



**Githiga & another v Mutunga & Ngamu (Suing as the Legal Representatives of the State of Simon Muriithi Ngamau - Deceased) (Miscellaneous Civil Application E001 of 2024) [2024] KEHC 12671 (KLR) (Civ) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12671 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E001 OF 2024  
CM KARIUKI, J  
OCTOBER 22, 2024**

**BETWEEN**

**GEORGE KANGARA GITHIGA ..... 1<sup>ST</sup> APPELLANT  
SIMON MAINA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ROSEMARY MWIKALI MUTUNGA & GEORGE K NGAMU (SUING AS THE LEGAL REPRESENTATIVES OF THE STATE OF SIMON MURIITHI NGAMAU - DECEASED) ..... RESPONDENT**

*(Being an Appeal against the Ruling and orders of Honourable E H Keago -Chief Magistrate in Nyahururu CM CC No. 84 of 2012, delivered on 8th November, 2023)*

**RULING**

1. By application dated 23/1/2024. The applicants seek special prayers 3, 4, and 5.
2. The application is supported by the affidavit of George Kangara Githiga, sworn on 23/1/2024, and opposed by the affidavit of Rosemary Mwikali Mutunga, sworn on 18/4/2024.
3. Parties were directed to canvass applications via written submissions.
4. Appellant submissions not available at time of drafting of ruling.

**Respondent submissions**

5. Before this Court is an application dated 23<sup>rd</sup> January 2024 seeking orders that:
  - 1.1. Prayer 1: spent



- 1.2. Prayer 2: spent
  - 1.3. Prayer 3: This Honourable court be pleased to grant leave to the Appellants to file an Appeal out of time
  - 1.4. Prayer 4: Pending the hearing and determination of the Appeal herein, this Honourable court be pleased to lift the warrant of arrest against the 1<sup>st</sup> Appellant herein in Nyahururu CMCC 84 of 2012 on 22<sup>nd</sup> January 2024 and all other consequent orders
  - 1.5. Prayer 5: Costs of this application will be provided.
6. The Respondent filed a Notice of Preliminary Objection dated 21<sup>st</sup> March 2024 against the application on the grounds: -
- a. There is no right of appeal against the ruling and Order impugned.
  - b. There is no order under Order 43 of the Civil Procedure Rules 2010. The applicant did not seek leave to appeal against the ruling and order impugned.
  - c. in view of grounds A and B above. This court lacks jurisdiction to grant the reliefs sought in these proceedings.
7. Propose first to submit the preliminary objection and, after that, on the merits of the application.

**Whether the Preliminary Objection should be upheld.**

8. The preliminary objection raises a jurisdictional issue. The Applicants are seeking leave to appeal out of time. The prayer number identifying the order or decree against which it is sought to appeal is not specified.
9. It is only upon reading the application grounds that it becomes apparent that the applicants are aggrieved with the Ruling delivered on 8<sup>th</sup> November 2023. The ruling was delivered on an application seeking a permanent stay of execution pending execution in another suit. The application was dismissed in the court ruling.
10. The ruling and orders impugned are not in the nature of a decree so that an appeal may lie as of right. Section 75 of the *Civil Procedure Act* provides for orders against which an appeal lies as of right. The orders dismissing the plaintiff's application are not listed among those orders. Not even subsection (g) is applicable as warrants of arrest in execution are not appealable as of right.
11. Further, the order is not one of the orders under Order 43, rule 1 of the Civil Procedure Rules, which provides for the right of appeal against specific orders. The orders impugned are not listed thereunder. Sub-rule (k) is not applicable as the orders specified are as follows:
  - 7.1. Order 22 rule 25, which provides for execution pending another suit between the decree-holder and judgment debtor. The other suit, the subject of the applicant's application before the trial court, was not between the applicant and the Respondents.
  - 7.2. Order 22 rule 57 deals with notification of sale by public auction and is thus inapplicable
  - 7.3. Order 22 rule 61 (3) deals with the setting aside of a purchase by a decree-holder
  - 7.4. Order 25 rule 73 is on a preferential bid by co-sharer of undivided immovable property
12. There is no order by the Applicants granting leave to appeal against the Orders of 8<sup>th</sup> November 2023, so he may be said to be seeking an extension of the time prescribed in the orders granting leave.



13. In these circumstances, the Court is invited to consider the persuasive decision in Cecilia Wanjiru Kimwere V Attorney General & Another [2014] Eklr, where it was held: -

“What the appellant seeks to appeal against is the order of 8<sup>th</sup> March 2013. That order was made pursuant to the application by notice of motion dated 8<sup>th</sup> February 2011. The said application was made under the inherent power of the court (section 3a of the *Civil Procedure Act*, Cap 21). There is no automatic right of appeal against Orders made under the inherent power of the court. See order 43, rule 1 (1) & (2) of the Civil Procedure Rules, 2010.

As there is no automatic right of appeal, and as there is no leave to appeal against the order of 8<sup>th</sup> March 2013 sought and obtained, the present application is indeed misconceived and incompetent. It is at this moment struck out with costs to the 2<sup>nd</sup> respondent.”

14. It is submitted that the preliminary objection is merited and that it should be upheld with the effect that this application should be struck out with costs.

### **The Merits of the application**

15. The Replying Affidavit states that the applicant does not have any genuine grievance against the Ruling of 8 November 2023. During the ruling's delivery, his advocates on record were quite content with the outcome of the dismissed application and did not seek leave to appeal against that decision.
16. These proceedings are a pattern of conduct on his part to delay the execution of a lawful decree which has never been set aside. He only appealed because he got wind of warrants of arrest having been issued against him.

### **Issues, Analysis And Determination**

17. After reviewing the pleadings, affidavits, and submissions on record, I find the issue is whether the PO has merit. If the above is negative, does the application have merit? What is the order as to cost? the applicants are aggrieved with the Ruling delivered on 8<sup>th</sup> November 2023. The ruling was delivered on an application seeking a permanent stay of execution pending execution in another suit. The application was dismissed in the court ruling.
18. The ruling and orders impugned are not in the nature of a decree so that an appeal may lie as of right. Section 75 of the *Civil Procedure Act* provides for orders against which an appeal lies as of right. The orders dismissing the plaintiff's application are not listed among those orders. Not even subsection (g) is applicable as warrants of arrest in execution are not appealable as of right.
19. Under the *Civil Procedure Act* and the Civil Procedure Rules made thereunder, an appeal lay only as against a decree or as against an order passed under rules from which an appeal was expressly allowed by order 43, rule 1 of the Civil Procedure Rules.
20. Further, the order is not one of the orders under Order 43, rule 1 of the Civil Procedure Rules, which provides for the right of appeal against specific orders. The orders impugned are not listed thereunder. Sub-rule (k) is not applicable as the orders specified are as follows:
- 1 Order 22 rule 25 provides for execution pending another suit between the decree-holder and judgment debtor. The other suit, the subject of the applicant's application before the trial court, was not between the applicant and the Respondents.



- 2 Order 22 rule 57 deals with notification of sale by public auction and is thus inapplicable.
  - 3 Order 22 rule 61 (3) deals with the setting aside of a purchase by a decree-holder
  - 4 Order 25 rule 73 is on a preferential bid by a co-sharer of undivided immovable property.
21. There is no order by the Applicants granting leave to appeal against the Orders of 8<sup>th</sup> November 2023, so he may be said to be seeking an extension of the time prescribed in the orders granting leave.
22. In these circumstances, the Court is invited to consider the persuasive decision in *Cecilia Wanjiru Kimwere V Attorney General & Another* [2014] Eklr, where it was held: -
- “What the appellant seeks to appeal against is the order of 8<sup>th</sup> March 2013. That order was made pursuant to the application by notice of motion dated 8<sup>th</sup> February 2011. The said application was made under the inherent power of the court (section 3a of the *Civil Procedure Act*, Cap 21). There is no automatic right of appeal against Orders made under the inherent power of the court. See order 43, rule 1 (1) & (2) of the Civil Procedure Rules, 2010.
- As there is no automatic right of appeal, and as there is no leave to appeal against the order of 8<sup>th</sup> March 2013 sought and obtained, the present application is indeed misconceived and incompetent. It is at this moment struck out with costs to the 2<sup>nd</sup> respondent.”
23. Under the *Civil Procedure Act* and the Civil Procedure Rules made thereunder, an appeal lay only as against a decree or as against an order passed under rules from which an appeal was expressly allowed by order 43, rule 1 of the Civil Procedure Rules. It is submitted that the preliminary objection is merited and that it should be upheld with the effect that this application should be struck out with costs.
24. The court agrees with the submission and makes orders;
- i. The objection is upheld, and thus, the application herein is dismissed with costs to the respondent.

**RULING, DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 22ND DAY OF OCTOBER 2024**

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**CHARLES KARIUKI**

**JUDGE**

