



**Amboseli Court Limited v Thimbui (Environment and Land Appeal  
5 of 2023) [2023] KEELC 19288 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19288 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 5 OF 2023**

**MD MWANGI, J  
JULY 25, 2023**

**BETWEEN**

**AMBOSELI COURT LIMITED ..... APPELLANT**

**AND**

**MESHACK MWANGI THIMBUI ..... RESPONDENT**

*(An appeal from the Ruling of the Chief Magistrate Hon. H. M. Nyaberi (MR) delivered on 16th June, 2022 in the Chief Magistrate Court CMELC No. E211 of 2021 (Milimani))*

**RULING**

*(In respect of the Appellant/ Applicant's application dated 11th April, 2023)*

**Background**

1. The application under consideration is the Notice of Motion dated April 11, 2023 filed by the Appellant under the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#). The Appellant pray for orders:
  - a. Spent
  - b. Spent
  - c. That there be a stay of execution of the Decree in CMELC ELC No E211 of 2021 pending the hearing and determination of the intended appeal.
  - d. That costs of this application be provided for.
2. The Application is premised on the grounds on the face of it being that the Lower Court declined to grant the Appellant/Applicant stay of execution of the Decree in CMELC E211 of 2021 exposing him to execution of the said Decree unless stay is granted.



3. The Appellant states that it has issued security herein by paying the Respondent a sum of Kshs 300,000/=. The Appellant further avers that it stands to suffer irreparable loss and damage unless the order of stay is granted. Finally, that the Appeal has high chances of success and will be rendered nugatory unless stay of execution is granted.
4. The application is further supported by the Supporting Affidavit of David Njeru Nyaga, the Advocate seized of this matter on behalf of the Appellant/Applicant who reiterates the averments contained in the grounds in support of the application.

### **Replying Affidavit**

5. The Respondent, Meshack Mwangi Thimbui opposed the application vide a Replying Affidavit deponed on the May 12, 2023. He depones that the application is unmerited, and an abuse of the court process as the Appellant has on numerous occasions sought the similar prayers before courts of competent jurisdiction and the same have been determined.
6. That despite the Lower Court granting the Appellant a chance to pay the decretal sum in installments, the Appellant has failed to comply; the Appellant went to slumber and waited for the last day for effecting payments to seek leave to appeal and a stay of execution. The prayer for stay was denied as the Applicant had not shown any interest in settling the debt.
7. After the said ruling by the Magistrate's court, the Appellant filed another application for stay after paying a sum of Kshs 500,000/=. The application was disallowed. The deponent filed yet another application for stay but the court declined to grant the prayers sought on the basis that the application was res judicata.
8. It is after the unsuccessful attempts at the Lower Court that the Appellant has now moved this court for similar orders. That in an attempt to mislead the Court, the Appellant has paid the Respondent a further sum of Kshs 300,000/=. The Respondent contends that the assertion by the Appellant that the installments as directed by the Magistrate's court are too high is baseless as no evidence has been adduced in support of the inability to pay.
9. The deponent asserts that he continues to face delays of owning a home on account of the Appellant's illegal acts of executing an agreement for sale of property despite knowing so well that it was not in a position to transfer the property. The Respondent prays that the application be dismissed with costs.

### **Directions by the Court**

10. Directions were given for the application to be disposed of by way of written submissions. Both parties complied with the directions. The Appellant's submissions are dated June 22, 2023 whereas the Respondents submissions dated June 26, 2023.

### **Submissions by the Parties**

11. The Applicant submits that the issue for determination is whether the it has satisfied the requirement for stay of execution pending appeal. The Appellant cites the provisions of Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) on conditions for stay of execution.
12. On the first condition for substantial loss, the Appellant relies on its assertion that it stands to suffer substantial loss and damages as it is unable to settle the Decretal sum at once.
13. On unreasonable delay, the Applicant submits that there is no delay in filing the application having filed it two weeks after the delivery of the ruling of March 16, 2023.



14. Regarding security, the Appellant submits that it does not arise in the instant case as it is willing to settle the Decretal sum but not as a lump sum. That it continues to make monthly installments to settle the amount.
15. Finally, on the appeal being rendered nugatory if stay is not granted, the Appellant submits that it has an arguable appeal with high chances of success. That it is apprehensive that should the stay not be granted, the Respondent will execute thus rendering the Appeal nugatory and further prejudice the Appellant's already struggling business.

### **Respondent's submissions**

16. The Respondent on his part submits that the issue for determination is whether the Appellant/Applicant should be granted a stay of execution pending appeal. Counsel cites the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. He submits that the Applicant's allegation that it is unable to pay the judgement sum in full and stands to suffer irreparable loss and damages is unmerited. That the Applicant has not adduced any evidence required to invoke the court's discretionary jurisdiction.
17. He relies on the decision in *Kenya Shell Limited v Kibiru* (1986) KLR 410 where Gachuni, AG JA (as he then was) at 417 held that;

” ...It is not sufficient by merely stating that the sum...is a lot of money and the applicant would suffer loss if the money is paid.... What loss would this be? In an application of this nature, the applicant should show that the damages it would suffer if the order for stay is not granted. On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”
18. The Respondent reiterates the averments stated in his Replying Affidavit and avers that the Applicant's conduct is not that of a person deserving the exercise of this Court's discretion in his favour. That the court should also consider the plight of the Respondent whose rights are being violated by the Applicant's numerous applications to delay paying the decretal sum. The Respondent urges the court to hold that the Applicant has not met the test required for the court to exercise its discretion to grant stay of execution pending appeal. Consequently, the application should be dismissed with costs.

### **Issues for Determination**

19. I have considered the Application, the affidavits, submissions by the Parties and authorities cited. The issues for determination are;
  - a. Whether the court has jurisdiction to entertain this matter.
  - b. Whether the Application for stay of execution pending appeal should be granted.

### **Analysis and Determination**

#### **A. Whether the court has jurisdiction to entertain this matter**

20. The jurisdiction of a court to determine a matter before it is such a fundamental issue that it does not have to be raised by any party. The court may as well pick it out on its own motion.



21. A court of law cannot validly take any step without jurisdiction. The Supreme Court of Kenya *in the Matter of Interim Independent Electoral Commission* [2011] eKLR stated as follows I regard to the issue of jurisdiction:

“(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

(30) The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

22. The Applicant in this matter has invoked the appellate jurisdiction of this Court under the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*. It seeks for a grant of an order of stay of execution pending appeal.

23. Under the provisions of order 42 Rule 1(1), appeals to the High Court are in the form of a Memorandum of Appeal signed in the same manner as a pleading. In the High Court, unlike the Court of Appeal, no ‘Notice of Appeal’ is required. All that a party who intends to appeal is merely required to do is to prepare a Memorandum of Appeal setting forth concisely and sequentially the grounds of appeal and file it in court.

24. Order 42 rule 1 of the *Civil Procedure Rules*; provides as follows: -

- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

25. I have perused the pleadings both in the physical file and those uploaded in the e-filing portal, and confirm that no memorandum of appeal has been filed in this court. Essentially therefore, the Applicant’s application seeking orders of stay of execution pending appeal lacks grounding. There is no appeal before this court.



26. The omission by the Applicant to file a memorandum is one that cannot be remedied by the provisions of Article 159(2)(d) of the Constitution. The court in *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR Odunga J held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

27. This Court faced with a similar situation in the case of Kenya *Harlequin Football Club v Quaco Two Hundred and Thirty-Two Ltd; Encore Lounge & Grill (Intended Interested Party)* [2022] eKLR held that;

“A Court cannot arrogate jurisdiction on itself. The Court’s appellate jurisdiction can only be invoked where an appeal has not been filed in accordance with the law.”

28. Having found that it has no jurisdiction the Court must down its tools at this point. The Court therefore finds that the application is incompetent *ab initio*. The same is hereby struck out with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms. Waceke holding brief for Inyangi for the Respondent.

Mr. Njeru for the Appellant/Applicant.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

