



REPUBLIC OF KENYA



**Kariuki v Munyithya & 3 others (Civil Appeal E030 of 2021)  
[2023] KEHC 21856 (KLR) (21 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21856 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E030 OF 2021  
OA SEWE, J  
AUGUST 21, 2023**

**BETWEEN**

**GRACE MARY NJAMBI KARIUKI ..... APPELLANT**

**AND**

**MUTUA MUNYITHYA ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL NGIGI NGINTONGO ..... 2<sup>ND</sup> RESPONDENT**

**DANIEL NGUGI GITONGA ..... 3<sup>RD</sup> RESPONDENT**

**PATRICK MWALOLO ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the Court for determination is the Notice of Motion dated September 14, 2021. It was filed by the 1<sup>st</sup> respondent, Mutua Munyithya, pursuant to Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 43 Rules 1, 2, 3 as well as Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. The 1<sup>st</sup> respondent thereby seeks orders that:
  - (a) The Court be pleased to strike out the Appeal for want of jurisdiction;
  - (b) The costs of the application and the Appeal be granted to the 1<sup>st</sup> respondent.
2. The application was premised on the grounds that the Appeal was filed without the leave; and therefore that this Court has no jurisdiction to entertain it. The application was supported by the affidavit of Mr. Joseph Karanja Kanyi, sworn on September 14, 2021. He deposed that upon the ruling dated March 5, 2021 being delivered by Hon. Kiage, SRM, the appellant neither sought nor was she granted leave to appeal from the said ruling; yet the provision of the law under which the impugned ruling was made required that leave to appeal be granted.



3. The appellant opposed the application and filed Grounds of Opposition on April 11, 2022 contending that:
  - (a) The application is an abuse of the process of the Court;
  - (b) The application is misconceived and lacks legal basis;
  - (c) The application has been overtaken by events and intervening circumstances since the Memorandum of Appeal was filed within the prescribed timelines;
  - (d) The application is premature and unprocedural since it seeks to impede a pre-existing appeal;
  - (e) The application controverts public policy since it seeks to engender an illegality.
4. Mr. Kanyi thereafter filed a Supplementary Affidavit for the sole purpose of exhibiting the ruling of Hon. G. Kiage, SRM, delivered on March 5, 2021 in Mombasa CMCC No. 452 of 2018: *Mutua Munyithia v Daniel Ngugi Gitogo & 3 Others* together with copies of the application dated October 30, 2020 and the proceedings of March 5, 2021, to confirm his averment that leave was neither sought by the appellant nor granted by the Court.
5. The appellant thought it necessary to file a Replying Affidavit as well. She deposed that the crux of her appeal is stay of execution; and that a party does not require leave of the Court to file an appeal in that regard. In addition, she averred that the application has been filed in bad faith, with the sole purpose of frustrating the appeal. The appellant also took issue with the fact that the Supporting Affidavit was sworn by counsel in respect of contentious matters. She therefore prayed that the application be dismissed with costs.
6. Upon directions being given that the application be canvassed by way of written submissions, and although counsel for the 1<sup>st</sup> respondent filed no submissions, counsel for the appellant filed his written submissions on June 28, 2022. His basic argument was that the Appeal was properly filed because it pertains to stay of execution. He relied on Order 43 of the *Civil Procedure Rules* and urged the Court to eschew the striking out of appeal; the same being a drastic measure. He relied on *Attorney General v Lucy Nduta Mganga*, Civil Appeal No. 34 of 2016, in urging the Court to weigh the prejudice likely to be suffered by the innocent party vis-à-vis the prejudice to be suffered by the offending party and find that the application is unwarranted. He thus urged for the dismissal of the application with costs.
7. In the light of the foregoing, the only issue for determination is whether the appeal is competently before the Court; the respondent having questioned the appellant's right of appeal. To begin with, Section 65 of the *Civil Procedure Rules* provides that an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, on a question of law or fact; except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed.
8. As the appeal is from the ruling and orders of Hon. Kiage, SRM, delivered on March 5, 2021 and therefore is not a decree for purposes of Section 65 of the *Civil Procedure Act*. Accordingly, Section 75 of the *Civil Procedure Act*, stipulates:
  - (1) An appeal shall be as of right from the following orders and shall also lie from any other order with leave of the Court making such Order or of the Court to which an appeal would lie if leave were granted:
    - (a) An order superseding an arbitration where the award has not been completed within the period allowed by the Court.



- (b) An order on an award stated in the form of a special case.
- (c) An Order modifying or correcting an Award
- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court
- (f) An order under section 64 of the Act
- (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree
- (h) Any order made under these rules from which an appeal is expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.

9. Since the application does not fall under any of the provisions of Section 75 of the *Civil Procedure Act*, it has to be looked at from the prism of Section 75(1)(h) of the *Civil Procedure Act* and Order 43 *Rules* 1, 2 and 3 of the Civil Procedure Rules, 2010. While Rule 1 provides for instances where one can appeal as of right, Rule 2 provides that leave is required for in respect of appeals from other orders not provided for under Rule 1.

10. Order 43 Rules 1, 2 and 3 of the *Civil Procedure Rules, 2010* therefore provides:

- 1. Appeals from Orders [Order 43, rule 1.]
  - (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
    - (a) Order 1 (parties to suits);
    - (b) Order 2 (pleadings generally);
    - (c) Order 3 (frame and institution of suit);
    - (d) Order 4, rule 9 (return of plaint);
    - (e) Order 7, rule 12 (exclusion of counterclaim);
    - (f) Order 8 (amendment of pleadings);
    - (g) Order 10, rule 11 (setting aside judgment in default of appearance);
    - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
    - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
    - (j) Order 19 (affidavits);
    - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
    - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
    - (m) Order 24, rules 5, 6 and 7 (legal representatives);



- (n) Order 25, rule 5 (compromise of a suit);
  - (o) Order 26, rules 1 and 5(2) (security for costs);
  - (p) Order 27, rules 3 and 10 (payment into court and tender);
  - (q) Order 28, rule 4 (orders in proceedings against the Government);
  - (r) Order 34 (interpleader);
  - (s) Order 36, rules 5, 7 and 10 (summary procedure);
  - (t) Order 39, rules 2, 4 and 6 (furnishing security);
  - (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
  - (v) Order 41, rules 1 and 4 (receivers);
  - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
  - (x) Order 45, rule 3 (application for review);
  - (y) Order 50, rule 6 (enlargement of time);
  - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
  - (aa) Order 53 (judicial review orders).
- (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.
11. It is therefore plain that an appeal from an order that is not on the list set out in Order 43 Rule 1 of the *Civil Procedure Rules* can only be filed with leave of court. A perusal of the impugned ruling shows that, although stay of execution was one of the prayers, that prayer was already spent by the time the ruling was delivered; and therefore the substantive prayer that was the subject of the ruling was setting aside of attachment and release of the attached properties on the ground that the appellant had beneficial interest therein. Thus, the learned magistrate, upon considering the application, held that:
- “In the absence of such proof and the fact that the transfer to her name was effected after the attachment had been effected I find that the objector has failed to prove that she is entitled to or has a legal or equitable interest in the attached property. I therefore find no merit in the present application and proceed to dismiss with costs to the plaintiff/respondent...”
12. In the premises, the application was brought pursuant to Order 22 Rule 51 of the *Civil Procedure Rules*. This provision is not being among the provisions listed in Order 43 Rule 1(k). It was imperative, in the circumstances, for the appellant to apply for and obtain leave either of the lower court before lodging her appeal; which she did not do. The consequence thereof is that, without such leave, her appeal is incompetent.
13. The Court of Appeal in *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR, held:
- “...As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. Without leave of the High



Court, the applicant 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 42 of the *Civil Procedure Rules* (sic), the procurement of leave to appeal is a 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. We so find and hold...”

14. Similarly, in *Civicon Limited v Collins Omondi Ouko* [2016] eKLR, it was held: -

“...Order 43 rule 1 (k) of the *civil Procedure Rules* does not anticipate the filing of appeals, as of right in respect of matters falling under Order 22 rules 51-55 of the *Civil Procedure Rules*; leave must be sought before an appeal emanating from the said rules is filed, as required by Order 43 rule 2 and 3 of the *Civil Procedure Rules*. The purported appeal before me is therefore incompetent...”

15. The Court of Appeal offered further guidance in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, thus:

“...Faced by the Rules and our decision aforesaid, the appellant took umbrage under Article 159 (2) (d) of the *Constitution*. To the appellant, a proscription or prohibition of the right to appeal in interlocutory decisions of the High Court to this Court amounts to violating the spirit of the *Constitution* and paying undue homage to procedural technicalities. It was contended that since the Court of Appeal Rules do contemplate and provide for appeals against rulings and orders of the High Court, we should give effect to them as they ought to override any contrary stipulations in the Elections Rules.

With respect to counsel, these twin arguments do not persuade us. The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation...”

16. In the result, it is my finding that this Appeal is incompetent. The same is hereby struck out with costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21<sup>ST</sup> DAY OF AUGUST 2023**

**OLGA SEWE**

**JUDGE**

