



**Wanga v Kowiti & another (Environment and Land Appeal
E059 of 2022) [2023] KEELC 18351 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E059 OF 2022
GMA ONGONDO, J
JUNE 20, 2023**

BETWEEN

MICHAEL OKWORO WANGA APPELLANT

AND

JOSEPH OMOL KOWITI 1ST RESPONDENT

MARGRAT ACHIENG OTIENO 2ND RESPONDENT

RULING

1. This ruling is in respect of the respondents' notice of preliminary objection dated January 25, 2023 and filed in court on January 27, 2023 (the preliminary objection herein).
2. The gist of the preliminary objection is that the instant appeal offends the provisions of section 75 of the *Civil Procedure Act*, chapter 21 Laws of Kenya and order 43 rule 1 of the *Civil Procedure Rules, 2010* for failure to obtain leave before filing. That further, the appeal offends the provisions of order 42 rule 6 of the *Civil Procedure Rules* (supra).
3. The appellant is represented by Nyakwamba and Company Advocates while the respondents are represented by Apondi & Company Advocates.
4. On February 27, 2023, this court ordered and directed that the preliminary objection be heard by way of written submissions in the spirit of article 159 (2) (b) of the *Constitution* of Kenya, 2010; see also *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* (2013) eKLR.
5. Accordingly, the respondents' counsel filed submissions dated March 24, 2023 on March 28, 2023. Counsel submitted that an order of or against stay of execution pending appeal cannot be appealed from without the appellant first seeking leave of court. That such failure to obtain leave is not curable by article 159 (2) (d) of the *Constitution* of Kenya, 2010 thus, the instant appeal ought to be struck out with costs to the respondents. To buttress the submissions, counsel relied on various authorities



including the case of *Rayleigh W. Wanyama v Lorna Mukhwana Wanyama and 3 others* (2020) eKLR.

6. On the part of the appellant, his counsel filed submissions dated March 25, 2023 on May 19, 2023. Counsel submitted, *inter alia*, that the instant application does not fall within section 75 of the *Civil Procedure Act* (supra). That the same has been brought under sections 3, 3A and 63 (c) and (e) of the *Civil Procedure Act*, as well as order 22 rule 25 of the *Civil Procedure Rules*. That there is an appeal pending before this court, to wit, Homa Bay ELC appeal No E039 of 2022, in which the respondents are the decree holders. That therefore, the present application is rightly before court. Counsel relied on the case of *Circuit Business Systems Limited v County Government of Siaya* (2020) eKLR, in support of the submissions.
7. It is noteworthy that, by way of a memorandum of appeal dated December 13, 2022 and filed herein on December 15, 2022, the appellant, being dissatisfied with the ruling of Hon J. M Nang’ea (Chief Magistrate) delivered on November 30, 2022, filed an appeal on four grounds including that the trial magistrate erred in law and fact by claiming that there was undue delay on the part of the applicant in filing the application seeking orders of stay and not taking into consideration the challenges faced by litigants in getting typed and certified copies of judgments after he had delivered a handwritten judgment on August 17, 2022. The appellant sought the following reliefs:
 - a. The appeal be allowed.
 - b. The ruling in favour of the respondents be set aside and a stay of execution be granted pending the hearing and determination of Homa Bay ELC appeal No E039 of 2022.
 - c. The appellant be awarded the costs of this appeal.
8. I have duly considered the preliminary objection, the appellant’s response thereto and the parties’ respective submissions. So, is the preliminary objection sustainable?
9. It must be noted that the preliminary objection is on a point of law and may dispose of the suit; see *Mukisa Biscuits case* (infra).
10. The preliminary objection is grounded on section 75 of the *Civil Procedure Act*, chapter 21 Laws of Kenya, order 43 rule 1 of the *Civil Procedure Rules, 2010* as well as order 42 rule 6 of the *Civil Procedure Rules* (supra).
11. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...”
12. Section 75(1) of the *Civil Procedure Act*, 2010 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:

75(1) 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.
13. Order 43 rule (1) of the [Civil Procedure Rules](#) sets out the orders and rules in respect of which appeals would lie as of right. Under rule 2 of the order, it is provided that an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under the said order 43 rule (1), leave to appeal must be obtained before such an appeal can be preferred.
14. It is noted that the procedure for obtaining leave is provided under order 43 rule (3) which states as follows:-
- (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.
15. It is my considered view that the subject of the instant application does not fall under any of the orders set out under order 43 rule (1) (supra) in respect of which an appeal lies as of right. On that account, even though the applicant brought this application under different provisions of the law, he did not have an automatic right of appeal against the ruling made on November 30, 2022 by the trial court. Therefore, he required to obtain the leave of the court as envisaged under section 75(1) of the [Civil Procedure Act](#) (supra) and order 43 rule (3) of the [Civil Procedure Rules](#) (supra).
16. Under the said order 43 rule (3), such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms. In my view where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal. Consequently, no competent appeal can be lodged against such an order. I find that is the obtaining situation in the present matter.
17. To that end, the instant appeal is also untenable as I subscribe to *Kakuta Maimai case* (supra). Therefore, the appeal must fail and is hereby struck out.
18. The respondents' notice of preliminary objection dated January 25, 2023 is merited in the circumstances.



19. The costs of this appeal in entirety to be borne by the appellant.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 20TH DAY OF JUNE 2023.

G.M.A ONG'ONDO

JUDGE

Present

Mr. Nyakwamba, learned counsel for the appellant

Ms. Apondi, learned counsel for the respondent

The appellant

T. Luanga, Court Assistant

