



REPUBLIC OF KENYA



**Kambi v Karisa (Civil Appeal 130 of 2023) [2024] KEHC 3141 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3141 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 130 OF 2023  
SM GITHINJI, J  
MARCH 20, 2024**

**BETWEEN**

**KAHINDI KAMBI ..... APPELLANT**

**AND**

**PETER KARISA ..... RESPONDENT**

*(Being an Appeal from the Ruling of CMCC No. E008 of 2022 at Malindi by the Honourable James Ongondo – SPM delivered at Malindi on the 23rd August, 2023)*

**RULING**

1. On 23<sup>rd</sup> August 2023, the subordinate court delivered a ruling in favour of the Respondent herein, allowing the Respondent’s application dated 25<sup>th</sup> February 2022. In that application, the Respondent had sought orders *inter alia* that the Appellant be committed to civil jail for contempt of court orders restraining the latter from interring the remains of his son on a land parcel known as Kilifi/Mtondia/156.
2. Aggrieved by that ruling, the Appellant moved to this court on appeal. He filed a memorandum of appeal dated 24<sup>th</sup> August 2023 and a Notice of Motion dated 28<sup>th</sup> August 2023 for orders: -
  1. Spent.
  2. Spent.
  3. Spent.
  4. Pending hearing and determination of this appeal, the Hon. Court be pleased to issue an order for stay of orders issued on 23<sup>rd</sup> August 2023.
3. The application was premised on the grounds stated on the face of it and supported by the affidavit sworn by the Appellant on the even date. The Appellant deposed that the Respondent was in the



process of executing the orders issued on 23<sup>rd</sup> August 2023 and was apprehensive that he will be prejudiced if stay is not granted.

4. On 30<sup>th</sup> August 2023, the court struck out the above application for non-compliance for being filed without leave to be admitted for hearing during the court vacation. This prompted the Appellant to file another application dated 31<sup>st</sup> August 2023 seeking the following orders: -
  1. Spent.
  2. Spent.
  3. The Hon. Court be pleased to review orders issued on 30<sup>th</sup> August 2023 which struck out the Applicant's application dated 28<sup>th</sup> August 2023.
5. This application was based on the ground that it was an oversight on the part of the court to conclude that there was no application for leave to be admitted during the court vacation, yet the same had been filed alongside the main application on 28<sup>th</sup> August 2023. In support of the application was an affidavit sworn by Mr. Philip Michira, the Appellant's advocate, on 31<sup>st</sup> August 2023.
6. In response, the Respondent filed a Replying Affidavit and Notice of Preliminary Objection on 12<sup>th</sup> September 2023.
7. In the Notice of Preliminary Objection, the Respondent sought that the above two applications be struck out on the grounds that: -
  - a. That the Applications are contrary to the provisions of Order 42 Rules 1 and 13 on filing of an appeal.
  - b. The Appellant cannot file an application directly in an appeal without a memorandum of appeal and record of appeal.
8. In his replying affidavit, the Respondent gave a narration of the events culminating to this appeal which I need not reproduce at this stage since the main application before me is one for stay pending appeal. In relation to the application for stay pending appeal, the Respondent deposed that if stay is granted, he is likely to suffer substantial loss as his constitutional rights to ownership of property will continue to be infringed. He added that the Appellant has failed to establish any legitimate proprietary rights over the suit property hence any orders issued in his favour will be in vain. He urged the court to dismiss the application.
9. This court directed that both applications and PO be canvassed by way of written submissions. I have carefully considered the applications, affidavits and annexures thereto, submissions and authorities relied upon by both parties. I find that the following issues arise for determination: -
  - i. Whether the preliminary objection is merited?
  - ii. Whether the orders issued on 30<sup>th</sup> August 2023 which struck out the Applicant's application dated 28<sup>th</sup> August 2023 should be reviewed.
  - iii. Whether the orders issued by the lower court on 23<sup>rd</sup> August 2023 should be stayed pending hearing and determination of the present appeal.



## Analysis and Determination

### Issue i

10. A Preliminary Objection is defined in the Black's Law Dictionary 10<sup>th</sup> Edition as: -

“In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary....”

11. The above position has been made clear in the famous case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 698 where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

12. The objection as raised by the Respondent does not in my view fit the above description. The Respondent argued in his submissions that there was no memorandum of appeal filed prior to the Appellant's applications herein, and if it was at all filed, he was not served with the same. Firstly, I have perused the file, there is a copy of a memorandum of appeal filed on 25<sup>th</sup> August 2023. Secondly, I find that to determine the issue of service would require interrogation of some evidence hence rendering the preliminary objection as raised not on a pure point of law. As raised, the PO lacks merit, it is hereby dismissed.

### Issue ii

13. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

(1). Any person considering himself aggrieved-

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of



such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

14. The above rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states: -

Any person who considers himself aggrieved-

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act.

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

15. The Court of Appeal in *National Bank of Kenya v Ndungu Njau*, Civil Appeal No. 2111 of 1996, held that;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence (sic) and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law”.

16. In the present case the application dated 28<sup>th</sup> August 2023 was struck out on 30<sup>th</sup> August 2023 by Onginjo J. The learned judge observed that the application had been filed during the high court recess without leave of admission. I have perused the court records; I agree with the Appellant’s submissions that this was an error apparent on the face of the record. The Appellant indeed filed an application for leave alongside the main application. For this reason, I will allow the application dated 31<sup>st</sup> August 2023. The result is that the application dated 28<sup>th</sup> August 2023 is reinstated.

17. Having said so, I will now consider the main application, which is the one dated 28<sup>th</sup> August 2023. This takes me to issue no. iii.

### **Issue iii**

18. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6 of the *Civil Procedure Rules* as follows: -

1. 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.
2. No order for stay of execution shall be made under subrule (1) unless—
  - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
19. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 guided on how a court should exercise discretion and held that: -
- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements...
- The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
20. It follows therefore that the authority to grant stay of execution as provided under Order 42 rule 6 above, is a discretionary power exercised only when an applicant satisfies the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
21. In the present case, the ruling subject to the appeal was delivered on 23<sup>rd</sup> August 2023, approximately five days before the present application was filed. This in my view is not unreasonable delay.
22. On substantial loss, I am guided by the decision cited to me by the Respondent, *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR where the Court described substantial loss as follows: -
- “... the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. .... Under Order 42 of the *CPR* and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasized the centrality of substantial loss thus:
- “...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
23. To the Appellant, the dispute between the parties herein touches on ownership of the suit property and that there is a pending suit before the environment and land court on the same. He argued that since the said issue is yet to be determined, he will be prejudiced if the orders sought herein are denied.
24. The orders sought to be appealed entail an order for committal to civil jail and exhumation of the Appellant’s son’s body interred on the suit property. In my view, these are special circumstances warranting this court’s intervention, bearing in mind that the Appellant demonstrated that there is



a pending suit before the ELC over ownership of the suit property herein; this averment was not challenged. In the circumstances, I am satisfied that an order for stay of the impugned ruling is necessary at this point.

25. In any event, it is not disputed that the two parties herein reside and have been on the same suit property for a long time. The Appellant first buried his kin in 2013. In light of this, I do not see any prejudice that will be suffered by the Respondent if stay is granted at this stage.
26. The outcome is that the application dated 28<sup>th</sup> August 2023 is hereby allowed. Costs to abide the outcome of the appeal.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Mr Kilonzo for the Respondent
2. Ms Ruttoh holding brief for Mr Michira for the Appellant

