



REPUBLIC OF KENYA



KENYA LAW
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**Gewinn Limited & 2 others v Kigwe (Civil Appeal E039 of 2022)
[2025] KEHC 1894 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E039 OF 2022**

A MSHILA, J

FEBRUARY 7, 2025

BETWEEN

GEWINN LIMITED 1ST APPELLANT

JOSEPH WANJOHI MUTHIE 2ND APPELLANT

FESTUS GITAU MUTHIE 3RD APPELLANT

AND

CELINA WAMBUI KIGWE RESPONDENT

RULING

1. The Appellants/Applicants have brought this chamber summons application dated 14th March, 2022 pursuant to Article 159(2)(d) of the *Constitution*, Sections 3, 3A, 75, 75G, 78, 79, 79C and 79G of the *Civil Procedure Act* and Order 42 rule 6 of the *Civil Procedure Rules* seeking the following orders;-
 - a. Spent;
 - b. The application be admitted for hearing out of time;
 - c. The Appellants be granted leave to appeal against the Ruling issued on 28th February, 2022 in Ruiru SPMCC No. E364 of 2021 Celina Wambui Kigwe v Gewinn and 2 Others;
 - d. The Memorandum of Appeal filed on 14th March, 2022 be deemed to have been duly filed;
 - e. Pending the hearing and determination of the Application, an order of stay do issue staying further proceedings in Ruiru SPMCC No. E364 of 2021 Celina Wambui Kigwe v Gewinn and 2 Others; and
 - f. The costs of the Application be provided for.



2. The Application is supported by the sworn affidavit of Joseph Wanjohi dated 14th March, 2022 stating the following;
- a. He is the 2nd Appellant and one of the directors of the 1st Appellant together with the 3rd Appellant;
 - b. The application has been brought without unreasonable delay since the impugned ruling was issued on 28th February, 2022 but the certified Ruling, Order and Proceedings of the lower court were emailed to the Appellants counsel on 11th March, 2022;
 - c. The parties had executed a lease dated 24th September, 2015 whereby the Respondent leased to the Appellants a Bar, Restaurant and Car Wash premises;
 - d. The first lease stipulated the lease term as three (3) years effective from 1st October, 2015;
 - e. Clause 19 (e) of the said first lease stipulates that disputes or questions arising from the agreement shall be referred to arbitration in accordance with the *Arbitration Act*;
 - f. On 25th August, 2021 the Respondent filed suit in the lower court against the Appellants alleging breach of obligations under the first lease based on an unknown and unexecuted second lease dated 1st January, 2017;
 - g. The Respondent misrepresents in the said suit that she also leased residential rooms to the Appellants based on the said fake second lease. The said lease purports to start from 1st January, 2017 and ends on 1st January, 2019.
 - h. The said second lease cannot rescind or modify the first lease;
 - i. The first lease under clause 19 (e) ousted the jurisdiction of court and preferred arbitration as the mode of resolving disputes hence the Preliminary Objection filed by the Appellants at the lower court;
 - j. The learned magistrate notified the parties that the Ruling on the Preliminary Objection would be delivered on 28th February, 2022;
 - k. On 28th February, 2022 the Appellants counsel logged into the video-conference link emailed by the lower court and waited for the Ruling for a long time but none was delivered. Counsel's video conference call finally dropped out.
 - l. The Appellants counsel logged into the e-judiciary case tracking system which indicated that the Ruling was delivered on 28th February, 2022 and the case was closed. Counsel understood this to mean that the case was struck out;
 - m. The Appellant's efforts to obtain a copy of the Ruling were thwarted by the unavailability of the Court file in the Registry;
 - n. Despite the indication in the e-judiciary case tracking system that the case had been closed, the Appellants' counsel received an email from the lower court on 8th March, 2022 stating the following;
 - i. The suit came up for mention in the presence of the Respondent's counsel;
 - ii. Directions were issued that the Appellants file their defence by close of business on 16th March, 2022; and



- iii. Mention on 18th March, 2022.
 - o. The learned magistrate erred in failing to appreciate that the Respondent's claim can only be resolved through arbitration pursuant to the said first lease agreement;
 - p. Filing a defence as directed by the lower court would mean that the Appellants have waived arbitration as the agreed mode of dispute resolution under the first lease agreement;
 - q. The continuance of the proceedings in Ruiru SPMCC No. E365 of 2022 will irreparably prejudice the hearing of the pending appeal.
3. The Respondent filed Grounds of Opposition in response to the Application stating the following;
- a. There is no competent Appeal before the Court as the Memorandum of Appeal was filed without the leave of court, the impugned Ruling having been made on a Preliminary Objection for which there is no automatic right of appeal;
 - b. Leave to appeal is mandatorily sought in the first instance, before the court appealed from, either orally at the time when the impugned order was made or within fourteen (14) days of the order, and since no application was made for leave before the subordinate court, the High Court has no jurisdiction to grant the leave to appeal;
 - c. The appeal is in any case not arguable as the Preliminary Objection lacked merit and was in breach of Section 6 of the *Arbitration Act*;
4. The Appellants filed a Replying Affidavit dated 10th May, 2022 which mainly reiterates the contents of their supporting affidavit dated 14th March, 2022.
5. The parties were directed to canvass the application by way of written submissions. Counsel for respective parties made the following submissions:-

Appellants'/applicants' Submissions

6. The Appellants submitted that the unfortunate lapse of time was occasioned by the learned magistrate, the e-judiciary tracking system and the unavailability of the court file. The e-judiciary case tracking system disclosed two contrary outcomes. Initially the case was indicated as closed meaning that the Preliminary Objection had been upheld. Later the same system indicated that a Ruling had been delivered and the case was still active, meaning that the Preliminary Objection had been dismissed.
7. By the time the learned magistrate clarified the actual findings of the Ruling, time had lapsed necessitating the filing of the instant chamber summons. The Appellants relied on *Wachira Karani v Bildad Wachira* [2016] eKLR where it was observed that the fundamental duty of the court is to do justice between the parties and that the court is not powerless to grant relief when the ends of justice and equity so demands because the powers vested in the court are of wide scope and ambit.
8. The Appellants also relied on *Stephen Boro Gitiba v Family Finance Building Society and 3 Others* Court of Appeal C.A No. 263 of 2009 where the Court of Appeal emphasized the paramount duty of a court was to administer justice.
9. The Appellants submitted that the judiciary made various blunders after delivery of the ruling. These blunders prevented the Appellants from instituting their appeal within the prescriptions of the law. The Appellants cited *Philip Chemowolo & Another v Augustine Kubende* [1986] KLR where it was observed that blunders will continue to be made from time to time but it does not mean that if a mistake is made a party should suffer the penalty of not having his case heard on merit. The Appellants averred



that the learned magistrate replied to the Appellants' complaint and clarified that it was an error that caused the case to be marked as closed. Time had already lapsed because the Appellants were convinced that their Preliminary Objection had succeeded.

10. The Appellants averred that without prejudice to the above arguments, since the basis of the Preliminary Objection is the fact that the lower court was divested of the jurisdiction to entertain the matter, the issues raised were essentially pleadings and hence fell within pleadings generally. They were therefore in the category of those orders that are appealable as of right under Order 43 Rule 1(b) of the [Civil Procedure Rules](#) and no leave was needed in the first instance. They placed reliance on Kisumu High Court Civil Appeal No.55 of 2020 [First Assurance Co. Ltd v Osenala & Another](#) [2021] eKLR.
11. The Appellants argued that the Respondent's attack on the application is a veiled resistance to Arbitration which forum the parties freely and mutually agreed as the alternative dispute resolution mechanism for the issues pleaded in SPMCC No. E364 of 2021. The Appellants have not filed a defence in the said matter and therefore the Preliminary Objection is not an acknowledgement of the subordinate court's jurisdiction. Based on the foregoing the Appellants urged the court to uphold the application and allow the appeal to be heard on merits.

The Respondent's Submissions

12. The Respondent submitted that the Preliminary Objection which is the subject of this appeal is not based on any rule or provision of law except that the suit before the subordinate court offended the [Arbitration Act](#) hence divesting the said court of jurisdiction to hear the matter.
13. Upon dismissal of the Preliminary Objection on 28th February, 2021 the Appellants filed their Memorandum of Appeal on the 14th March 2022. This was well within the 30 days timelines. However, the Memorandum of Appeal was filed without leave of court hence it was incompetent. The Respondent relied on section 75 (1) and Order 43 Rule 1(1) of the [Civil Procedure Rules](#).
14. The Appellants have conceded that they received the email forwarding the certified ruling, order and proceedings of the lower court on 11th March 2022. They were still within the 14 days window to seek leave to appeal that order since the order was delivered on 28th February, 2022. No explanation was given as to why leave was not applied for before the expiry of the mandatory 14 days.
15. The Respondent averred that this court does not have jurisdiction to grant leave to appeal where none has been applied for first before the trial court. She cited Isaac Mbugua Ngirachu v Stephen Gichobi Kaara (Embu) Civil Appeal No. 80 of 2019.
16. The subordinate court could not have allowed the Preliminary Objection solely because it lacked jurisdiction. Under Section 6 of the [Arbitration Act](#), the Appellants ought to have sought for stay of proceedings before the subordinate court. The subordinate court had no power to strike the suit based on a Preliminary Objection but could only stay the suit pending reference to arbitration.
17. The Appellants have not fulfilled the requirements for an order of stay of proceedings pending hearing and determination of the appeal. This is because there is no competent appeal pending before this court for lack of leave to appeal. There are no substantial questions to be determined in the appeal and hence the appeal is not arguable. There is no arbitration clause in the subsequent tenancy agreement. Even if there was such clause, Section 6 of the [Arbitration Act](#) does not give the court the power to strike out a matter as sought in the Preliminary Objection. The Appellants have not demonstrated that the appeal would be rendered nugatory if the stay of proceedings is not granted.
18. The Respondent further argued that the Appellants have not demonstrated that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded



and all arising grievances taken up on a single appeal. The Respondent relied on [Turbo Highway Eldoret Ltd v Muniu](#) Civil Appeal No.E40 of 2021. The Respondent urged the court to dismiss the application with costs.

Issues For Determination

19. From the application, and the written submissions this court has framed three issues for determination; which are as follows;
 - a. Whether the court should exercise its discretion to grant the Applicants leave to appeal the ruling issued on 28th February, 2022 in Ruiru SPMCC No.E364 of 2021 *Celine Wambui Kigwe v Gewinn Ltd and 2 Others*; and
 - b. Whether the Applicants have met the prerequisites for grant of stay of proceedings in Ruiru SPMCC No. E364 of 2021 *Celine Wambui Kigwe v Gewinn Ltd and 2 Others* pending hearing and determination of the appeal.
 - c. Whether the court should exercise its discretion to grant the Applicants leave to appeal the ruling issued on 28th February, 2022 in Ruiru SPMCC No.E364 of 2021 *Celine Wambui Kigwe v Gewinn Ltd and 2 Others*

Whether the court should exercise its discretion to grant the Applicants leave to appeal the ruling issued on 28th February, 2022 in Ruiru SPMCC No.E364 of 2021 *Celine Wambui Kigwe v Gewinn Ltd and 2 Others*;

20. The applicable law is found at Section 75 (1) of the [Civil Procedure Act](#) which provides;-

“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—“
21. The section proceeds to list a number of orders which can be appealed as of right from paragraph (a) to (b). The order sought to be appealed against herein does not expressly fall within that category. Order 43 (1) provides a list of orders that may be appealed as of right based on the rules under section 75 (1) (h) of the [Civil Procedure Act](#). Again the order sought to be appealed against in the instant matter does not feature in that list. It therefore follows that there was a need to apply for leave of court before filing an appeal against the impugned order. Guidance on this requirement is detailed in Order 43 Rule 1 (2) and (3) which provides that;-
 - “(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.”
22. From the above provisions it is procedurally appropriate to first approach the subordinate court for leave to appeal an order that is not appealable as of right like the instant case. Does failure to do so bar a party from applying for the leave to appeal to the High Court?. Section 75 (1) of the [Civil Procedure Rules](#) foresees the possibility of applying for such leave either to the subordinate court or to the High Court. Order 43 Rule 1 (3) of the [Civil Procedure Rules](#) requiring that leave to appeal be sought in



the first instance in the subordinate court does not state the consequences of failure to do so. The Applicants still have a window in appropriate cases to apply for such leave at the High Court.

23. In the case of *Lighting And Interiors By Diamond Limited v Njoroge & 2 others* (Miscellaneous Application E099 of 2022) [2022] KEHC 531 (KLR) (Civ) (31 May 2022) (Ruling) it was held;-

“Despite the requirement of Order 43 rule 1(3) of the Rules requiring that leave be granted by the Subordinate Court in the first instance, this position is not supported by the provision of Section 75(1) of the *Civil Procedure Act* which provides that leave may be granted by the court making the order or by the court to which the appeal lies if such leave were granted.”

24. The Applicants herein have indicated with sufficient detail their frustrations in trying to comply with timelines in the subordinate court. The frustrations were not the Applicants fault because they were occasioned by inadvertent mistakes due to technical problems with the e-judiciary tracking system. This court is satisfied that the application is properly before this court and the court has the jurisdiction to grant such order for leave to appeal.

Whether the applicant has met the prerequisites for grant of stay of proceedings in Ruiru SPMCC No.E364 of 2021 Celine Wambui Kigwe v Gewinn Ltd and 2 Others pending hearing and determination of the appeal

25. Stay of proceedings is an extremely delicate issue that the court should approach with abundance of caution. This is so because it is a grave judicial action that interferes with the right of a litigant to conduct his litigation. It touches on the key fundamental rights such as the right to fair trial, the right of access to justice and the right to be heard without delay. Consequently, the test for stay of proceeding is high and stringent. In *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 Ringera, J stated;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added).

26. In this matter the validity of the suit was challenged by the Applicant in the Preliminary Objection which was dismissed by the trial court. The ruling in which the Preliminary Objection was dismissed is the subject matter of the current appeal. If the appeal is successful, the Respondent’s suit will automatically collapse and if the appeal is dismissed, the suit in the subordinate court will be prosecuted to its logical conclusion. The interests of justice will therefore be better served if the orders sought are granted in order to prevent the continuation of proceedings in the lower court pending the hearing and determination of the appeal. As stated in *APA Insurance Limited v Rose Linnet Achieng* (Civil Appeal 440 of 2019) [2020] KEHC 5978 (KLR) (Civ) (14 May 2020) (Ruling) granting the orders will save precious judicial time as it will prevent a situation where the High Court and the lower court conducts parallel proceedings and it will also save the parties’ time and costs in prosecuting or defending a suit which may eventually be declared incompetent in the event the appeal succeeds.



27. This Court is satisfied that the Applicants have demonstrated sufficient cause to justify the grant of orders staying proceedings in the lower court as sought.

Findings And Determination

28. In light of the above reasons this court makes the following findings and determinations;

- a. This court finds the application to have merit and it is hereby allowed.
- b. The Applicants be and are hereby granted leave to appeal against the Ruling issued on 28th February, 2022 in Ruiru SPMCC No. E364 of 2021, Ruiru Law Court, *Celina Wambui Kigwe v Gewinn and 2 Others*;
- c. The Applicants to file and serve Record of Appeal within Forty-Five (45) days from the date hereof.
- d. Pending the hearing and determination of the Appeal an order of stay of proceedings be and is hereby issued staying further proceedings in Ruiru SPMCC No. E364 of 2021 Ruiru Law Court, *Celina Wambui Kigwe v Gewinn and 2 Others*;
- e. The costs of the Application be in the cause.
- f. Mention 19/05/2025 for compliance and directions.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 7TH DAY OF FEBRUARY, 2025

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

Kuria for the Appellant/Applicant

Masore h/b for Nyangau for the Respondent

