



REPUBLIC OF KENYA



**Ndamboi Agencies Limited & others v First Capital Limited (Civil Appeal E150 of 2024) [2025] KEHC 12146 (KLR) (9 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12146 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E150 OF 2024  
F WANGARI, J  
JUNE 9, 2025**

**BETWEEN**

**NDAMBOI AGENCIES LIMITED & OTHERS ..... DEFENDANT**

**AND**

**FIRST CAPITAL LIMITED ..... PLAINTIFF**

**RULING**

1. Before me is a Notice of Motion application dated 10062024 which was brought under certificate of urgency. The Applicants sought the following orders in summary;
  - a. Spent
  - b. Spent
  - c. Stay of execution of the court orders dated 03052024 pending hearing of this application and subsequently the appeal
  - d. That there be stay of accrual of interest pending the appeal
  - e. Costs of the application be provided for.
2. In the Supporting Affidavit sworn by Stella Wandoe, the 2<sup>nd</sup> Appellant, the Applicants stated that their appeal is arguable and raises prima facie case for determination on appeal. They are likely to suffer irreparable harm if the orders sought for are not granted and the appeal shall be rendered nugatory. They prayed that the application be allowed with costs.
3. In response to the application, the Respondent through the Replying Affidavit sworn on 27092024 sworn by the Respondent's Recoveries Officer one Raphael Osogo, stated that this court has no jurisdiction to deal with the application, as the Memorandum of Appeal has not been lodged within time.



4. Further, the application for stay was not first made in the trial court hence this application is defective. The Applicants have not shown how they will suffer irreparable damage if the stay orders are not granted. It is further stated that the call to stay interest on decretal amount is an invitation to interfere with the decree at a preliminary stage. The Respondent seeks to have the application be dismissed with costs.
5. In response to the above, the Applicants filed Further Affidavit dated 04112024 without leave of this court. The Applicants did not seek to have the Further Submissions be properly filed. The same is expunged from the court's records.
6. The application was canvassed by way of written submissions. Both parties complied by filing the rival submissions which I have perused and considered.

### **Analysis**

7. Having considered the application, supporting affidavit, the response and the rival submissions, the issues for determination are;
  - a. Whether this court has jurisdiction over the matter
  - b. If the court assumes jurisdiction, whether the Applicants should be granted stay orders
  - c. Who bears the costs
8. The judgment subject to this application was delivered on 03052024. The Applicant ought to have filed the Memorandum of Appeal by 03062024. I have perused through the e-filing platform. I agree with the Respondent that no Memorandum of Appeal was filed. The Applicants filed Notice of Appeal dated 03062024.
9. Appeals before this court are not initiated by way of Notice of Appeal but the Memorandum of Appeal. In Order 42 Rule 1 of the *Civil Procedure Rules*, it provides as follows; -

Form of appeal

  - (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
  - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
10. The requirement is in mandatory form. What the Applicants filed as far as the Memorandum of Appeal is concerned is a Draft Memorandum of Appeal which was attached to the application in issue. It is not dated nor signed. Further, even if this court was to consider the Further Affidavit, the attached Memorandum of Appeal which was alleged to have been filed was also not signed nor dated.
11. It cannot be said that the Applicants filed the Memorandum of Appeal. The Applicants did not seek leave to file appeal out of time. In *Nairobi Bottlers Limited vs Ndungu & Another* [2023] KESC 96 (KLR) the Supreme Court declined to accede to the request to deem the appeal which had been filed out of time as properly filed for the same would amount to sanctioning an illegality.
12. Further, in *Patrick Kiruja Kitbinji v Victor Mugira Marete* [2015] eKLR, the Court of Appeal stated that whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the



court. Secondly, that the court only has jurisdiction to entertain appeals filed within the requisite time and or appeals filed out of time, but with leave of the Court.

13. As was held in the case of *Daniel Nkirimpa Monirei v Sayialet Ole Koilel & 4 Others*, any appeal filed out of time without leave is for striking out. In this case, the appeal has not even been filed. I find no appeal exists. The application dated 03052025 is therefore premature and is hereby struck out.
14. On costs, the court exercises its discretion and award costs to the Respondents.

#### **Determination**

15. In the upshot, I make the following orders: -
  - a. The application dated 03052024 is hereby struck out
  - b. Costs awarded to the Respondent

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 9<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

the Appellant

for the Respondent

MS Norah, Court Assistant

