



**Brandworld Communications Ltd & 2 others v Improtech Kenya Ltd & another  
(Civil Appeal E719 of 2021) [2022] KEHC 9959 (KLR) (Civ) (1 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 9959 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E719 OF 2021**

**CW MEOLI, J**

**JULY 1, 2022**

**BETWEEN**

**BRANDWORLD COMMUNICATIONS LTD ..... 1<sup>ST</sup> APPLICANT**

**PROCHEM (EA) LTD ..... 2<sup>ND</sup> APPLICANT**

**SOLARIS DEVELOPMENT COMPANY LTD ..... 3<sup>RD</sup> APPLICANT**

**AND**

**IMPROTECH KENYA LTD ..... 1<sup>ST</sup> RESPONDENT**

**DECORITE (EA) LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The motion dated November 1, 2021 by Brandworld Communications Ltd, Prochem (EA) Ltd and Solaris Development Company Ltd (hereafter the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Applicant/Applicants) seeks several orders, including an order to stay execution of the ruling and order made on the October 29, 2021 pending hearing and determination of the Applicants' appeal and an injunction to restrain the 1<sup>st</sup> Respondent and any other person acting on their behalf from attaching any property belonging to Applicants in execution of the decree dated November 23, 2020 and issued in Milimani CMCC No. 7154 of 2019 in favor of Improtech Kenya Ltd (hereafter the 1<sup>st</sup> Respondent). The motion is expressed to be brought under Section 3A & 75(1)(h) of the *Civil Procedure Act*, and Order 42 Rules 6, Order 43 Rule 1(k) of the *Civil Procedure Rules*.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Kirimi Rintaugu who describes himself as a director of the Applicant companies. He deposes the Applicants' objection to attachment in execution of the above decree was dismissed on October 29, 2021 and the Applicants' properties are under imminent risk of attachment; that being aggrieved with the said



- ruling the Applicants have preferred an appeal; that he is reasonably apprehensive that if the Applicants properties are sold in satisfaction of the 1<sup>st</sup> Respondent's decree, and the appeal succeeds, the 1<sup>st</sup> Respondents may be unable to refund the decretal sum and that if execution were to proceed the intended appeal would be rendered nugatory.
3. The 1<sup>st</sup> Respondent opposes the motion by way of a replying affidavit sworn by Dronavalli Bharadwaz, a director of the 1<sup>st</sup> Respondent who in addition to raising legal objections to the motion swears that the Applicants' supporting affidavit does not demonstrate the requisite conditions for stay of execution pending appeal; that 1<sup>st</sup> Respondent is a reputable company with over thirty years' experience in its line of work and able to refund the decretal amount in the event that the appeal is successful; and that if the stay or injunctive orders sought are granted, the 1<sup>st</sup> Respondent will be highly prejudiced having been forced to pay monies to the Kenya Revenue Authority (KRA) on account of the 2<sup>nd</sup> Respondent's failure to honor its tax obligation to the KRA.
  4. The motion was canvassed by way of written submissions. Counsel for the Applicants argued that the impugned ruling having been delivered on October 29, 2021 the instant motion and appeal were filed on November 1, 2021, the Applicant moved the court timeously. On substantial loss, counsel reiterated the Applicants' apprehension that the 1<sup>st</sup> Respondent may be unable to refund any monies recovered in execution in the event of the appeal succeeding, thereby rendering the appeal nugatory. Citing the oft-cited decision of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 (UR), counsel urged the court to allow the motion.
  5. On behalf of the 1<sup>st</sup> Respondent counsel cited the decisions in *Jean Francois Louis Raymond Damon v Director of Public Prosecutions & 3 Others* [2016] eKLR and *George Ole Sangui & 12 Others v Kedong Ranch Limited* [2015] eKLR to argue that the trial court's dismissal of the objection application was a negative order incapable of being stayed by this court. Further citing the applicable principles under the provisions of Order 42 Rule 6 (2) of the *Civil Procedure Rules* as pronounced in the decision of *Visbram Ravji Halai v Thornton & Turpin (1963) Ltd* [1990] eKLR it was submitted that the Applicants have not satisfied the legal requirements for the grant of stay of execution pending appeal. He relied on several decisions, including *Henry Sakwa Maloba v Boniface Papanda Tsabuko* [2020] eKLR to assert that the Applicants have not demonstrated substantial loss.
  6. Further citing the case of *Susan Njeri Mungai t/a Supertag General Contractors & Anor v Amber Universal Security BV* [2021] eKLR he asserted that no offer for security was given by the Applicants. In addressing question whether the appeal will be rendered nugatory if the orders sought are denied, he relied on among others the case of and asserted that the 1<sup>st</sup> Respondent had demonstrated its ability to refund the decretal sum in the unlikely event that the appeal is successful. He urged that the motion be dismissed with costs.
  7. The court has considered the material canvassed in respect of the motion. In the court's view, the motion stands or falls on the competence of the appeal herein, a matter that was not addressed by any of the parties. The Applicant's motion is primarily based on Order 42 Rule 6 of the *Civil Procedure Rules*. Section 75 (1) (h) of the *Civil Procedure Act* provides that an appeal lies as of right from any order made under the rules from which an appeal is expressly allowed by the rules. Order 43 of the *Civil Procedure Rules* (CPR) makes provision for appeals from orders of the lower court. The appeal herein emanated from objection proceedings taken in the lower court by the Applicants pursuant to Order 22 Rules 51 to 55 of the *CPR*.
  8. Orders made under these provisions are not included in Order 43 Rule 1 of the *CPR* as among those from which an appeal lies as of right. Moreover, the provisions of Order 43 Rule (1) (k) of the *CPR*



cited in the Applicants' motion do not relate to appeals from objection proceedings. The rest of Order 43 [CPR](#) provides that:

- “(2) An appeal shall lie with the leave of the court from any other order made under these Rules.
- (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
- (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”

9. It is trite that the question whether an appeal lies as of right or by leave goes to the jurisdiction of the appellate court to entertain an appeal before it. I associate myself with the sentiments of Sewe J, in [Edith Wairimu Njoroge v Brooks Holdings Co. Ltd](#) [2018] eKLR that where an appeal does not lie as of right from an order but only with leave, such leave “was a prerequisite to the assumption of jurisdiction by this court on appeal.”
10. In [Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others](#) [2013] eKLR the Court of Appeal held that the issue relating to the existence of the right of appeal goes to the appellate court's jurisdiction, is a fundamental matter and that a question regarding the absence of statutory conferment of such right is not a mere technicality. The same court held in [Peter Nyaga Muvake -v- Joseph Mutunga](#) [2015] eKLR, that:

“Without leave of the High Court, the Appellant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the [Civil Procedure Act](#) and Order 43 of the Civil Procedure Rules; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave, which has not been sought and obtained is dead in the water.”

11. It is evident on a plain reading of Order 42 Rule 6(1) of the [CPR](#) that an order to stay execution pending appeal as herein sought presupposes the existence of a competent or valid appeal. Equally, Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) under which injunctive relief may be granted states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).

12. There is no evidence that the Applicants had obtained the requisite leave from the subordinate court prior to filing this appeal and motion. As matters stand therefore, the appeal is invalid, and the appellate jurisdiction of this court has not been properly invoked. The Applicants' motion must fail and is accordingly struck out with costs to the 1<sup>st</sup> Respondent. The court further directs the Applicants to take steps to regularize the appeal, failing which it also will automatically stand as struck out at the expiry of thirty (30) days from today's date.



**DELIVERED AND SIGNED ELECTRONICALLY IN OPEN COURT AT NAIROBI ON THIS 1<sup>ST</sup>  
JULY 2022**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicants: Ms. Njoroge h/b for Mr. Ombati

For the 1<sup>st</sup> Respondent: Ms. Ndegwa

C/A: Carol

