



REPUBLIC OF KENYA



**KENYA LAW**  
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**Adrian Kenya Limited v Rubis Energy Kenya PLC (Commercial Appeal E142 of 2025)  
[2025] KEHC 9715 (KLR) (Commercial and Tax) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9715 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E142 OF 2025**

**CM KARIUKI, J**

**JULY 4, 2025**

**BETWEEN**

**ADRIAN KENYA LIMITED ..... APPELLANT**

**AND**

**RUBIS ENERGY KENYA PLC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. Lucy Njora (SPM) delivered on 24th April 2025 in Mililani cvrcc No. E292 of 2024 Rubis Energy Kenya PLC vs Adrian Kenya Limited)*

**RULING**

**Introduction**

1. The Appellant's Application seeks the stay of execution of the Judgment of the Court in MCCOMSU E292 of 2024- Rubis Energy Kenya PLC v Adrian Kenya Limited delivered on 24<sup>th</sup> April 2025 by Hon. Njora (SPM). The Respondent has filed a Notice of Preliminary objection dated 26<sup>th</sup> May 2025 on the grounds that the Application and the Appeal are incompetent and should be struck out because of the Appellant's failure to seek leave to appeal under Order 43 Rule 1. The Respondent has also filed a Replying Affidavit sworn by Evelyn Rotich on 21<sup>st</sup> May 2025, the Respondent's Fuel Territory Manager in opposition to the Application.

**Factual Background**

2. By an application dated 14<sup>th</sup> March 2024, the Respondent herein sought judgment on admission against the Appellant for the sum of Kshs. 12,522,161.05 under Order 13 Rule 2 of the Civil Procedure Rules. The Court found that the Appellant had unequivocally admitted its indebtedness to the Respondent through various correspondence and pleadings and entered judgment on admission against the Appellant.



3. On the day the Magistrate delivered the Ruling, the Appellant's counsel was not present in Court and no application was made thereafter for leave to file the instant appeal before this Court. Further, the Appellant instructed new counsel to take over the appeal. The Respondent contends that the Appeal is fatally defective, and this Court lacks the jurisdiction to determine the stay application filed within this appeal.

#### **Respondent's submissions in respect of its preliminary objection**

4. In the Respondent's considered view, the issues that render themselves for determination by this Court are as follows: proposed issues
  - i. Whether this Court has jurisdiction to entertain the Stay Application.
  - ii. Notwithstanding the above and without prejudice to issue No. i above,
  - iii. whether the Appellant has met the legal threshold for granting an order of stay of execution.
  - iv. Whether this Court has jurisdiction to entertain the Stay Application
5. Order 43 Rule 1(1) of the Civil Procedure Rules.
6. Sets out Orders from which appeals shall lie as a matter of right. Order 43 Rule 1(2) states that appeals from any other Orders under the Civil Procedure Rules shall lie with the leave of the Court. The Respondent's Application was brought under Order 13 Rule 2. This is not one of the provisions set out under Order 43 Rule 1 (1) as an Order from which an appeal shall lie as a matter of right. Therefore, it follows that, this appeal could only have been instituted with leave of the Magistrate's Court.
7. Enunciating the importance of seeking leave where no automatic right of appeal exists, the Court of Appeal in *Peter Nvaua Muvake v Joseoh Mutunua* 120151 KECA 475 (KLR) held as follows:

“In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant's appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.

In light of the above finding, it is not necessary to consider whether the principles governing the grant of an order for stay under Rule 5(2)(b) of the rules of this court were met because our jurisdiction has not been invoked through the lodgement of a valid notice of appeal.
8. Similarly, the Court in *KCB Bank (K) Limited v Peter Wainaina Nguzi* 120201 eKLR when considering unerringly similar facts held as follows:

“I strongly disagree with the position taken by Ms. Mathenge that failure to obtain leave to file an appeal where the appellant did not have an automatic right of appeal was a mere procedural technicality which did not affect the competence or validity of an appeal.



In my view, failure to obtain leave to appeal where such leave was required was a fundamental omission which went to the root of the competence of an appeal. It is not a procedural technicality which as submitted by Ms Mathenge can be disregarded under Article 159 of the *Constitution*. It is a matter which affects the jurisdiction of this court to entertain such an appeal, and any application filed therein.

Put differently, an appeal filed without leave of the court where such leave is required does not properly invoke the appellate jurisdiction of the court and the court would not consequently have any basis to entertain an application filed in the appeal.

9. The Respondent submits that on account of the Appellant's failure to seek leave, this Court's appellate jurisdiction has not been properly invoked, and the Court lacks the jurisdiction to determine the stay application filed in the incompetent appeal.
10. On this basis alone, the Court must down its tools and dismiss the Application with costs to the Respondent as found in *Owners of the Motor Vessel "Lillian S" v Caltex Oil. (Kenya) Ltd (Civil Appeal 50 of 1989) 119891 KECA 48 (KLR)* ¶(17 November 1989) (Judgment) where the Court held as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step.

Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of other matter before it the moment it holds the opinion that it is without jurisdiction.”

### **Appellant Submissions**

11. The Appellant submits that, the decision it seeks to appeal from is one that directly affects the substantive rights and interests of the Appellant by sanctioning execution through warrants of attachment and sale. Such a decision falls within the realm of appealable orders, either as of right or with leave.
12. Under Order 43 Rule 1(u) of the Civil Procedure Rules, appeals lie as of right from orders made under Order 22, which governs execution of decrees. The issuance of warrants of attachment falls under Order 22 Rule 6 onwards, and the objection, therefore, has no basis. He further submits that, the specific order does not expressly fall under Order 43 Rule 1, courts have consistently held that where an order conclusively determines a party's rights or substantially affects their interests, an appeal may lie with leave or without leave.
13. In *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 696*, the court stated that a Preliminary Objection should be based on pure points of law that are not dependent on ascertainment of facts. Here, whether leave was necessary is a factual and legal inquiry, not a pre point of law. He further submits that objection is premature and designed to obstruct the Appellant's right to access justice and ventilate the merits of its appeal.
14. It offends the principles of Article 50(1) of the *Constitution* which guarantees the right to a fair hearing, and Article 159(2)(d) which requires courts to administer justice without undue regard to procedural technicalities. He thus sums up that, the objection by the Respondent is devoid of merit, founded on a misapprehension of the law, and an affront to the constitutional right to fair hearing.



## Issues for Determination

15. The only issue for determination is:

“Whether the Appellant’s appeal is competent under the Civil Procedure Rules and whether leave to appeal was necessary in the circumstances. If above in negative, whether application for stay is meritorious.

16. Order 13, rule 2 of the Civil Procedure Rules in Kenya deals with judgment on admissions.

17. It allows a party to apply for judgment, or an order based on admissions of fact made by another party, either on the pleadings or otherwise, without waiting for the resolution of other issues in the case. Appeals from Orders [Order 43, rule 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);

“Rule 13 (2) and for that matter the whole of entire rule 13 is omitted in the list. Emphasising on the importance of seeking leave where no automatic right of appeal exists, the Court of Appeal in *Peter Nvaua Muvake v Joseoh Mutunua* 120151 KECA 475 (KLR) held as follows:

“In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.

18. In light of the above finding, it is not necessary to consider whether the principles governing the grant of an order for stay under Rule 5(2)(b) of the rules Q/ this court were met because our jurisdiction has not been invoked through the lodgement of a valid notice of appeal.

19. Similarly, the Court in *KCB Bank (K) Limited v Peter Wainaina Nguzi* 120201 eKLR\_\_\_\_\_ when considering unerringly similar facts held as follows:

“I strongly disagree with the position taken by Ms. Mathenge that failure to obtain leave to file an appeal where the appellant did not have an automatic right of appeal was a mere procedural technicality which did not affect the competence or validity of an appeal. In my view, failure to obtain leave to appeal where such leave was required was a fundamental omission which went to the root of the competence of an appeal. It is not a procedural



technicality which as submitted by Ms Mathenge can be disregarded under Article 159 of the *Constitution*. It is a matter which affects the jurisdiction of this court to entertain such an appeal, and any application filed therein.

20. Put differently, an appeal filed without leave of the court where such leave is required does not properly invoke the appellate jurisdiction of the court and the court would not consequently have any basis to entertain an application filed in the appeal.
21. The situation herein obtains as to the holdings aforestated and thus on this basis alone, the Court must down its tools and dismiss the Application along with the appeal with costs to the Respondent. Thus, court makes the orders that.
  - i. The application and the appeal are hereby struck out with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY 2025**

.....

**CHARLES KARIUKI**  
**JUDGE**

