



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 67 OF 2015**

**CIVICON LIMITED.....APPELLANT**

**-VERSUS-**

**COLLINS OMONDI OUKO .....RESPONDENT**

**RULING**

1. The Applicant, Civicon Limited , the losing objector in Naivasha CMCC 694/2013 approached this court under certificate of urgency seeking stay of execution.
2. An appeal from the objection proceedings in the lower court had on the face of it been filed together with the urgent application on 27<sup>th</sup> July, 2015. Through subsequent affidavits sworn by the Respondents in opposition to the application for stay pending appeal, it has come to light that the court's leave had not been sought before the alleged memorandum of appeal was lodged. The applicant through its written submissions has confirmed that indeed the intended appeal emanates from objection proceedings in the lower court. However there was no evidence laid before the court to demonstrate that leave had been sought by the applicant prior to filing its appeal.
3. Order 43 rule 1 (K) of the civil Procedure Rules does not anticipate the filing of appeals, as of right in respect of matters falling under Order 22 rules 51-55 of the Civil Procedure Rules; leave must be sought before an appeal emanating from the said rules is filed, as required by Order 43 rule 2 and 3 of the Civil Procedure Rules. The purported appeal before me is therefore incompetent.
4. I agree with the Respondent's submission that an order for stay pending appeal can only issue where a competent appeal has been filed. That is clear from the wording of Order 43 rule 6 of the Civil Procedure Rules.
5. In the case of *Equity Bank Ltd versus West Link MBO Ltd [2013] eKLR* the Court of Appeal. **Kathurima M'inoti JA**, discussing the jurisdiction of the Court of Appeal under rule 5(2) (b) of the Court of Appeal Rules to grant, inter alia, stay execution pending appeal observed that:

***“ In my view Rule 5(2) (b) was to address powers of the Court of Appeal that are incidental to hearing and determination of Appeals from the High Court. These powers were never meant to exist independent of the jurisdiction of the court to hear appeals..... the fact of the matter is that, the Court of Appeal cannot assume or exercise jurisdiction under rule 5 (2) (b) unless a competent Notice of Appeal has been filed. The filing of the Notice of Appeal from the decision of the High Court is a condition precedent before the powers under rules 5 (2) (b) can be invoked. This position is reiterated in order 42 rule 6(4) of the Civil Procedure Rules, 2010 which provides that an appeal to the Court of Appeal is deemed to have been filed when a Notice of Appeal has been given under the Court of Appeal Rules ..... In my view Rule 5 (2) (b) read together with rule 2 leaves no doubt that the powers under rule 5 (2) (b) are exercised only in the context of an appeal...”***

6. There is no provision for the filing of a notice of appeal in the High Court, in respect of matters emanating from the subordinate court. However, it is clear that the courts jurisdiction to entertain applications brought under Order 42 rule 6 of the Civil Procedure Rules is similarly predicated on

the filing of an appeal as a condition precedent. No competent appeal had been filed in this case when the application for stay of execution was presented before the court.

7. I consider it mischievous that the Applicant while delving in a robust manner into the substance of its application has been reticent to address these glaring deficiencies .
8. The Memorandum of Appeal filed on 22nd July 2015 and the application for stay pending appeal of the same date are hereby struck off with costs to the Respondent.

**Delivered and signed in Naivasha this 18<sup>th</sup> day of March, 2016**

In the presence of:-

For the Applicant Mr. Mburu holding brief for Mr Muthama

For the Respondent N/A

Court assistant Baraza

**C. W. MEOLI**

**JUDGE**