



**Gathii v Mwatha (Civil Appeal 125 of 2022)  
[2025] KEHC 5030 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5030 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 125 OF 2022  
SM MOHOCHI, J  
APRIL 24, 2025**

**BETWEEN**

**PHILIP MAINA GATHII ..... APPELLANT**

**AND**

**STEPHEN MWAURA MWATHA ..... RESPONDENT**

*(Being an appeal from the Ruling of the Chief Magistrate's Court of Kenya at Nakuru delivered by the Honourable Principal Magistrate Orege K. I. on 7th September, 2022 in Nakuru Chief Magistrate's Civil Case No. 383 of 2019)*

**JUDGMENT**

1. The Appellant being dissatisfied with the entire ruling of Hon. Orege K. I. delivered on 7<sup>th</sup> September, 2022 appeals by way of a Memorandum of Appeal dated 16<sup>th</sup> September 2022 to this Court on the following amongst other grounds;
  - i. That the Honourable Principal Magistrate erred in Law and fact by failing to consider the applicable Law in the event of a Moratorium being declared against an Insurance matter.
  - ii. The Honourable Principal Magistrate erred in Law and fact by failing to pronounce himself on the prayer for payment of the decretal amounts by instalments.
  - iii. The Honourable Principal Magistrate erred in Law in misapprehending the kind of Stay of execution the Appellant was seeking in the application dated 7th April, 2022.
  - iv. The Honourable Principal Magistrate erred in Law and fact in holding that there was a delay on the part of the Appellant in moving the Court for Stay of execution.



2. It should be recalled that a default judgment had been entered against the Appellant who only moved the Court after proclamation was done giving rise to the impugned ruling dated 7<sup>th</sup> September, 2022 subject to this Appeal.
3. The Motion giving rise to the to the impugned ruling dated 7<sup>th</sup> September, 2022 was an application for stay of execution of judgment or decree filed pursuant to Order 42 Rule 6 of the Civil Procedure Rules.
4. This Appeal is not one that lies as a matter of right but one that requires leave of Court to be sought and granted.
5. Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules set out decrees/orders that are appealable as a matter of right. Under Section 75 of the *Civil Procedure Act*, an appeal shall lie as of right from the following orders: -

“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—

(1)

- (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.

(2) No appeal shall lie from any order passed in appeal under this section.”

6. On the other hand, Order 43 of the Civil Procedure Rules lists those orders from which appeals would lie as a matter of right. The Order provides:

“1.

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—
  - (a) Order 1 (parties to suits);
  - (b) Order 2 (pleadings generally);



- (c) Order 3 (frame and institution of suit);
- (d) Order 4, rule 9 (return of plaint);
- (e) Order 7, rule 12 (exclusion of counterclaim);
- (f) Order 8 (amendment of pleadings);
- (g) Order 10, rule 11 (setting aside judgment in default of appearance).
- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- (j) Order 19 (affidavits);
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- (m) Order 24, rules 5, 6 and 7 (legal representatives);
- (n) Order 25, rule 5 (compromise of a suit);
- (o) Order 26, rules 1 and 5(2) (security for costs);
- (p) Order 27, rules 3 and 10 (payment into Court and tender);
- (q) Order 28, rule 4 (orders in proceedings against the Government);
- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security);
- (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers);
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);
- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);
- (aa) Order 53 (judicial review orders).



- (2) An appeal shall lie with the leave of the Court from any other order made under these Rules.
- (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.
- (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”

7. The Court in *Directline Insurance Co. Ltd v Onyango* (Civil Appeal E345 of 2022) [2022] while faced with a similar application as the instant application had this to say;

“It is then clear that under order 43(2) 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 order 43(1) leave to appeal must be obtained before such an appeal can be preferred. (See Mutungi J in *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR). Order 42 rule 6 under which applications for stay of execution fall is not one of the orders mentioned in order 43(1) where the appeal lies as of right. The appellants ought to have sought leave before filing this appeal. In *Stephen Omondi Juma v Sprocer Awuor Rabote* [2022] eKLR, Aburili J was faced with a similar issue as the issue before me. She cited a Court of Appeal decision and stated that:

“As was emphatically stated in *Nyutu Agrovet Ltd vs Airtel Networks Ltd* [2015] eKLR, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of Court. Further, that the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of section 75 of the *Civil Procedure Act* and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower Court to appeal to this Court.”

Leave to appeal in the instant case did not lie as a matter of right.”

8. There is no automatic right of appeal of the order sought to be appealed from by the Applicant in the instant matter.
9. The exercise of discretion was judicious. The Court cannot interfere with exercise of discretion unless the Court was plainly wrong or fettered is discretion. In this matter it was not capricious. Madan JA (as he then was) in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd Vs East African Underwriters (Kenya) Ltd* [1985] eKLR stated as hereunder: -

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account;



fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

10. This Court has fully considered the Unpaged Record of Appeal the Impugned ruling dated 7<sup>th</sup> September 2022 and submissions by the Appellant and the Respondent and is persuaded that no leave of the Court was sought before initiating this Appeal. The Appellant not only conveniently remained silent on this fact but equally failed to plead having successfully sought for the same either on the 7<sup>th</sup> September 2022 or any other subsequent day up to the 15<sup>th</sup> September 2022.
11. No basis has been laid to demonstrate that the Trial magistrate exercised his discretion in an injudicious manner.
12. This Appeal fails for being fatally incompetent having been filed without leave of the Court and lacking in merit and accordingly dismiss the same with costs to the Respondent.
13. The temporary Stay of execution dated 19<sup>th</sup> September 2023 is hereby vacated

It is so Ordered

**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 24<sup>TH</sup> APRIL, 2025**

**MOHOCHI S.M**

**JUDGE**

