



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki & 2 others v Kogi (Civil Appeal 53 of 2021)
[2023] KEHC 1141 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 1141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 53 OF 2021
DKN MAGARE, J
JANUARY 23, 2023**

BETWEEN

JOSEPH KARIUKI 1ST APPELLANT

MICHAEL NJOROGE 2ND APPELLANT

TIMOTHY KARWE 3RD APPELLANT

AND

JOHN WAMUTEGI KOGI RESPONDENT

(Being an Appeal against the Ruling by Honourable E Nderitu (Chief Magistrate) in Molo CMCC No 398 of 2009 delivered on April 27, 2021)

RULING

1. This matter came up for hearing today morning for Notice to Show Cause why the appeal should not be dismissed for want of prosecution.
2. I perused the file and asked the learned counsel for the appellant whether an appeal lies in law from an application for stay pending appeal from the lower court.
3. Learned counsel was convinced that an appeal can lie. I prompted him on the contents of order 42 but requested for directions.
4. This was prompted by the dictates of order 42 rule 6 (1) which provides:- “No appeal of second Appeal shall operate as stay of execution or proceedings when a decree or orders 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 to which such appeal is preferred shall be at liberty, on application be made to consider shall an application and to matter such order thereon as may to it seem just...”



5. *Ipsa facto*, when aggrieved by an application for stay pending appeal, recourse is to make another application in the court appealed to. There is no basis for appealing against a decision on stay. This is even more pertinent as regards the dictates of order 43 rule 2 (w). An order made under order 42 rule 6 is not among the orders that are made as a matter of right.
6. Therefore, this appeal being an appeal from an order made pursuant to order 42(6) the same is untenable and cannot be sustained.
7. Consequently, the entire appeal is struck out. Given that the respondent did not appear nor defend this appeal, the order that commends itself in terms of section 27 of the *Civil Procedure Act*, is to order that there be no order as to costs.

Dated, issued and delivered at Nairobi, *ex tempore*, virtually this 23rd day of January, the year of our Lord Two Thousand and Twenty Three.

HON MR JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, NAIROBI

Delivered virtually in the presence of;

Miss Mwangi for the Appellant

Nancy Bor, Court Assistant.

JUDGE

23RD JANUARY, 2023

