



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL No. 22 OF 2020**

**JOHN MBUGUA MUIRURI.....APPELLANT/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT/OBJECTOR**

**RULING**

By a **Notice of Motion Application** dated **10<sup>th</sup> June 2020**, brought under **Order 40 rule 2, Order 51 of the Civil Procedure Rules and Sections 3A, 1A and 1B of the Civil Procedure Act**, the Appellant/Applicant sought for orders that;

- 1. That the said Appeal acts as a Stay of the Judgement and any Execution emanating from the said Judgement pending the hearing and determination of the Appeal.***
- 2. Costs be provided for.***

Before the same could be determined, the Respondent/ Objector filed **Notice of Preliminary Objection** dated **13<sup>th</sup> July 2020**, opposing the Application on the grounds that ;

- 1. The instant Application is incompetent as the Appellant has failed to initiate the Appellate process by way of filing a Memorandum of Appeal as required by Order 42, Rule 1 of the Civil Procedure Rules 2010.***
- 2. The instant Application is incompetent due to lapse of the mandatory 30 days of filing an Appeal as provided in Section 79G of the Civil Procedure Act.***
- 3. The order sought to be stayed is a Negative Order which by law is incapable of Execution and thus incapable of being stayed.***

The Notice of Preliminary Objection was canvassed by way of written submissions. The Respondent/Objector through the **Law Firm of Muchoki Kangata Njenga & Co. Advocates** filed its written submissions on **7<sup>TH</sup> December 2020**, and submitted that the Appellant has failed to follow the Appellate process as provided for in law. That the Application has been filed contrary to the provisions of **Order 42 rule 1 of the Civil Procedure Rule**. That the Appellant has not filed a Memorandum of Appeal and therefore the Application of stay, pending appeal has no basis. The Respondent/ Objector relied on the case of **Abraham Lenaula Lenkeu...vs... Charles katekeyo Nkaru (2016) eKLR**.

It was further submitted that the Application is incompetent as the time for appeal had lapsed. That the Application lacks legal grounding as it was filed on **2<sup>nd</sup> July 2020**, more than a month after the expiry of the statutory time provided for filing the appeal. It was further submitted that the Ruling dismissing the Appellant's Application dated **10<sup>th</sup> June 2019**, amounts to a negative order that cannot be executed. The Respondent/ Objector therefore prayed that the Application seeking stay be dismissed for incompetency.

The Appellant filed his submissions on **9<sup>th</sup> October 2020**, through the Law Firm of **T.W Murage & Co Advocates** and submitted that the Memorandum of Appeal was filed before filing of the instant Application under certificate of urgency due to the imminent danger the Appellant was facing, as his property was on the verge of being attached by the Respondent. He urged the Court to take Judicial Notice of the Memorandum of Appeal in the Court's file. It was further submitted that the Appeal is arguable and has high chances of success and that substantial loss would emerge from refusal to grant stay. The Appellant relied on the case of **Esther Wanjiru ....Vs... Jackline Arege (2014)eklr** and submitted that the Court asserted that an **Order of stay of execution** will be granted where the Court is satisfied that substantial loss will be suffered. It was therefore the Appellant's submissions that the Preliminary Objection is warranted and the same ought to be dismissed.

The Court has carefully read and considered the Preliminary Objection and the written submissions and finds that the issue for determination is **whether the preliminary objection by the Respondent has merit, and should be allowed.**

Does the objection raised by the Respondent/Objector fall within the ambit of a preliminary Objection threshold as set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696?**

In the case of **Hassan Ali Joho & Another ...vs...Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]** the Court stated:-

**“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:**

**‘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 the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.**”

Further in the case of **J.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR** the Court held that;

**“12. Also relevant is the decision by Ojwang, J (as he then was) where he expressed himself as follows:-[3][3]**

**“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 the contract giving rise to the suit to refer the dispute to arbitration.... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion....The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. ....”**(Emphasis added)

**13. Thus, a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”**

The Respondent/objector has raised various grounds of objection being that the Appellant has failed to initiate an Appellate process, lapse of mandatory time of filing an appeal and the fact that the order sought to be stayed is a negative order.

As already noted above, a Preliminary Objection is a pure point of law. A question on whether or not a Memorandum of Appeal was duly filed goes to the Jurisdiction of the Court as without a Memorandum of appeal, then the Court has no jurisdiction as there would be no appeal before it.

Further, whether or not the Order is a negative order would not require the ascertaining of facts as the same would be found from the pleadings. The Court therefore finds and holds that the Preliminary Objections are grounds properly raised.

On the merit of the same, It is not in doubt that the Ruling that the Appellant seeks to appeal against was delivered on **28<sup>th</sup> February 2020**. Indeed there is a Notice of Appeal on record filed in Court on **26<sup>th</sup> May 2020**. There is no evidence that the Appellant was granted leave to file the **Appeal** out of time nor is there an Application before Court to show that the Appellant has sought for extension of time within which to regularize the Appeal. The Appeal having been filed out of time without the same being admitted, it is therefore not in doubt that the same is not proper and therefore null and void. Section **79G of the Civil Procedure Act** provides as follows

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

Without a proper Memorandum of Appeal, it follows therefore that the Court is without jurisdiction as the Application has no anchor which holds it and therefore without any legal basis. See the case of **James Mbatia Thuo & Ephantus Mwangi ....Vs... Kenya Railways Corporation & Attorney General of Kenya [2018] eKLR** where the Supreme Court held that ;

*“The Notice of Appeal was filed on 23<sup>rd</sup> December 2015, while the application for stay was lodged at the Supreme Court Registry on 15<sup>th</sup> May 2017; more than a year after the expiry of the statutory time provided for filing appeals. The applicants have not provided any reason for their failure to apply for an extension of time, which application, had it been granted, would have enabled them to file their appeal and thereby provided legal grounding for the rejected application for stay.*

*[21] In the absence of an appeal, or an application for extension of time, accompanied by a memorandum of appeal, the rejected application had no legal basis. We therefore see no reason to interfere with, or upset the decision by the Honourable Registrar rejecting the application.”*

On whether the Application for stay is against a negative order, it is not in doubt from the said Ruling that the lower Court merely dismissed the Appellant’s Application. There is not doubt that the same is a negative order and no stay of execution can be granted as against a negative order. The Court of Appeal decision in the case of **Kaushik Panchamatia & 3 Others...Vs...Prime Bank Limited & Another [2020]eKLR**. As the Court reiterated and which I fully adopt, that;

*“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”*

The Upshot of the above is that the Court finds that the Notice of **Preliminary Objection** dated **13<sup>th</sup> July 2020**, by the Respondent/ Objector **is merited** and the same is **upheld**. Consequently, the Appellant’s Application dated **10<sup>th</sup> June 2020** herein is hereby **struck out** with costs to the Respondent/Objector. For avoidance of doubt, the Memorandum of Appeal is null and void and therefore there is no appeal on record.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 27TH DAY OF MAY 2021.**

**L. GACHERU**

**JUDGE**

**27/5/2021**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Muhuri for the Respondent/Objector**

**No appearance for the Appellant**

**L. GACHERU**

**JUDGE**

**27/5/2021**