



REPUBLIC OF KENYA



KENYA LAW
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Thuo & another (Guardians Ad Litem of Mary Wanjiku Kimathi) v NCBA Bank Kenya PLC & another (Civil Appeal E147 of 2024) [2025] KEHC 743 (KLR) (3 February 2025) (Ruling)

Neutral citation: [2025] KEHC 743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E147 OF 2024
JM NANG'EA, J
FEBRUARY 3, 2025**

BETWEEN

ANTHONY MUIGAI THUO 1ST APPELLANT

SAMWEL MUIGAI THUO 2ND APPELLANT

GUARDIANS AD LITEM OF MARY WANJIKU KIMATHI

AND

NCBA BANK KENYA PLC 1ST RESPONDENT

**BENJAMIN KISIA T/A LEGACY AUCTIONEERING SERVICES 2ND
RESPONDENT**

RULING

1. The court is to rule on two applications dated 28th May 2024 and 1st July 2024 brought by the Appellants and 1st Respondent respectively. On 15/7/2024 the court directed that the two applications would be heard together. I will dispose of the latter application first.

The 1st Respondent's Application Dated 1st July 2024

2. The 1st Respondent seeks an order striking out the appeal with costs. Through affidavit evidence of its Legal Counsel (Jackson Nyaga), the court is told that this appeal was lodged against the lower court's ruling of 16th May 2024 by which the Appellant's application dated 25/10/2022 seeking inter alia temporary injunction restraining the 1st Respondent from realizing property known as Kampi ya Moto/Menengai Block 1/2224 (Mangu) charged to secure a loan was dismissed.
3. The 1st Respondent's Legal Counsel further states that the Appellant subsequently filed an application dated 29th May 2024 before the lower court praying inter alia for review of the trial court's orders.



Pending hearing and determination of the review application, the court is said to have granted temporary orders of injunction prohibiting disposal of the charged property.

4. In the circumstances, the 1st Respondent contends that the Appellants cannot lawfully seek review of the impugned orders and at the same time appeal the orders, hence this application.
5. The Appellants have neither filed a response to the application nor their submissions thereon. In effect, the application is therefore unopposed. Be that as it may, it is not denied that an application for review of the same orders appealed against is pending in the lower court. Section 80 of the *Civil Procedure Act* allows a party to apply for review of a judgment or order only where no appeal is in law preferable or none has been preferred. Order 45 of the Civil Procedure Rules 2010 amplifies this legal provision and further states the grounds on which such review may be sought. Case law has also underscored the legal requirement in many decisions including the Court of Appeal's decision in *National Bank of Kenya Limited vs Ndung'u Njau* [1997] eKLR.
6. The upshot therefore is that as this application has not been opposed by evidence, and given that an application seeking review of the order complained of is before the lower court, this appeal is defective.
7. The appeal is accordingly struck out with costs as prayed.

The Appellants' Application Dated 28th May 2024

8. The Appellants pray for these orders:-
 1. Spent
 2. Spent
 3. That pending the hearing and determination the appeal, there be an order of injunction do issue restraining the 1st Respondent by itself, its servants, auctioneers, receivers agents or any of the or otherwise from advertising for public auction or offering for sale by public auction or purporting to sell by public auction the parcel of land being Land Reference Number Kampi ya Moto/Menengai Block 1/2224 (Mangu).
 4. That the 1st Respondent by itself, its servants, auctioneers, receivers' agents, servants or anybody acting on its behalf be restrained from selling, auctioning, disposing of, advertising for sale or in any way divesting the interest of parcel of land being Land Reference Number Kampi ya Moto/Menengai Block 1/2224 (Mangu) pending any further Orders/Directions of this court.
 5. That this court does order that the dispute between the parties herein be referred back to the trial court for hearing and determination on the merits.
 6. That cost be provided for.
9. The application is supported by a joint affidavit of Guardians Ad Litem appointed to take care of the minor subject of the dispute.
10. This application is not also opposed as the Respondents thereto filed no replies. I have not also seen submissions of Counsel for the parties.
11. Even though the application is unopposed, it lacks the necessary substratum on which to stand as the appeal has been struck out. The same is also struck out with no orders as to costs.

J. M. NANG'EA, JUDGE.



RULING DELIVERED THIS 3RD DAY OF FEBRUARY, 2025 IN THE PRESENCE OF:

Advocate for Appellants, Ms Kimotho for Ms Wairimu

Advocate for 1st Respondent, Mr. Dachu

2nd Respondent, Absent

The Court Assistant (Jeniffer)

J. M. NANG'EA, JUDGE.

