



REPUBLIC OF KENYA



KENYA LAW
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**Getanda & another v Ayienda & another (Civil Appeal
E080 of 2021) [2022] KEHC 10929 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E080 OF 2021**

JN KAMAU, J

MAY 30, 2022

BETWEEN

VIVIAN GETANDA 1ST APPELLANT

JOSHUA OMBATI RATEMO 2ND APPELLANT

AND

CATHERINE KERUBO AYIENDA 1ST RESPONDENT

OMWOYO AUCTIONEERS 2ND RESPONDENT

RULING

Introduction

1. In their Notice of Motion dated 21st October 2021 and filed on 27th October 2021, the Appellants herein sought an order for stay of execution of the Ruling in Keroka CMCC NO 4 of 2018 that was delivered on 21st September 2021 pending the hearing and determination of this appeal.
2. In her Affidavit that she swore in support of the present application on 21st October 2021, the 1st Appellant averred that she was aggrieved by the decision of Hon B. Kimtai (PM), the Learned Trial Magistrate that dismissed her application in which she had sought to set aside the consent judgment dated 17th September 2020 for the sum of Kshs 32,900/= on the ground that she had already paid the 2nd Respondent herein the sum of Kshs 59,400/=being the fees for proclamation, attachment and storage. She added that the accurate consent of 17th September 2021 had not been properly executed by the Appellants and/or adopted as an order of the court thus making it illegal and/or irregular.
3. It was her contention that she filed the present application timeously. She added that the decree was for a substantial sum of Kshs 32,900/= and that if she paid it to the 2nd Respondent, who she said was a man of straw, and she was successful in her Appeal, she would suffer substantial loss as she would not be able to recover the said decretal sum from him.



4. She was apprehensive that in the event an order for stay of execution pending appeal was not granted and the Respondent (sic) proceeded to execute against her, her Appeal would be rendered nugatory. She thus urged this court to allow her application as prayed.
5. In response to the said application, the 2nd Respondent herein filed a Preliminary Objection on 1st February 2022. He contended that the said application violated Rule 55(5) of the Auctioneers Rules which requires that an Appeal against an auctioneer's costs should be filed within seven (7) days of the date of the decision of the Learned Trial Magistrate.
6. He pointed out that the decision of the Learned Trial Magistrate was rendered on 21st September 2021 and lapsed on 28th September 2021 rendering the Appellants' Appeal and present application null and void.
7. He stated that the Appellants did not seek leave to file an appeal out of time as stipulated by the mandatory provisions of Auctioneers Rules and consequently, the instant application.
8. He added that the law and procedure for challenging an auctioneer's costs was provided under Rule 55(4) of the Auctioneer Rules and the instant application, not purporting to be in pursuance of the said Rules, it was therefore unknown under the [Auctioneers Act](#) and Auctioneers Rules.
9. He asserted that once a matter had been compromised by parties to a suit and satisfaction recorded as judgment of the court, the same could not be set aside or varied for reasons that one party was unwilling to adhere to the terms of such a consent.
10. It was his contention that the Appellant's application was incompetent and a non-starter in limine and both the said application and Appeal were devoid of merit and an afterthought merely brought to cause delay and therefore ought to be dismissed with costs.
11. In addition to the said Preliminary Objection, the 2nd Respondent herein swore and filed a Replying Affidavit on 3rd March 2022.
12. He was emphatic that the order that was issued by the court was not among the orders that were appealable under the provisions of Section 75 of the [Civil Procedure Act](#) Cap 21 (Laws of Kenya) and Order 43 Rule 1 of the [Civil Procedure Rules](#), 2010 and that it was incumbent upon the Appellants to have sought leave of the court to appeal in accordance with Order 43 Rules (2) and (3) of the Civil Procedure Rules.
13. He further added that the Appellants had not met the threshold of being granted an order for stay of execution pending appeal and that the orders dismissing the application were negative orders that were not capable of being stayed. He was categorical that there were no valid proceedings which would warrant the exercise of this court's discretion.
14. This court directed that both the Appellants' Notice of Motion application and 2nd Respondent's Preliminary Objection would be heard together. The 2nd Respondent's Written Submissions in respect of the aforesaid Appellant's Notice of Motion application were dated 3rd March 2022 and filed on even date while those of the Appellants were dated 8th March 2022 and filed on 10th March 2022. The Appellants filed Written Submissions dated 8th March 2022 on 11th March 2022 in respect of the 2nd Respondent's Preliminary Objection.
15. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.



Legal Analysis

16. The 2nd Respondent submitted that the order dated 21st September 2021 was not appealable as of right given the fact that the Appellant had sought to join the 2nd Appellant (sic) in the proceedings and to set aside the consent orders that had been recorded.
17. He argued that the order the Appellants had sought to appeal against was not the kind of order that was appealable as of right but was only appealable with the leave of the court, sought and obtained. He averred that having failed to seek leave of the court to appeal, no appeal could lie against the impugned Ruling and the court was deprived of jurisdiction and the court had to down its tools as was held in the cases of *J.A.S Kumenda & Another v Governor (County Government of Kisii) & 5 Others* [2018] eKLR, *National Bank of Kenya v Maurice Onyango Okongo* [2018] eKLR and *Martin Njubigu & 11 Others v Sacco Societies Regulatory Authority & Another* [2016] eKLR.
18. He also contended that the order dated 21st September 2021 was negative in nature and as the order for dismissal of an application was incapable of execution, the Appellants would not suffer any substantial loss as was held in the case of *Republic vs Retirement Benefits Appeals Tribunal Ex-parte Heritage A.I.I Assurance Company Limited Retirement Benefits Scheme* [2017] eKLR.
19. It was his further submission that the law also provided that there could never be a stay on costs. In this regard, he placed reliance on the case of *Ausilio Mungatia vs Japhet Mburugu* [2015] eKLR wherein the court cited the case of *Francis Kabaa vs Mary Wambui* CA 298/1991 where the court held that there could not be any stay of execution of costs.
20. The Appellants also invoked Rule 55(3), (4) and (5) of the Auctioneer's Rules and argued that her appeal was against a Ruling which was to the effect that the consent dated 17th September 2020 was valid. They were emphatic that they were not challenging the taxation of auctioneer's fees but the amount that was payable to the auctioneer.
21. They argued that an appeal under Rule 55(3) of the Auctioneer's Rule was applicable when a party was aggrieved by a ruling on the taxation of an auctioneer's bill to award the auctioneer a particular fee. In this regard, they relied on the cases of *Barclays Bank (K) Ltd vs Hezron Getuma Onsongo t/a Heceon Auctioneers* [2021]eKLR and *James Kilonzo t/a Base Auctioneer v China Wu Yi Limited* [2021]eKLR where the appellants therein filed appeals under Rule 55(5) of the Auctioneer's Rules, which they contended was not the case in the instant appeal as the 2nd Respondent never taxed his bill of costs. They were categorical the basis of the dispute in the Appeal herein was the validity of the consent dated 17th September 2020.
22. They urged this court to find that the Appeal herein was not governed by Rule 55(5) of the Auctioneer's Rules and that the same was filed within time as the Ruling was delivered on 21st September 2021 and the Memorandum of Appeal herein was filed on 15th October 2021. In this regard, they invoked Section 79 G of the *Civil Procedure Act* Cap 21 (Laws of Kenya) and relied on the case of *Francis Likhabi v Barclays Bank of Kenya* [2020] eKLR and urged the court to dismiss the 2nd Respondent's Preliminary Objection.
23. Rule 55 of the Auctioneers Rules, 1997 provides as follows:-
 1. Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.



2. Where a dispute arises as to the amount of fees payable to an auctioneer—
 - a. in proceedings before the High Court; or
 - b. where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.
 3. In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.
 4. An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.
 5. The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”
24. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides as follows:-
- “An appeal shall lie as of right from the following orders, and shall also lie from any other order with the 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;
 - 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 rules from which an appeal is expressly allowed by rules.”
25. Notably, Section 75 of the *Civil Procedure Act* must be read together with Order 43 Rule 1 of the Civil Procedure Rules, 2010 which sets out the orders and rules in respect of which appeals would lie as of right. Order 43 Rule 1(2) of the Civil Procedure Rules provides that an appeal shall lie with the leave of the court from any other order made under the Rules.
26. A reading of the Memorandum of Appeal dated 10th September 2020 and filed on 27th October 2021 showed that the Appellants had sought to appeal against the Learned Trial Magistrate’s Ruling that



dismissed their application dated 24th February 2021 in which they had prayed that the consent dated 17th September 2020 for Kshs 32, 900/= be set aside on the ground that the Learned Trial Magistrate had erred in having found that the aforesaid amount was owing to the 2nd Respondent despite them having paid the 2nd Respondent herein Kshs 30,000/= and Kshs 59,400/= being proclamation fees, attachment fees and storage fees in respect of motor vehicle registration number KCK 254T.

27. After carefully analysing the parties' respective submissions, this court agreed with the Appellants that the auctioneer's costs they were referring were not determined either by the Learned Trial Magistrate or the Auctioneers Board contemplated in Rule 55 of the Auctioneers Rules 1997. Rather, the same were pursuant to a consent that was recorded by parties to the suit in the lower court. The provisions of Rule 55(5) of the Auctioneers Rules on the time within which an appeal ought to have been preferred were therefore not applicable.

28. The question of whether an appeal lay as of right from the said Ruling was a different question altogether. Order 43 (1)(n) of the Civil Procedure Rules provides that :-

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act

Order 25, rule 5 (compromise of a suit);”

29. Order 25 Rule 5 (1) of the Civil Procedure Rules states that:-

Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith (emphasis court).”

30. It did therefore appear to this court that a party aggrieved by such entry or recording of agreement, compromise or satisfaction as a judgment could appeal as of right from such decision.

31. In the understanding of this court, the basis of the Appeal herein was to determine whether or not the Learned Trial Magistrate erred in having determined that consent judgment was validly recorded. The court did not therefore analyse the parties Written Submissions on the validity or otherwise of the said consent judgment as that would be pre-empting the decision of the Appeal which could otherwise embarrass another court that might hear and determine the Appeal herein and come up with a different decision from this court on that issue.

32. As the decision the Appellants wished to appeal against was delivered on 21st September 2021 and the Memorandum of Appeal herein was filed on 15th October 2021, the Appeal herein was properly before this court for hearing and determination having been filed within thirty (30) days as provided in Section 79G of the Civil Procedure Rules that stipulates that:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time when the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order ”

33. This court also noted that the consent judgment could be executed against necessitating this court to establish if the Appellants herein had demonstrated that they had met the pre-requisites of being granted an order for stay of execution pending appeal.



34. Under Order 42 Rule 6 of the Civil Procedure Rules, an applicant has to demonstrate the following:-
 - a. That substantial loss may result unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. Such security as the court orders for the due performance of the decree has been given by the applicant.
35. Bearing in mind that the present application was filed on 27th October 2021 and the Memorandum of Appeal herein was filed on 15th October 2021, the present application was filed without any delay. The Appellants had therefore satisfied one of the requisite conditions of being granted an order for stay of execution pending appeal.
36. Although the sum of Kshs 32,900/= was not colossal, this court was persuaded that there was need to conserve the subject matter as the Appeal herein was being heard and determined. This would guarantee that the successful litigant would be able to recover the money without recourse of litigation. Challenges of recovering decretal sum, no matter how little, can amount to substantial loss to a successful litigant considering how the time, effort and resources he or she would have to incur to recover the money from a recalcitrant opposing party. This court was satisfied that the second condition for the granting of an order for stay of execution had been met.
37. The Appellants indicated that they were ready and willing to deposit the full decretal sum or that because the Appeal herein was on quantum, they were ready to release some of the undisputed sum to the Respondent (sic) or comply with any order that this court would deem fit to grant.
38. This court found the pleadings they had filed herein to have been very confusing and difficult to decipher. It was also not clear which decretal sum and the particular Respondent they were referring to in their Written Submissions because the gist of their said Notice of Motion dated 21st October 2021 and filed on 27th October 2021 was the consent that was entered into regarding the 2nd Respondent's costs.
39. It was also not clear whether the sum of Kshs 32,900/= was in respect of the Appeal herein only as it was related to HCCA No E079 of 2021 and HCCA No E080 of 2021 which all made reference to Motor Vehicle Registration Number KCK 254T. In the absence of any clarity in this matter of the amount that was in contestation, this court found it prudent to treat each of the three (3) Appeals separately.
40. Going further, in their Notice of Motion application dated 21st October 2021 and filed on 27th October 2021, their advocates indicated that they were for the Appellant. The application was supported by the 1st Appellant who referred to herself only and did not allude to the 2nd Appellant herein whatsoever. However, the Written Submissions were by both Appellants. This court therefore considered the present application as having been filed by both Appellants.
41. Taking into account the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 that mandates courts to administer justice without having due regard to procedural technicalities, this court found and held that it was proper and in the interests of justice to that an order for stay of execution pending appeal be granted herein so as not to render the Appeal herein nugatory as the Appellant had met the third condition of being granted an order for stay of execution, that of furnishing security that would be binding upon them for the due performance of the order.



Disposition

42. For the foregoing reasons, the upshot of this court's decision was that the 2nd Respondent's Preliminary Objection dated 1st February 2022 was not merited and the same be and is hereby dismissed.
43. The effect of this Ruling was that the Appellants' Notice of Motion application dated 21st October 2021 and filed on 27th October 2021 was merited and the same be and is hereby allowed in terms of Prayer No (2) therein in the following terms:-
 1. That there shall be a stay of execution of Judgment that was delivered by Hon B. Mutai (PM) on 21st September 2021 in Keroka Civil Suit No 4 of 2018 Catherine Kerubo Ayienda v Vivian Getanda & 2 Others pending the hearing and determination of the appeal on condition the Appellants shall deposit into court the sum of Kshs 32,900/= within thirty (30) days from the date of this Ruling.
 2. For the avoidance of doubt, in the event, the Appellants shall default on Paragraph 43(1) hereinabove, the conditional stay of execution shall automatically lapse.
 3. The Appellants be and is hereby directed to file and serve their Record of Appeal within forty five (45) days from the date of this Ruling.
 4. This matter will be mentioned on 19th September 2022 to confirm compliance and/or for further orders and/or directions.
 5. Costs of the application and the Preliminary Objection herein will be in the cause.
 6. Either party is at liberty to apply.
44. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 30TH DAY OF MAY 2022

J. KAMAU

JUDGE

