



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 5 OF 2017**

**(CORAM: R. E. ABURILI - J.)**

**FRANCIS NDAHEBWA TWALA.....APPELLANT**

**VERSUS**

**BEN NGANYI.....RESPONDENT**

**(Being an appeal against the Ruling dated 30.03.2017 in Criminal Case No. 54 of 2015 in UKWALA Law Court before Hon. G. A. Adhiambo - SRM).**

**JUDGMENT**

1. On 30/3/2018, the SRM, Ukwala Hon. G.A. Adhiambo delivered a ruling which is contained at *pages 75-97* of the Record of Appeal, staying **Ukwala SRMCC No. 54 of 2015 Francis Ndahebwa Twala Vs Ben Nganyi** pending the hearing and determination of **Kisumu CMCC No. 25 of 2017 Ben Nganyi Vs Africa Merchant Assurance Company Limited** (*herein called the Declaratory Suit*).
2. Dissatisfied with the said Ruling and Order, the appellant herein, who is the Plaintiff in the said Ukwala matter filed this appeal setting out three grounds of appeal vide Memorandum of Appeal dated 6<sup>th</sup> April 2017 and filed in Court on 13<sup>th</sup> April 2017.

**1. That the Learned trial magistrate erred in law and in fact in ordering for stay of execution of Ukwala SRMCC Number 54 of 2015 pending the conclusion and determination of Kisumu CMCC Number 25 of 2017 yet Kisumu CMCC Number 25 of 2017 has no relationship with Ukwala SRMCC Number 54 of 2015.**

**2. That the Learned trial magistrate erred in law and in fact in staying Ukwala SRM CC No. 54 of 2015 pending determination of Kisumu CMCC Number 25 of 2015 yet the Defendant in the Kisumu case is seeking for recovery of monies in particular cases which does not include Ukwala SRMCC Number 54 of 2015 and even if the Kisumu Case was to be concluded, it will not solve the Ukwala Case.**

**3. That, the Learned trial magistrate erred in law and in fact in granting stay pending the hearing of Kisumu CMCC Number 25 of 2017. The Appellant urged the court to allow the appeal, set aside the ruling of 30/3/2017 and allow execution to proceed.**

3. The appeal was argued orally on 22/10/2018 with Mr. Ngala Advocate, arguing for the Appellant whereas, Mr. Waguda held brief for Mr. Onganda Advocate for the Respondent.

4. In his arguments for the appeal, Mr. Ngala submitted that Kisumu CMCC No. 25/2017 is in no way related to Ukwala SRMCC 54 of 2015 because in the latter case, there are specific 3 cases listed therein which do not relate with the Ukwala case and hence even if the Kisumu case was to be concluded, it will have no impact on the Ukwala SRM Case No. 54/2015. He urged this court to set aside the ruling and order as impugned and allow execution to proceed in the Ukwala case.

5. In opposing the appeal Mr. Waguda Advocate submitted that Motor Vehicle Registration No. KBZ 747V was involved in an accident and that the Respondent is one of the claimants for damages arising from the same accident wherein the claimants in the cases listed in Kisumu CMCC 25/2017 were injured.

6. That the said motor vehicle which belonged to the Defendant in the Ukwala SRMCC 54/2015 was insured by the Defendant AMACO Insurance Company in Kisumu CMCC 25/2017 vide **Insurance Policy No. AMC/85/1/132/20XX/3/2014** procured in 2014 to cover up to 2015 and that the accident occurred on 21/1/2015 when the policy was still in force.

7. That when the accident occurred, the appellant instituted suit against the Respondent in person and AMACO Insurance Co. appointed

Karanja & Co. Advocates to defend the suit. That judgment was entered against the Respondent but AMACO Insurance Co. refused to settle the claim hence the Respondent filed Kisumu CMCC 25/2017, a Declaratory Suit to compel AMACO Insurance Co. to settle the suit.

8. That the ruling in the Ukwala suit stayed the said suit to allow for determination of the Kisumu Case which order is not prejudicial to the Appellant as the Kisumu Case seeks to determine whether the Respondent is personally responsible to settle the Decrees in the matters arising from the subject accident involving his vehicle or whether the insurance company should settle the Decrees in question.

9. The Respondent's Counsel urged the Court to dismiss the appeal.

10. In a brief rejoinder, Mr. Ngala Counsel for the Appellant submitted that the appellant was not denying the existence of a declaratory suit in Kisumu CMCC 25/2017 but that the said suit does not mention Ukwala SRMCC 54/2015. Further, that the conclusion of the Kisumu matter will in no way impact on the Ukwala Case as the Ukwala Case was not captured in the Kisumu Case.

11. None of the parties' Advocates referred this court to any case law or statutory provisions in support of their respective positions.

12. This being a first appeal, this Court is mandated by **Section 78 of the Civil Procedure Act** and as was espoused in the case of *Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA, 212* wherein the Court of Appeal stated; inter alia: -

**“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion through it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”**

13. In line with the above legal provision, it follows that albeit the trial court was only called upon to consider the application for stay of execution and stay of the suit pending the hearing and determination of Kisumu CMCC 15/2017, it is the duty of this Court, being the First Appellate Court to reconsider the application before the trial court and affidavit evidence in support of the application and the reply thereto and arrive at its own independent conclusion.

14. Evaluating the evidence on record, this court observes that on 13/3/2017 the Defendant in Ukwala SRMCC 54/2015, Ben Nganyi filed a Notice of Motion dated 13<sup>th</sup> March 2017. The application which was specifically brought under the **provisions of Order 1, Rules 1,3,4,6,6.10; Order 24, 22 Rule 22; Order 9 Rule 9 of the Civil Procedure Rules, Section 6,7, and 3A of the Civil Procedure Act** and all the other enabling provision of the law sought for orders; material to this appeal:

1. ....
2. ....
3. ....

**4. That this Honourable Court do hereby order a stay of execution and cancel the Plaintiff/Respondents proclamation dated 8<sup>th</sup> March 2017 issued by its appointed Auctioneers PAMBO Investments pending the hearing and determination of this application;**

**5. That this Honourable Court do hereby order a stay of execution proceedings in the suit herein pending the hearing and determination of Civil Suit No. 25 of 2017 (Kisumu Ben Nganyi Vs Africa Merchants Assurance Company Ltd).**

15. Among the grounds relied on and material to this appeal were:

(A) .....

(B).....;

**(C) The continued proceedings of execution process in this suit will embarrass or delay this suit herein opening the hearing and determination of CMCC No. 25/2017 (Kisumu);**

(D)....;

(E)....;

(F)....;

**(G) The consent judgment entered did not include the knowledge and participation of the defendant/applicant who was not given the opportunity to defend and be heard on the matter hence a clear contravention of the defendant/ applicant constitutional rights specifically Article 40, 47 and 50 of the Constitution;**

**(H) The Defendant/Appellant/Judgment Debtor are not liable as there was a contractual obligation against the insurance Company, AMACO who were bound to not only defend the claim but indemnify the Applicants from any pecuniary damages**

*awarded against them which the insurers has in a wanton and careless manner disregarded and failed to cover them;*

***(I) The law does not allow the decree holder to execute the decree as it will result in a gross abuse of the legal process and an injustice will have occurred.***

*(J).....;*

*(K).....;*

*(L).....;*

***(M) There is overwhelming grounds and in the interest of justice that the orders sought are granted;***

*(N).....;*

*(O).....*

16. The application was supported by an affidavit sworn by Ben Nganyi on 13<sup>th</sup> March 2017 deposing (material to this appeal):

17. That he was registered owner of Motor vehicle (PSV) No. KBZ 747V which was insured by AMACO Insurance Co. Ltd and that the said motor vehicle was involved in an accident on 21/1/2015 along Kisumu/Busia Road thereby injuring the Plaintiff (now Appellant) among other injured persons.

18. That the deponent lodged the claim against the said insurance company who took up the defence in the suit through the firm of Peter Karanja Advocate and consent judgment was entered into on 31/8/2016 for Sh. 100,000/= general damages less 20% contributory negligence and costs assessed at Sh. 40,000/=, without the Respondent's authority.

19. That subsequently, he filed suit against the said AMACO Insurance Co. Ltd vide Kisumu CMCC 25/2017 over execution in three suits Ukwala SRMCC 77/2015 John Oduor Makanda Vs Patrick Omollo Onyango and Ben Nganyi; SRMCC 78/2015 Charles Obare Vs Patrick Omollo Onyango and Ben Nganyi; and SRMCC 79/2015 Christine Achieng Owino Vs Patrick Omollo Onyango and Ben Nganyi.

20. That in the above suits, judgment had been entered and execution proceedings commenced against the Respondent herein who did not authorize such judgments and so he was compelled to settle the said claims together with the auctioneer's charges all totaling Kshs. 1,382,554 which he was claiming for reimbursement in the Kisumu CMCC 25/2017 as per the Plaint annexed.

21. That the proceedings in the Ukwala SRMCC 54/2015 should be stayed pending hearing and determination of Kisumu CMCC 25/2017 as it refers to the same prayers and relief arising from the same act or transaction or series of acts or transactions as alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

22. That the issue as to whether the said insurance company is liable to meet any claims against the applicant or whether liabilities arising from the execution proceedings in this matter should be indemnified against the insurance company or the Applicant is yet to be determined by the Court hence the reason why the proceedings should be stayed.

23. That the *Matatu* had wrongly been proclaimed and its disposal will result in considerable harm and damage and his family will be put to irreparable harm and loss (as shown by the copies of proclamation and warrants of attachment of the said motor vehicle).

24. That the Plaintiff/Decree holder was claiming colossal sums of money which is oppressive and too high which he can ill afford and will greatly unjust.

25. That the insurance company had underwritten any liabilities that are due from the said insurance policy hence the prayers sought should be granted.

26. The application was vehemently opposed by the Plaintiff through a replying affidavit sworn by Francis Twalah Ndahebwa who deposed contending that the application which also sought for setting aside /review of consent judgment and joinder of the AMACO Insurance Company to the suit where judgment had already been entered by the court was ridiculous and out of tune with the law as the merits of the judgment had not been faulted. Further, that the applicant should have sought for compensation from AMACO Insurance Company directly through another suit and not take a short cut.

27. That there was no denial that the applicant's motor vehicle was involved in the material accident and that there was judgment on record hence the application should be dismissed.

28. The parties' advocates canvassed the application echoing the Notice of Motion and Replying affidavit respectively.

29. The trial magistrate, upon consideration of both the applicant's and Respondent's positions and submissions found and held that as judgment had been entered by consent, in the absence of fraud, mistake or misrepresentation, such judgment could not be set aside.

30. She dismissed the allegation that the suit was *res judicata* and or *res sub judice* Kisumu CMCC 25/2017. She declined to review the

judgment and also declined to enjoin AMACO Insurance Company Limited as a party to the suit. She maintained that the application had been heard through counsel appointed by the Insurance Company.

31. On the (material) issue of whether the Court should grant stay of execution pending hearing and determination of Kisumu CMCC 25/2017, the trial magistrate held that the outcome of the aforesaid suit will affect the suit now before her, considering the prayers sought by the Plaintiff in the Kisumu suit and she exercised her discretion in the interest of justice to grant Prayer 5 of the Notice of Motion, staying execution of judgment/decreed in Ukwala SRMCC 54/2015 pending hearing and determination of Civil Suit No. 25/2017 Ben Nganyi Vs AMACO Ltd. She awarded costs of the application to the Plaintiff/Respondent.

32. It is the above Ruling and Order of Stay that gave rise to this appeal.

## **DETERMINATION**

33. I have carefully considered the grounds of appeal as argued and the opposition thereto. I have also considered the rejoinder thereto. In my humble view, **the main issues for determination in this appeal are whether the trial magistrate erred in staying execution in Ukwala SRM CC 54/2015 pending hearing and determination of Kisumu CM CC 25/2017. Secondly, whether the appellant should have first obtained leave of the trial court to file this appeal.**

34. On the first issue of whether the trial magistrate should have granted stay of execution in the Ukwala SRM CC No. 54 of 2015 pending hearing and determination of Kisumu CMCC No. 25 of 2017, this court observes that the power to stay execution of judgment/decreed is a discretionary power exercised by the court. The application (prayer for stay) was specifically brought under **Order 22 Rule 22 of the Civil Procedure Rules**. In **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal held that:

- 1. The power of the court to grant and refuse an application for stay of execution is discretionary, that is discretionary power. To stay execution must however be exercised in such a way as not to prevent an appeal;**
- 2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion;**
- 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings;**
- 4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

35. Albeit the above principles were cited in an application for stay pending appeal, I find them relevant to cases of stay of execution of decree pending other proceedings. Thus, whereas there was no appeal pending here, but there could be other circumstances calling for the court to exercise jurisdiction and discretion to grant stay.

36. As earlier stated, the application for stay was brought under **Order 22 Rule 22 of the Civil Procedure Rules** among other enabling laws. The said provisions stipulates: -

**“22(1), The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an Order to stay the execution, or for any other order relating to the decree or execution which might have been made by the Court of first instance, or Appellate Court if execution has been issued thereby, or if application for execution has been made thereto.**

**(2) Where the property or person of the judgment debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.**

**(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may request such security from, or impose such conditions upon the judgment-debtor as it thinks fit.”**

37. From the above provisions, it is clear that a court issuing decree may in its discretion stay execution of decree for a reasonable time and upon sufficient cause being shown, to allow the judgment-debtor apply for stay or to apply to the appellate court for stay, and the Court may impose conditions or order for security to be furnished by the judgment-debtor.

38. The above Provision does not stipulate stay pending hearing and determination of other pending suit as was in this case. However, where there is no specific provision for making such like applications, **Section 3 of the Civil Procedure** is applicable, where the court is empowered to invoke its special jurisdiction or power conferred, or any special form or procedure prescribed by or under any other law for the time being in force.

39. In addition, the Court may also make orders by invoking inherent jurisdiction as stipulated in **Section 3A of the Civil Procedure Act** to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

40. **Section 6 of the Civil Procedure Act** prohibits courts from proceeding with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties, under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya. That is what is commonly known as the *res subjudice* Rule. In such cases, the court may stay the subsequent suit until the earlier suit is heard and determined.

41. The Respondent herein had in his application before the trial court also sought for stay on the ground that the suit was *res judicata* and *subjudice* Kisumu CM CC 25/2017. However, the trial magistrate was unable to find any substance in the claim of *res judicata* and *res subjudice*. She nonetheless found that as the outcome of the Kisumu matter was likely to impact on the Ukwala case, a stay of execution of decree was necessary to meet the ends of justice. She therefore ordered for stay of execution of decree in the Ukwala case until the Kisumu matter (Declaratory Suit) was heard and determined.

42. Having found that the trial court had the jurisdiction and power to order for stay of execution of decree even where there was no specific provision of the law, to meet the ends of justice, the question that arises is whether the trial court exercised her discretion judiciously and not capriciously, and secondly, whether this court as an appellate court should interfere with that discretion and if so on what basis.

43. The Court of Appeal in *Child Welfare Society of Kenya Vs Republic, Exparte Child in Focus Kenya & AG & Others [2017]eKLR* per Waki, Nambuye & M’noti JJA held as follows, citing *Mbogoh & Another Vs Shah [1968] EA 93*, on the power of the appellate court in matters discretion exercised by the court below: -

“37. Sir Clement De Lestang V-P in *Mbogoh & Another Vs Shah [1968] EA 93* stated thus:

**“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

44.44. For his part, the court President, Sir Charles Newbold in the same case stated:

**“For myself, I like to put in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in the exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of the discretion and that as a result there has been a misjustice.”**

45. Subsequently, Madam JA (as he then was) in *United India Insurance Co. Ltd Kenindia Insurance Co. Ltd and Oriental Fire & General Insurance Co. Ltd Vs East African Underwriters (K) Ltd (1985)eKLR* developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members for that of the trial court. He stated:

**“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at the first instance, would or might have given different weight to that given by the Judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong.”**

46. Therefore, guided by the above principles, and examining the trial court record and ruling touching on stay of execution of decree in Ukwala SRMCC 54/2015, in my humble view the trial court was not capricious in her exercise of judicial discretion to stay the Ukwala SRMCC 54/2015 pending the hearing and determination of Kisumu CMCC No. 25/2017. And as earlier stated, this court finds that there is no specific provision under the Civil Procedure Act and Rules which confers upon the court specific jurisdiction to stay the suit which was earlier filed until the latter suit is heard and determined.

47. There was indeed no material to show that the Ukwala Suit was *res subjudice* or *res judicata* the Kisumu Suit and neither has the appellant complained or raised any challenge to those questions as determined by the trial court. It is only the *res subjudice* rule which specially provides for stay of one suit to pave way for the hearing and determination of the other.

48. I have further examined **Order 21 Rule 25 of the Civil Procedure Rules** which relate to the court’s power to stay execution of a decree in a suit if the decree holder is a Defendant in another pending suit in which the judgment debtor in the concluded one is the Plaintiff, but which is not the case here.

49. Then there is the big question therefore, as brought out in the second issue as to whether, there being no specific provision under which the stay of execution of decree was granted by the Ukwala Court, and therefore the said court having stayed execution of decree in exercise of inherent and or special jurisdiction of the court as espoused in **Section 3 & 3A of the Civil Procedure Act**, for the ends of ***justice to be met, whether the appellant had any automatic right of appeal from the said ruling or order; and if not, what are the consequences thereof, where the court finds that there was no automatic right of appeal.***

50. I reiterate that the application in the lower court was brought under the provisions of **Order 1 Rules 1, 3, 4, 6, 10, Orders 24, 22 Rule 2 and Order 9 Rule 9 of the Civil Procedure Rules and Sections 6, 7 and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya.**

51. **Section 75 of the Civil Procedure Act** as implemented by **Order 43 of the Civil Procedure** all espouse this issue of which

decrees/orders can be appealed from as a matter of course or right. What the above provisions espouse is that not often does a losing party have or enjoy an automatic right of appeal, to have the decision of the court making the decision reversed by a superior court. In other words, there is no absolute right of appeal for all decisions rendered by a court. Under **Section 75 of the Civil Procedure Act**, an appeal shall lie as of right from the following orders: -

## **52 Orders from which appeal lies**

**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—**

- (1) (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.**
- (2) No appeal shall lie from any order passed in appeal under this section.**

52. On the other hand, **Order 43 of the Civil Procedure Rules** which is the procedural; aspect of **Section 75 of the Civil Procedure Act** sets out (lists) those orders from which appeals would lie as a matter of right. The Order provides:

## **43. APPEALS FROM ORDERS**

**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 applications 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.

(4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.

2. The rules of Order 42 shall apply, so far as may be, to appeals from orders.

3. Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

53. The above provision clearly stipulate that in all other cases, the party wishing to appeal must first seek leave of court to appeal.

54. Stay of execution or of proceedings can be made **under Order 42 Rule 6(1) of the Civil Procedure Rules** but only when the stay sought is pending hearing and determination of an appeal. In this case, there was no appeal hence the issue of stay pending appeal did not and could not have arisen. In **Nyutu Agrovet Ltd Vs Airtel Networks Ltd [2015]eKLR**, the Court of Appeal (5 Judge Bench) held that where there was no automatic right of appeal stipulated under **Section 75 of the Civil Procedure Act** and **Order 43 of the Civil Procedure Rules**, then the Appellate Court has no jurisdiction to hear and determine an appeal unless leave of the court from which the order was made is sought and obtained. Karanja J.A. held, inter alia, that “.....*I am convinced that a right of appeal is conferred by statute and cannot be inferred.*”

55. The above decision was also upheld in the Court of Appeal decision rendered on 10/3/2017 in **CA No. 228/2014 Micro House Technologies Ltd Vs Co-operative College of Kenya [2017] eKLR (Musingu, Gatembu, Murgor, and JJA)**.

56. And where the court has no jurisdiction as was held in owners of **Motor Vessel “Lilan ‘S’ Vs Caltex Oil (K) Ltd (1989) KLR 1**, then it acts in vain. The court must down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

57. In the **Micro-House Technologies Ltd (Supra)** case, the Court of Appeal held, inter alia:

“.....

(d) The question that we must answer is whether in light of the above summarized position, this court has jurisdiction to hear this appeal. Our simple answer is in the negative, that the court lacks jurisdiction. The appellant had no right of appeal to this court not having obtained leave under **Section 39(3) of the Arbitration Act**. This Court emphatically held in **Nyutu Agrovet Ltd vs Airtel Networks Ltd (supra) Karanja JA** stated inter alia:

**“I hold the view that no right of appeal is provided for in arbitral Awards save for matters pegged on Section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be inferred.”**

58. In the same decision of **Nyutu Agrovet Ltd** [supra] the court also held that where a right of appeal does not lie to the Court of Appeal in terms of **Section 39(3) of the Arbitration Act**, a party cannot rely on either **Section 75(1) of the Civil Procedure Act** or **Article 104(3) of the Constitution** to found an appeal to the Court.

59. I have no reason to depart from the unanimous five Judges’ decision in **Nyutu Agrovet Vs Airtel Networks**. In my humble view, the principles espoused by the court of appeal in the above decisions are applicable to this appeal 100% as the appellant did not demonstrate that she had an automatic right of appeal to challenge the decision made by the Ukwala SRM’s court and neither did she show that she sought and obtained leave of that court to lodge this appeal.

60. Consequently, this court finds and holds that it has no jurisdiction to entertain the appeal before it, as the appellant had no automatic right of appeal from the decision of the trial magistrate staying execution pending hearing and determination of the Kisumu High Court matter. In addition the appellant did not seek and obtain leave of the trial court before filing this appeal.

**61. Accordingly, I come to the conclusion that I have no jurisdiction to hear and determine this appeal. I down my tools and proceed to strike out the appeal herein for being fatally incompetent, with an order that each party shall bear their own costs of this appeal. This order on costs is informed by the fact that this important point that has led to the striking out of the appeal and which ought to have been canvassed by the parties was never mentioned by either of the parties’ Advocates yet it is a jurisdictional issue and as jurisdiction cannot be conferred on the court by the parties’ silence or ignorance, this court was duty bound to determine it.**

Dated, Signed and Delivered at SIAYA this 27<sup>th</sup> Day of November 2018.

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Okachi, Senior Principal Prosecution Counsel h/b for Mr. Ngala for the Appellant

N/A for the Respondent

CA: Brenda and Modestar