



REPUBLIC OF KENYA



**KENYA LAW**  
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**Pisani v Valji & another (Civil Appeal E228 of 2024)  
[2024] KEHC 11705 (KLR) (Civ) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11705 (KLR)

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

**CIVIL**

**CIVIL APPEAL E228 OF 2024**

**AN ONGERI, J**

**SEPTEMBER 24, 2024**

**BETWEEN**

**KARIM FATEHALI PISANI ..... APPLICANT**

**AND**

**FARUK SADRUDIN VALJI ..... 1<sup>ST</sup> RESPONDENT**

**ICON AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application coming for consideration is the one dated 15/2/2024 brought under sections 3, 3A, 75(1) and 79 (G) of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 42, 43 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law seeking the following orders;
  - i. That this matter be certified as urgent and be heard ex-parte in the first instance.
  - ii. That the appellant/applicant be granted stay of execution of the ruling and order delivered on 6<sup>th</sup> February 2024 by the Honorable magistrate in favour of the respondents herein pending the hearing and determination of this application.
  - iii. That the appellant/applicant be granted stay of execution of the ruling and order delivered on 6<sup>th</sup> February 2024 by the honourable magistrate in favour of the respondents herein pending hearing and determination of the appeal.
  - iv. That costs of this application be provided for.
2. The application is supported by the affidavit of Karim Fatehali Pisani sworn on 15/2/2024 in which he deposed that a ruling was delivered on 6/2/2024 by the chief magistrate's court which dismissed



- his application on 23/8/2023 and allowed the respondent's herein to execute the orders given on 9/6/2023 to proclaim his movable properties as itemized in the 2<sup>nd</sup> respondent's proclamation notice dated 18/8/2023.
3. He deponed that he is aggrieved with the entire ruling and order of 6/2/2024 and therefore wishes to appeal against it. The respondents are however filing in court to be issued with warrant of attachment and he is apprehensive that any time from now the respondents may execute the orders granted on 9/6/2023 and if allowed he will suffer irreparable loss and damages.
  4. The respondent Faruk Sadrudin Valji filed a replying affidavit sworn on 14/3/2024 stating that an appeal from the decision of the court on the application herein cannot lie unless otherwise by the leave of court sought and granted by the court upon oral application immediately made by the applicant upon delivery of the impugned ruling/order or by formal application made by the applicant within 14 days of the delivery of the ruling pursuant to section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Amendment Rules, 2020.
  5. He indicated that the applicant's advocate who had attended court on 6/2/2024 when the impugned ruling/order was delivered neither informally sought nor was granted by the court leave to appeal against the aforementioned ruling. 14 days have since lapsed without any application being lodged in the subordinate court to his court seeking leave to appeal against the order and further the impugned ruling/order dismissed the applicants application hence a negative order without anything to stay execution thereof.
  6. He indicated that the applicant has not demonstrated sufficient cause to grant the reliefs sought notwithstanding that the reliefs are misconceived, misadvised and unavailable in law and fact. There is no arguable or competent appeal before this court upon which the reliefs sought or application is anchored or which can be rendered nugatory. The applicant has also failed to demonstrate that he will suffer substantial loss if the application is not granted. the applicant is abusing court process causing him to suffer great prejudice and substantial loss.
  7. The parties filed written submissions as follows; the applicant submitted that the respondent seeks to execute an order and auction the applicant's property via a notification of sale by public auction. The execution of the order is sale by auction under Order 22 Rule 57 of the Civil Procedure Rules, 2010.
  8. The applicant argued that he has an automatic right to appeal against the ruling dated 6/2/2024 without an oral or formal application for leave immediately upon delivery of the ruling.
  9. The applicant argued that the ruling was rendered on 6/2/2024 and the applicant file the memorandum on 15/2/2024 before this court and was thus filed within time. The applicant further argued that he has an arguable appeal which would be rendered nugatory if orders sought herein are not granted. the applicant further has reasonable fear that of the decretal sum is paid the respondent will be unable to repay in the event the appeal allowed.
  10. The respondent alternatively submitted that no leave to appeal was sought and obtained prior to filing this appeal against the impugned ruling. Section 75 of the Civil Procedure Act as read together with Order 43 of the Civil Procedure Rules lists orders which appeal lies as a matter of right and the instant appeal arising from an application made under Orders 51 Rule 1 of the CPR and Article 50 and 59 of the constitution of Kenya as well as section 3A of the Civil Procedure Act is not one of them.
  11. The respondent further submitted that the applicant in an afterthought submission without basis in the application or affidavit, has purported to submit that the appeal is against execution by public auction and is filed under Order 43 Rule I(k) of the CPR. That the Respondent seeks to execute sale by auction under Order 22Rule (3) and 73 of the CPR (Orders in execution). The Respondent however



submits that the Applicants application that was dismissed by the Subordinate Courts impugned ruling did not cite or move the Court under the above said provisions of law at all.

12. The respondents submitted that the application and appeal should be found to be incompetent for failure to comply with statutory requirements provided under Order 43 of the Civil Procedure Rules. The respondents relied on the case of *Niazsons (K) Limited V China Road & Bridge Corporation (KENYA)* [2000] eKLR where the court stated that: -

“In these circumstances, there is no order granting or refusing to grant an Order of stay within the meaning of section 75(1)(d) of the *Civil Procedure Act* which can be the only basis for an appeal to lie as of right. Since there is no such basis, that section has not even begun to apply to the facts of the present case. In our judgment, there is no right of appeal. The appellant, however, does have a right to appeal to this Court with leave of the superior court or failing that of this Court. It is not in dispute that no such leave has been sought or obtained with the result that we have no jurisdiction to make any order in the matter.

Mr. Billing sought to persuade us that there was a course of conduct on the part of the Respondent amounting to a representation when he submitted that there was a right to appeal. Assuming, without deciding, that there was a representation which was binding the Respondent about legal relations, we are unable to confer jurisdiction upon ourselves to entertain an appeal which lies only with leave when no leave has been sought or obtained. It is trite that there can be no estoppel against the statute. Nor can jurisdiction be conferred by estoppel, consent, acquiescence or default.”

13. The respondent argued that no arguable appeal has been demonstrated by the applicant from the memorandum of appeal. The applicant vide a court order dated 9/6/2023 was granted an opportunity to put in a defense and failure or default in compliance thereof after 45 days from the date of the said order then the said order could automatically lapse.
14. That the application dated 23/8/2023 was lodge by the appellant upon failure to comply with the said order which was an illegality.
15. It was submitted that the applicant has also failed to demonstrate any substantial loss he shall suffer in case the orders sought are not granted. the applicant is therefore abusing court process in efforts to deny the respondents the fruits of a lawful decree.
16. The issues for determination in this ruling are as follows;
  - i. Whether the applicant has a right of appeal.
  - ii. Whether the ruling of the trial court should be stayed pending appeal.
  - iii. Who pays the costs of this application?
17. I find that the ruling dated 6/2/2024 dismissing the applicant’s application dated 8/9/2022 had the effect of confirming the default judgment entered against the applicant on 11/1/2021.
18. I find that in the circumstances, the applicant did not need to seek leave to appeal since final judgment had been entered.
19. The applicant has an automatic right of appeal against the default judgment.



20. In the case of *Circuit Business Systems Limited v County Government of Siaya* [2020] eKLR, it was held that;

“..... Order 43 of the Civil Procedure Rules gives a long list of orders from which an appeal lies from as of right. It therefore follows that if one wishes to appeal on an order that is not on the list under Order 43 of the Civil Procedure Rules, one must seek leave of court that made that very order”.

21. The said Order 43 is the procedural Order for Section 75 of the *Civil Procedure Act*. It provides as follows;

Appeals from Orders:”

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—

.....

(g) Order 10, rule 11 (setting aside judgment in default of appearance).

22. I find that the applicant has an automatic right of appeal since he was seeking to set aside judgment in default of appearance.

23. It is not in the interest of justice to chase a party from the seat of judgment unheard.

24. The Trial court has to consider whether the applicant had a defence that raises triable issues.

25. I allow the application dated 15/2/2024 on the following conditions;

- i. That the applicant files the intended appeal within 30 days of this date.
- ii. That stay of execution pending appeal is granted on condition that the applicant deposits ½ the decretal sum in court within 30 days of this date.
- iii. That the applicant pays the respondent the costs of this application assessed at Kshs.20,000/ = within 30 days of this date.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**A. N. ONGERI  
JUDGE**

**In the presence of:**

- ..... for the Appellant
- ..... for the 1<sup>st</sup> Respondent
- ..... for the 2<sup>nd</sup> Respondent

