



**Lighting And Interiors By Diamond Limited v Njoroge & 2 others (Miscellaneous Application E099 of 2022) [2022] KEHC 531 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 531 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**CIVIL**  
**MISCELLANEOUS APPLICATION E099 OF 2022**  
**DAS MAJANJA, J**  
**MAY 31, 2022**

**BETWEEN**

**LIGHTING AND INTERIORS BY DIAMOND LIMITED ..... APPLICANT**

**AND**

**BERNARD NGIGI NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**SASAHOST LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AIRTEL KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant has moved the court by the Notice of Motion dated 4<sup>th</sup> February 2022 made, inter alia, under section 79G of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya). It seeks leave to appeal out of time against the ruling delivered by the Subordinate Court on 31<sup>st</sup> August 2021 in Milimani MCC No. E622 of 2021 striking out the suit for lack of jurisdiction. The application is supported by the affidavit of Joseph Rituga, an advocate in the firm representing the Applicant, sworn on 4<sup>th</sup> February 2022.
2. In opposition of the application, the 1<sup>st</sup> Respondent has filed Grounds of Opposition dated 23<sup>rd</sup> May 2022. The 3<sup>rd</sup> Respondent filed a Notice of Preliminary Objection dated 13<sup>th</sup> April 2022 and also Grounds of Opposition of the same date.
3. From the application, preliminary objection and depositions, the issues for determination are twofold. First, whether the court has jurisdiction to grant leave in view of the fact that order appealed from is not appealable as of right but with leave which leave must be sought and obtained. Second, whether on the facts of the case, the Applicant has made out a case for the grant of leave to file the appeal out of time.



4. On the first issue, which is the subject of the 1<sup>st</sup> Respondent's opposition and the 3<sup>rd</sup> Respondent's Preliminary Objection, is grounded on the undisputed fact that it is a preliminary objection which led to the suit in the subordinate court being struck out. The Respondents argue that the appeal being on based on want of jurisdiction is not appealable as of right under Order 45 rule 1 of the [Civil Procedure Rules](#). That under Order 43 rule 1(2) of the Rules, an appeal against such a decision where an appeal is not as of right shall on lie with leave granted under section 75 of the [Civil Procedure Act](#). Thus they urge that it is premature for the Applicant to seek leave to file an appeal out of time when no such leave to appeal was applied for and granted by the Subordinate Court pursuant to Order 43 rule 1(3) of the Rules.
5. I have considered the arguments and I agree with the Respondents that the application before the subordinate court was struck out on the ground of want of jurisdiction hence it could not give rise to a decree since the rights of the parties were not settled. The Applicant therefore required leave as the order resulting therefrom was not appealable as of right under Order 43 rule 1(2) of the Rules. Since an appeal in the High Court is filed by way of filing a Memorandum of Appeal, an appeal would be incompetent if leave is not sought as a pre-condition for the filing the appeal.
6. Despite the requirement of Order 43 rule 1(3) of the Rules requiring that leave be granted by the Subordinate Court in the first instance, this position is not supported by the provision of section 75(1) of the [Civil Procedure Act](#) which provides that leave may be granted by the court making the order or by the court to which the appeal lies if such leave were granted. In this case, the time for filing the appeal has lapsed and the opportunity for applying for leave before the Subordinate Court lost. Since it is only the High Court that can grant leave for extension of time, it is the High Court that ought to grant leave to appeal which may be sought at the same time with the application for leave to appeal out of time.
7. For the reasons I have set out, I do not think it is necessary to express a view of the grounds for seeking leave to appeal out of time which is the second issue.
8. The application dated 4<sup>th</sup> February 2022 is struck out. The Applicant shall pay costs assessed at KES. 15,000.00 to each Respondent.

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mwangi instructed by Patrick Law Associates Advocates for the Applicant.

Ms Shikali instructed by Chesikaw and Kiprop Advocates for the 1<sup>st</sup> Respondent.

Mr Muhandick instructed by Aquino Advocates for the 3<sup>rd</sup> Respondent.

