicant is seeking the following orders; -
  1. Spent.
  2. That pending the hearing and determination of the Application, the Honourable Court do issue warrants of attachment and sale of the Respondent's movable properties in the 1<sup>o</sup> Appellant's/Applicant's premises in satisfaction of the Orders of the Court of June 9, 2022.



3. That pending the hearing and determination of the Appeal herein, the Honourable Court do issue warrants of attachment of the Respondent's movable property in the Appellant's/ Applicant's premises in satisfaction of the Orders of the Court of June 9, 2022.
  4. That the proceeds realized from the auction of the attached goods be deposited in the joint interest earning account of both counsel for the Appellants and Respondent pending the hearing and determination of the Appeal.
  5. That in the alternative to the foregoing, the Honourable Court be pleased to make an order for the Respondent to furnish security for a sum of Kshs 43,261,939.22 which is the accrued unpaid rent, service charge and car park licence fees within 14 days in satisfaction of the order of the Honourable Court of June 9, 2022.
  6. That the cost of this application be provided for.
  7. Any other relief that the Honourable Court will determine to be just, fair, equitable and convenient in the circumstances.
3. The motion is premised on the grounds that:
- a. The 1<sup>st</sup> Appellant/Applicant is the proprietor of Flamingo Towers, a commercial Building in Upperhill and the 2<sup>nd</sup> Appellant is the property manager of Flamingo Towers.
  - b. The Respondent is a tenant in the 1st Appellant's building vide a lease Agreement of January 9, 2019.
  - c. The Respondent has not paid any rent, service charge and car park licence fees since September 2019 despite occupying and enjoying the use of the 1<sup>st</sup> Applicant's premises.
  - d. Through a ruling of the Honourable Court on June 9, 2022, the Court directed that the Respondent does deposit Kshs 6,855,278.00 together with accrued unpaid rent, service charge and car park licence fees from September 27, 2019 to date in an interest earning escrow account of both counsels pending the hearing and determination of the Appeal.
  - e. The accrued rent, service charge and car park licence fees since September 27, 2019 is as follows:
    - i. Rent and Parking fees- Kshs 34,104,735.22
    - ii. Service charge - Kshs 2,301,926.00

Total = Kshs 36,406,661.00

    - a. To ensure compliance with the Honourable Court's Order of June 9, 2022, they wrote a letter dated June 27, 2022 to the Advocates of the Respondent requesting for the requisite account opening documents to facilitate the opening of the joint account.
    - b. The Respondent has never responded to the letter and neither did they forward the requested documents forcing the applicant's advocates to send another letter dated July 19, 2022. This said letter then prompted a response from the respondent's advocate. He sent a letter dated July 20, 2022.
    - c. Through the said letter, the advocate of the respondent instead of facilitating the opening of the joint account in compliance with the court order of June 9, 2022 proceeded to inquire to the contents of the order.



- d. It's now 4 months since the court gave the order and the respondent has neither participated in the process to open a joint account nor made any effort to deposit the sums as directed. The respondent has not only frustrated the opening of a joint account but they have willfully and deliberately ensured that the court order issued on September 9, 2022 is not complied with.
- e. The Respondent has failed, neglected and/or refused to participate in the opening of the joint account hence frustrating the depositing of the amounts as directed by the Court; this despite being prompted by the Appellants/Applicants Advocates.
- f. The Respondent is not intent in complying with the Court orders and the Appellants/Applicants are apprehensive that the Respondent may steal a march on them and defeat justice.
- g. In view of the foregoing, unless the Honourable Court intervenes and grants the orders sought herein the Appellants/Applicants will continue to be gravely prejudiced, oppressed and cheated out of their rightful revenue.
- h. The Respondent's conduct is an open challenge on the authority Honourable Court and smirks of impunity and it needs to be nipped in the bud at the earliest.
- i. It is in the interest of justice that the orders prayed herein be granted in the circumstances.

### **Respondent's Response**

4. The Respondent responded to the above mentioned Application through the Replying Affidavit of Joe Musyimi Mutambi dated October 21, 2022. The Respondent opposes the 1<sup>st</sup> Appellant/Applicant's Application by stating that:
  - a. The application filed is baseless and a mere abuse of the court process and should be dismissed with costs.
  - b. Since lodging the unmerited appeal herein, the applicant has filed 3 applications dated December 9, 2020, October 12, 2021 and this present one dated October 7, 2022 and all of them have nothing substantive.
  - c. The applicant has abandoned its appeal. Further, that there is no judgment in place against the respondent to warrant issuance of warrants of attachment. All the applications in the lower court were heard on merit and were all dismissed with costs vide ruling dated November 25, 2020 and ruling dated September 24, 2021.
  - d. The orders that the appellant appealed against are still in force, the same have never been set aside or reviewed or stayed. The appellant should comply with the orders of the lower court that restrained them from interfering or and frustrating the respondent. The said orders were obtained through a vigorous court trial where all the issues were determined.
  - e. There must be consistency in issuance and enforcement of the orders. The appellant herein is filing false averments in court.
  - f. The application herein offends the clear provision of Article 50 and 48 of *the Constitution* where a litigant is entitled to fair trial and clear access to justice.



- g. The appeal herein has never been prosecuted but the appellant has found side or/and back channel where now they purport to execute nonexistent orders herein.
- h. The Respondent urges the court to review or and set aside the orders dated June 21, 2022 that are clearly causing confusion in this matter.
- i. According to the history of this matter, sometime in August 2020, the respondent while in lawful occupation of the office space on 9th floor at Flamingo Towers owned by the Is applicant was denied access to the said office space. That apart from denying the respondent's employees, clients entry to the office the applicants switched off the respondent's supply of if electricity to its business paralyzing all operations.
- j. Due to the Massive business loss and infringement of his rights and damages that he had suffered he decided to seek relief from the court vide application dated August 12, 2020 and sought various orders. Those were equitable orders arising from an illegality that was being perpetrated by the applicants. The subject matter was blocking access to his office and the trial court had jurisdiction to determine that.
- k. The issue that triggered the suit in the lower court was a threat to evict the respondent from the suit property where the applicant was demanding payment of Ksh 10, 690,228 .00. That the applicants filed their response to the above stated application through the firm of Muthaura Mugambi Ayugi & Njonjo Advocates where the issue of jurisdiction was never raised. There is no defence of counter claim in the matter despite the applicants acknowledging receipt of all the pleadings.
- l. The lower court made a determination that the appellant was selling the office space, whoever they failed to generate a sale agreement although they had received Kshs 4,500,000; plus Kshs 2,713,275 plus Kshs 900,000 making a total of Kshs 8,113,275
- m. The applicants herein are not justified in demanding such a colossal amount of money from the respondent. There is no order from any court of law that alludes to the amount that the applicants demand from the respondent.
- n. Their letter dated July 20, 2022 sought to seek clarity as to which court order had ordered deposit of Kshs 42,598,479.54
- o. The applicants have not indicated the manner in which they arrived at the amount they are demanding for. There is no valid lease between the parties herein. The respondents have not provided any documentation to support their calculations. Their demands are baseless.
- p. There is a lot of malice and bad faith in the application herein. The same is actuated by bad faith, seeking an order to attach movable assets of the respondent before the appeal is heard and keep the proceeds in joint interest earning account of the advocates herein is not only bad in law but clear manifestation of malice and bad faith.
- q. The appellant wants to close the respondent business contrary to the order of the lower court and even before the unmerited appeal herein is heard.
- r. There are no certified orders of the lower court have been availed to the appellate court herein, no records of appeal have ever been filed herein, and therefore we have been advised by our advocates on record that the application herein is scandalous and vexatious.



- s. The figure the appellant is seeking orders to enforce is not there. There is no particular ground in the Appeal seeking an order or counterclaim for the respondent to pay such colossal sum of money.
- t. The appellant/applicants have not taken any steps to bring any clarity on the amount of Kshs 42,598,479.54 that they are demanding.
- u. They have also not provided any order that directs the respondent to deposit such an amount.
- v. The respondent is not obligated to act on unsubstantiated demands made by the applicants/appellants. The respondent herein can only be guided by orders made by a court of competent jurisdiction.
- w. The orders sought by the appellants/applicants for this court to issue warrants of attachment are unjustified since they have no such claim against the respondent.
- x. The appellant/applicants have not taken any steps to prosecute this appeal. Instead, they are engaging in sideshows by filing baseless applications.
- y. The Appeal herein is based on jurisdiction, the prayers sought in the application herein have Nothing to do with the jurisdiction or and the substance of the matter. The respondent urges the court to dismiss the same with costs.
- z. The application dated October 7, 2022 has no merit and the same is frivolous, vexatious, and bad in law and clear abuse of the court process. It is only fair and in the interest of justice that it be dismissed with costs.

#### **Respondent's application - 2<sup>nd</sup> application**

5. The Respondent filed a Notice of Motion Application dated October 26, 2022 brought under Section 1A, 1B and Section 3A of the *Civil Procedure Act*, Order 43 Rule 35 (1) and (2) and Order 50 Rule 1 of the *Civil Procedure Rules*. The Respondent seeks for orders that:
  - a. Spent.
  - b. That the Honourable court be pleased to mark the Memorandum of Appeal filed on October 8, 2021 as a nullity.
  - c. That the appeal be dismissed for want of prosecution as the appellant has not been diligent in prosecuting this matter and has not shown sufficient reason for its complacency.
  - d. Costs be provided for.
6. The Application is based on grounds that:
  - i. The appellant has failed to move the court to set a hearing date for a period of over one year.
  - ii. No steps have been taken by the plaintiff in this matter. Summons for directions have not been taken out and no directions have been taken since that time.
  - iii. The appellant has shown no interest in the matter as exhibited by its complacent behavior.
  - iv. The appellant filed the appeal on October 8, 2021 and from that date has not taken any further steps to prosecute this matter.



- v. The appellant has not given any reasons as to the inordinate delay in moving the court to set this appeal on action.
- vi. The appellant has failed to move the court to set a hearing date in the appeal above for more than three months since the memorandum of appeal was filed. The memorandum of appeal was filed on October 8, 2021. It has been way over 3 months since the appeal was filed.
- vii. According to Order 42 Rule 35(1) if the [Civil Procedure Rules](#), unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be, at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
- viii. Order 43 Rule 35(2) also gives this court jurisdiction to dismiss this suit for want of prosecution after one year as it states that. "If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."
- ix. The delay is prolonged and inexcusable. Instead of prosecuting this appeal, the appellants have engaged this court in sideshows.
- x. The applicant has been engaging this court in frivolous side shows and has filed 3 applications dated December 9, 2021, October 12, 2021 and one dated October 7, 2022. All of them have nothing substantive.
- xi. It would be in the interests of justice to dismiss this appeal as the respondent will suffer an injustice if the appeal is not dismissed.
- xii. For the reasons stated above, this appeal warrants to be dismissed for want of prosecution. That this is a court of law, we urge the same to uphold the rule of law and dismiss the appeal herein for want of prosecution.

### **1<sup>st</sup> appellant/respondent's response**

- 7. The 1<sup>st</sup> Appellant responded to the above mentioned application through grounds of opposition dated November 7, 2022. The 1<sup>st</sup> Appellant opposes the Respondent's Application on grounds that:
  - i. The application is fundamentally defective, bad in law, a nullity and a complete abuse of the court process; whose sole intention is to derail, obstruct and circumvent the hearing of the Application dated October 7, 2022 by the Appellants.
  - ii. The Honourable Court's jurisdiction is wrongly invoked as the provisions relied upon by the Respondent being Order 43 Rule 35(2) do not exist in the [Civil Procedure Rules, 2010](#) and the quoted text is provided under Order 42 Rule 35(2) of the [Civil Procedure Rules 2010](#).
  - iii. The application is misconceived and untenable in law as the Respondent has assumed, usurped and arrogated to itself the powers of the Deputy Registrar by purporting to invoke the jurisdiction of the Court under Order 42 Rule 35(2).
  - iv. The Application is incompetent as only the Deputy Registrar is permitted by the rules to invoke the particular provisions of the rules after satisfaction that the Appellant(s) is not interested to prosecute his/her Appeal.
  - v. The Application is premature considering there is a date before the Deputy Registrar on November 14, 2022 to confirm the position on the status of filing of the Record of Appeal



and transfer of the lower Court file to the Environment and Land Court registry; that was to be the right forum for the Respondent to raise the matters raised herein.

- vi. The Application can only be placed before the Deputy Registrar who thereafter if satisfied shall list the Appeal before a judge in chambers for dismissal as contemplated by the *Civil Procedure Rules, 2010*; the Respondent cannot purport to appropriate the Deputy Registrar's powers and duties.
- vii. The Application offends the holding of the Court of Appeal in *Speaker of the National Assembly v James Nienga Karume* [1992] eKLR where the Court of Appeal observed that procedures proved under statutory law must be strictly followed and/or adhered to.
- viii. Accordingly, the Appellants seek that the Application dated October 26, 2022 be dismissed with costs.

### **Submissions**

8. The Court gave directions on filing of submissions on November 10, 2022. The 1<sup>st</sup> Appellant filed its submissions to both applications are dated November 18, 2022 and filed on the even date. The Respondent filed its submissions to both applications are dated November 28, 2022 and filed on November 29, 2022. I have considered them.

### **Analysis and determination**

9. Having considered the two motions together with their respective supporting affidavits, annexures, rival affidavit, grounds of opposition and written submissions, this court is of the considered view that the issues falling for determination are:
  - a. Whether the appellant's motion dated October 7, 2022 is merited.
  - b. Whether the respondent's motion dated October 26, 2022 is merited

### **Whether the appellant's motion dated October 7, 2022 is merited.**

10. The 1<sup>st</sup> Appellant filed an application seeking the court to issue warrants of attachment and sale of the Respondent's movable properties in the 1<sup>st</sup> Appellant's premises I satisfaction of the orders of the Court of June 9, 2022 among other orders.
11. A glance at this application shows that it is essentially one for execution of a decree. Execution is the process of enforcing a decree and or order by a court of law. This is provided for under Order 22 of the *Civil Procedure Rules*. A decree is a final determination of and or adjudication of a matter by a court of competent jurisdiction. A Decree Holder may apply to court to execute a decree against a Judgment Debtor either orally or through a written application, as per Order 22 Rule 6 of the *Civil Procedure Rules*. Written applications are made where the mode of execution is for attachment of immovable and or movable property or attachment of debts.
12. There is no decree arising from the ruling delivered on June 9, 2022. The 1<sup>st</sup> appellant is purporting to execute an order delivered by this court. The procedure for warrants of attachment is provided for by the law. This application is premature. An order for warrant of attachment is given where Judgment has been entered in a suit.
13. The court has considered the application, and the submissions by the parties. It is not disputed that there is no judgment against the respondent herein and a decree to be satisfied. I agree with the



submissions of the respondent. The order of June 9, 2022 did not give a specific timeline in which it was to be executed. The order reads as follows:

“the Respondent be and is hereby ordered to deposit Kshs 6,855,278.00 together with accrued unpaid rent, service charge and car park licence fees from September 27, 2019 to date in an interest earning escrow account of both Counsel for the Applicants and Respondent pending the hearing and determination of the Appeal.”

14. In *Black's Law Dictionary*, 11<sup>th</sup> Edition, “pending” is defined as “remaining undecided; awaiting decision”. Based on this definition, the 1<sup>st</sup> Appellant had no reason to make this application seeking the Court to issue warrants of attachment.
15. For the above reasons, the Application dated October 7, 2022 lacks merit and is hereby dismissed. No order as to costs.

#### **Whether the Respondent's motion dated October 26, 2022 is merited**

16. The issue for determination here is if the memorandum of appeal should be struck out and the appeal dismissed for want of prosecution.
17. The memorandum of appeal was filed on October 1, 2021. Since then the only things that have transpired is the filing of various applications. Order 42 rules, 11, 12 and 13 of the *Civil Procedure Rules* set out the processes to be followed by an appellant and the court after the filing of an appeal, in the following terms: -
  11. upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a Judge for directions under section 79B of the Act.
  12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.
  13. 1) on notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a Judge in chambers.”
18. Section 79B of the *Civil Procedure Act* provides that:-

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C reject the appeal summarily.”
19. The 1<sup>st</sup> Appellant herein has explained the reason behind the delay in filing a record of appeal was occasioned by processes beyond their control, to wit, typing of proceedings. That the Milimani Magistrate's Court Registry recently communicated on November 8, 2022 that the proceedings were ready for collection and the same were collected promptly. I note that the Record of Appeal was filed on November 18, 2022.
20. Order 42 rule 35(1) of the *Civil Procedure Rules* provides for the respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within 3 months after the giving of directions under rule 13 of the same Order, the appellant shall not have set the appeal for hearing.



Such directions have not been given in this appeal, which has not even been admitted to hearing. The applicant cannot as such invoke the provisions of Order 42 rule 35(1) in its favour.

21. In the case of *Kirinyaga General Machinery v Hezekiah Mureithi Ileri* HCCC No 98 of 2008 the Court observed thus:-

“It is clearly seen from that rule that before the respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given.”

22. This court is however not powerless when dealing with dismissal of appeals for want of prosecution under the provisions of Order 42 rule 35(2) of the *Civil Procedure Rules*. This procedure has however not been followed by the applicant to move this court for dismissal of the appeal.

23. In *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others* [2011] eKLR, a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A) observed that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of *the Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

24. Although the foregoing case dealt with the striking out of the notice of appeal on the basis that it was served on the respondent out of time and without leave of the court, the jurisprudence it laid out is that the court in exercising its discretion to strike out a document, or like in this case, an appeal, has to out-weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party.

25. The memorandum of appeal was filed on October 1, 2021. The appeal has been stalled by the many applications that were being filed. The directions under rule 13 have not been given. The record of appeal was filed on November 18, 2022. The prejudice that the 1<sup>st</sup> Appellant is likely to suffer if this appeal is dismissed might be graver than the prejudice that the respondent/applicant will suffer if the appeal is ordered to proceed. In the interest of justice, this court will give an opportunity to the respondent to ensure that the appeal is set down for directions and hearing.

26. I decline to grant the prayers sought to strike out the memorandum of appeal and to dismiss the appeal for want of prosecution. No order as to costs.



## **Disposition**

27. Ultimately, the upshot is that I find no merit in the both applications dated October 7, 2022 and October 26, 2022 and the same are dismissed with no order as to costs.
28. Due to the nature of this case, the Court is willing to fast track the appeal in the following terms: -
  - a. The Respondent to file its response to the Appeal and serve within 14 days from the date hereof.
  - b. The Appellant to file a response, if need be, together with their written submissions and serve within 14 days from the date of service.
  - c. The Respondent to file and serve its written submissions within 14 days upon service.
  - d. The Appellant has leave to file submissions in response on points of law, if need be, within 3 days from the date of service.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF FEBRUARY 2023.**

.....

**MOGENI J**

**JUDGE**

**In the virtual Presence of:-**

Mr Manyara for the Appellant/Applicants

Mr Katunga Mbuvi for the Appellant/Respondent

**Ms. Caroline Sagina: Court Assistant**

