



**Migeke v Chomba & another (Civil Appeal 146 of 2019)
[2025] KEHC 2079 (KLR) (Civ) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 146 OF 2019

JN MULWA, J

FEBRUARY 6, 2025

BETWEEN

NICHOLAS NDANYI MIGEKE APPELLANT

AND

ROBERT CHOMBA 1ST RESPONDENT

PAUL THIONGO WAMBUGU 2ND RESPONDENT

RULING

1. By a Notice of motion application dated 26/04/2024, the applicant's sought Orders for grant that the law firm of G. m. Gamma LLP be allowed to come on record on their behalf in place of Humphrey & Co. LLP, as well as orders of stay of execution of a judgment delivered on 31/01/2024 by the late Hon. Majanja J pending hearing of the intended appeal.
2. The impugned judgment was in favour of the appellant and Kshs. 600,000/= was awarded on account of loss of earning capacity plus a cost assessed at Kshs. 30,000/= which is the subject of the intended appeal.
3. The motion is based on grounds appearing at the face of supporting affidavit filed by Hope Wambugu, a manager Legal Claims for the insurance of the accident motor vehicle Britam General Insurance Company (Kenya Limited) sworn on 26/04/2024. The impugned judgment has been annexed as an exhibit to the affidavit.

The motion s premised upon Order 42 Rule 6, Order 9 Rule 9 and Order 22 Rule 2 of the Civil Procedure Rules.
4. The substratum of the applicant's motion is that the former law firm failed to notify them of delivery of judgment leaving them exposed to pay the decretal sum to the tune of Kshs. 1,258,199.94 in addition



to Kshs. 248,000/= as Auctioneers fees and therefore the need to change advocates as they proceed to the challenge the judgment at the Court of Appeal.

5. In opposition to the motion, one Colleta Wambua Advocate in the firm of Humpley & Company LLP Advocates swore the replying affidavit on 7/06/2024.

It is the respondents contention that the clients were duly notified of delivery of the judgment by letter dated 16/02/2024 and shared the said judgment and the said Hope Wambugu copied by the email; and on 19/02/2024 shared its opinion on the judgment.

6. The respondent further depones that as its legal fees for the lower court matter that lead to the instant appeal had not been paid, they could not proceed to file the Notice of Appeal and motion for stay of execution by an email dated 29/04/2024.
7. It is the respondents further disposition that the applicant's supporting affidavit by Hobe Wambugu is false and the said claims manager, being an advocate has committed and liable to the perjury to the advocate's code of conduct and ethics, all the correspondences between the parties has been annexed to the replying affidavit.
8. The respondent has also filed its submissions dated 25/07/2024 stating that the applicant's motion was not brought to court expeditiously for a delay period of about four months that it is an abuse of court process as no notice of appeal has been filed nor has the applicant sought leave to file an appeal out of time.
9. Additionally, the Respondent submits that in the absence of an appeal filed, no order for stay may be granted cited the case of Kuko & Another v. Ali & Another, Robinson (Interested Party) [2024] eKLR, Sokoro Savings & Credit Cooperative Society ltd v. Mwamburi [2023] eKLR.
10. Further, it is submitted that as the applicants lied to the court and exhibited no prejudice should the orders sought be denied, that it is the appellant/respondent who is suffering as he cannot enjoy his judgment sum that the intended appeal has no chances of success as no merits is oppressive and malicious.
11. The applicants have also filed their submissions dated 25/07/2024. On whether leave should be granted to the firm of G. M. Gamma Advocates to come on record, it is submitted that such leave was granted by the Hon. Majanja J. on 20/06/2024.
12. On stay of execution, it is submitted that provisions under Order 42 Rule 6 of the civil Procedure Rules have been complied with and adds that if the sum of Kshs. 600,000/= is paid to the respondent he may not be able to repay should the appeal succeed and have the intended appeal would be rendered nugatory citing the case of RWW V. EKW [2019] eKLR.
13. It is further submitted that the applicant has already paid the respondent Kshs. 2,500,000/= awarded by the trial court leaving only the contested Kshs. 600,00/= and stated that they are ready to abide with orders on security that the court may make relying on the case of Nduhiu gihahi & Another V. Anna Wambui Wangongo [1988] 2KAR 621.
14. The court has carefully evaluated and interrogated the parties submissions.

Two issues arise for determination;

1. Whether there is an appeal pending before the Court of Appeal.
2. Whether stay of execution of the decree should be granted pending hearing and determination of the intended appeal if the answer to (1) above is in the affirmative.



15. The Court has perused the proceedings and documents filed in the CTS by the parties after delivery of the impugned judgment on 31/01/2024. I agree with the Respondent that no notice of Appeal has been filed by the applicants showing their intention to appeal against the judgment delivered on 31/01/2024.
16. In addition the motion before the court dated 26/04/2024 has only two prayers
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 3. That pending hearing and determination of the application the court be pleased to stay execution of its judgment delivered on 31/01/2024.
 4. That pending lodgment hearing and determination of the intended appeal against the judgment delivered on 31/01/2024 the court be pleased to stay execution of its judgment delivered on 31/01/2024.
17. Clearly, the applicants have not sought leave of court to file that intended Appeal out of time. Section 79G of the Civil Procedure Act has also not been invoked by the applicants.
18. In the court's view therefore, the applicants have no intentions to file an appeal from the judgment dated 31/01/2024 out of time or at all.
19. For a party to invoke the jurisdiction of the Court of Appeal under Rule 5 (2) (b) it must file a Notice of Appeal in accordance with Rule 77 of the Court of Appeal Rules.
20. In respect thereof, the Court in the case of Phoenix of EA Assurance Company Limited v. S. M. Thiga t/a Newspaper Services [2019]eKLR held that a:-

“A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction is dead the court cannot confer jurisdiction on itself”
21. Further in Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 6 Others [2013]eKLR, the Supreme Court rendered that

“a notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is one that requires leave or not. It is a jurisdictional prerequisite”

See Nairobi City Council V. Tom Ojienda & Associates [2022] KECA 1326(KLR)
22. It is therefore this court's considered opinion that there being no notice of appeal filed, whether valid or otherwise, no orders of stay of execution may be issued pending hearing and determination of a non-existing appeal exhibited by a notice to appeal.
23. It is trite that court orders cannot be given in a vacuum nor may a court grant orders that an applicant has by its application not sought from the court.
24. Based on the foregoing and particularly the falsehoods contained in the supporting affidavit by the applicant one Hope Wambugu are perjuringly on the face of the record, considering the email communication exchanged between herself and the Respondents advocates, the court finds the applications to be a gross abuse of the court process, oppressive, malicious and unnecessary in the circumstances.



25. The upshot is that the application is devoid of merit and is dismissed with costs to the Respondent/ Appellant.

Orders accordingly

DELIVERED DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2025.

JANET MULWA

JUDGE

