



**Agola (Suing as holder of power of Attorney for Isaya Ramogi Agola) v Odul (Sued as the legal representative of the estate of Robinson Ondu) (Environment and Land Appeal E002 of 2022) [2022] KEELC 12702 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12702 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND APPEAL E002 OF 2022**  
**GMA ONGONDO, J**  
**SEPTEMBER 27, 2022**

**BETWEEN**

**JOHNSON OTIENO AGOLA ..... APPLICANT**  
**SUING AS HOLDER OF POWER OF ATTORNEY FOR ISAYA RAMOGI**  
**AGOLA**

**AND**

**RICHARD AMOLLO ODUL ..... RESPONDENT**  
**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ROBINSON**  
**ONDU**

**RULING**

1. By a notice of motion application dated February 28, 2022 and filed on March 1, 2022 brought under, *inter alia*, articles 45, 50(1), 159(d) (sic) and 165 of the [Constitution](#) of Kenya, 2010, sections 1A, 1B and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya, Order 42 rule e (6) (sic) and Order 9 rule 9 of the [Civil Procedure Rules, 2010](#) (the application herein), the applicant, Johnson Otieno Agola through M/S Ochwangi and Company Advocates is seeking the following orders;
  - a. Spent.
  - b. Spent.
  - c. The honourable court be pleased to grant an order of stay of execution and/or enforcement of the ruling and order issued on February 24, 2022 together with consequential orders arising therefrom and/or attendant pending the hearing and determination of the appeal in terms of the notice of appeal dated September 13, 2021.
  - d. Costs of this application do abide the appeal.



2. The application is founded upon grounds (a) to (o) stated on the face of the same. It is further anchored on the applicant's supporting affidavit of sixteen paragraphs and a copy of power of attorney dated March 29, 2021, copy of ruling dated November 19, 2020, copy of notice of motion dated June 16, 2021, copy of ruling dated September 9, 2021, copy of the memorandum of appeal dated September 13, 2021 and a copy of order of eviction issued on February 24, 2022 being documents marked as JOA-1, JOA-2, JOA-3, JOA-4, JOA-5 to JOA-6 respectively annexed to the affidavit.
3. The applicant's complaint is that on November 19, 2020 the honourable trial magistrate dismissed his (plaintiff's) case in Oyugis Environment and Land Case No 56 of 2019. The applicant then filed an application by way of a notice of motion dated June 16, 2021 seeking a review of the court's orders of November 19, 2020 but the same was dismissed. Being dissatisfied with the said ruling, the applicant preferred the instant appeal.
4. Upon lodging the instant appeal, the applicant filed yet another application at the trial court by way of notice of motion dated September 15, 2021 wherein he sought an order of stay but that application was similarly dismissed. Thereafter, the respondent filed an application by way of notice of motion dated October 25, 2021 seeking an order of eviction against the applicant. The honourable trial court allowed that application and eviction orders were issued on February 24, 2022.
5. On that score, the applicant seeks an order of stay of the eviction orders issued on February 24, 2022 pending the hearing and determination of the instant appeal. The applicant contends that if the respondent proceeds with execution, the instant appeal will be rendered nugatory as such execution shall be incapable of redemption in the event that this appeal succeeds.
6. The respondent, Richard Omollo Odul, through the firm of O M Otieno and Company Advocates, opposed the application by way of his replying affidavit sworn on March 28, 2022 duly filed in court on even date and a copy of notice of motion application dated June 16, 2021 (RAO-1), copy of ruling dated September 9, 2021 (RAO-2), copy of the order of court issued on February 24, 2022 (RAO-3) annexed thereto. He deposed, inter alia, that the order dismissing the application dated June 16, 2021 is not among the orders appealable as of right under section 75 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 43 rule 1 of the *Civil Procedure Rules, 2010*. That the applicant failed to seek leave of court prior to lodging the instant appeal pursuant to Order 43 rules 2 and 3 of the *Civil Procedure Rules* (supra). Thus, this appeal is incompetent, null and void. That the court is devoid of jurisdiction to entertain the appeal herein.
7. Simultaneous with the replying affidavit, the respondent through counsel filed a Notice of preliminary objection dated March 28, 2022 against the competence of the entire appeal and the notice of motion application dated February 28, 2022. The gravamen of the preliminary objection is that this court lacks jurisdiction to hear and determine the appeal herein together with the application dated February 28, 2022 and that both should be dismissed. That the same offend the provisions of section 75 as read with Order 43 rules 2 and 3 (supra). That the applicant having failed to seek leave of the court, the entire suit and the application are an abuse of the due process of court.
8. Both the preliminary objection and the application were heard by way of written submissions further to this court's directions of May 4, 2022; see Order 51 rule 16 of the *Civil Procedure Rules, 2010* and *Practice Direction number 33 of the Environment and Land Court (ELC) Practice Directions, 2014*.
9. Accordingly, learned counsel for the applicant filed submissions dated June 20, 2022 on even date. Briefly, counsel gave the facts of the matter and stated that the original suit was not heard, in contravention of article 50(1) of the *Constitution* of Kenya, 2010. In response to the preliminary



- objection, counsel submitted that the provisions of the law relied on by the respondent are not applicable in the instant circumstance. That an appeal to this court lies as of right.
10. To reinforce the submissions, reliance was made on Order 22 of the [Civil Procedure Rules, 2010](#) as well as Order 45 of the same Rules. Counsel also cited various authorities including the case of [Regnoil Kenya Limited v Winfred Njeri Karanja](#) (2019) eKLR therein.
  11. By the submissions dated March 28, 2022 and filed herein on even date, learned counsel for respondent gave a background of the matter. Counsel submitted that both the subject application and appeal are fatally defective and bad in law. That the court is devoid of jurisdiction to entertain both the appeal and the application. That besides, the applicant has not satisfied the court that he is entitled to the grant of orders of stay as sought. Counsel urged the honourable court to dismiss both the appeal and application with costs payable to the respondent.
  12. To fortify the submissions, counsel relied on various authorities including the case of [National Bank of Kenya v Maurice Onyango Okongo](#) (2018) eKLR.
  13. I have anxiously considered the application, the replying affidavit, the notice of preliminary objection and the rival submissions in their entirety. So, is the preliminary objection meritorious? If so, what is the fate of the application dated February 28, 2022 and the instant appeal?
  14. The Court of Appeal sitting at Nairobi in [Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others](#) [2013] eKLR stated the following in regard to jurisdiction:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.” (Emphasis laid)
  15. The Honourable Court proceeded to quote Nyarangi JA in the case of [The Owners of the Motor Vessel Lillian 'S' v Caltex Kenya Ltd](#) [1989] KLR 1 thus:

“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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...” (Emphasis added)
  16. 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.
17. 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.
18. 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.
19. In the instant matter, the notice of motion application dated June 16, 2021 pursuant to which the learned magistrate granted the orders sought to be appealed by the applicant did 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, the applicant did not have an automatic right of appeal against the order made on September 9, 2021. 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).
20. 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.
21. Under section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, where a party opts to apply for review, such a party cannot after the review is rejected, exercise the option to appeal against the same order he sought review of. The section provides thus:
- 80. Any person who considers himself aggrieved –
    - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- (b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
22. Order 45 of the *Civil Procedure Rules, 2010* provides the procedure and the conditions that an applicant must satisfy in an application for review. Equally, it makes it clear that a party cannot seek review of an order and appeal from the same order.
23. In addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, Order 45 rule 1(a) and (b) (supra) reiterates the proviso of section 80(a) and (b) which in my view makes it clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party.
24. Rule (2) of Order 45 of the *Civil Procedure Rules* further makes the matter clearer. It provides:-  
Order 45 (2):  
A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.
25. It is my considered view that section 80 of the Act and Order 45 rules 1 and 2 (supra) make it clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review. He now wishes to go back to the same order he sought review of but failed and he is trying his luck with an appeal. He cannot be permitted to do so. The instant application constitutes an abuse of the process of the court and the same must surely fail.
26. Clearly, the applicant was accorded a fair opportunity to be heard before the trial court. Indeed, the right to fair hearing is a fundamental principle of justice as noted in *Halsbury's Laws of England, 5<sup>th</sup> Edition 2010* Volume 61 Para 639 and article 50(1) of the *Constitution* of Kenya, 2010.
27. The cardinal principle is that litigation must come to an end; see *Halsbury's Laws of England, 4<sup>th</sup> Edition* Volume 22 at page 273.
28. To that end, I find no merit in the applicant's application dated February 28, 2022. The instant appeal is also untenable as I subscribe to Kakuta Maimai case (supra).
29. The respondent's notice of preliminary objection dated March 28, 2022 is merited in the circumstances.
30. Wherefore, the applicant's application dated February 28, 2022 together with the instant appeal lodged by way of a memorandum of appeal dated September 13, 2021 are hereby dismissed with costs of the appeal and court below to the respondent.
31. It is so ordered.

**DELIVERED VIA E-MAIL THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**G.M.A ONGONDO**

**JUDGE**

