



REPUBLIC OF KENYA



**Gitau v Kimindu (Civil Appeal E1016 of 2022)  
[2023] KEHC 18419 (KLR) (Civ) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18419 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1016 OF 2022**

**AA VISRAM, J**

**JUNE 5, 2023**

**BETWEEN**

**LYDIA WAMBUI GITAU ..... APPLICANT**

**AND**

**JACKSON MITHUKA KIMINDU ..... RESPONDENT**

**RULING**

1. This ruling determines the Respondent’s Notice of Preliminary Objection dated March 1, 2023 (“the PO”) and the Applicant’s Notice of Motion dated December 15, 2022 (“the Application”).
2. The Application is supported by the affidavit of Lydia Wambui Gitau, the Applicant, sworn on December 15, 2022. The Application seeks orders of stay of execution against the ruling and orders of the lower court delivered on November 25, 2022. The Appellant filed a Memorandum of Appeal dated December 15, 2022, listing eight grounds of appeal.
3. In opposition to the Application, the Respondent filed a Replying Affidavit sworn by Mr. Jackson Muthoka Kimindu on March 2, 2023 and objected to the same based on the following grounds set out in the PO:-
  - a. That the Appellant was under statutory obligation to seek and obtain the leave of the subordinate court to file the Memorandum of Appeal lodged herein.
  - b. That indeed, no leave was sought by the Appellant to file and lodge the appeal herein, in compliance with the provisions of section 75 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and order 43 Rule (1) and (2) of the Civil Procedure (Amendment) Rules, 2020.



- c. That in the absence of such leave, the Appeal; before this Honourable Court is incompetent and therefore, there is no Appeal to anchor the motion dated December 15, 2022.
  - d. That in the absence of a competent Appeal, or evidence of such leave having been sought and obtained by the Appellant, this Honourable Court lacks the requisite jurisdiction to hear and determine these proceedings and/or to grant any of the orders sought therein.
4. The Application on the other hand sought the following orders:-
  - a. Spent
  - b. That pending the hearing and determination of this Application, there be a stay of execution against the Ruling and consequential orders given by the Hon. Principle Magistrate on 25<sup>th</sup> November, 2022 and status quo be maintained.
  - c. That pending the hearing and determination of the Appeal, there be a stay of execution against the Ruling and consequential orders given by the Hon. Principle Magistrate on November 25, 2022 and *status quo* be maintained.
  - d. That this Honourable Court do grant any order it deems just and fit.
  - e. Costs.
5. The Application and the PO were heard together, orally. I will rule on the PO first. In support of the PO, Learned Counsel, Mr Akhaabi, for the Respondent submitted the basis of the PO was that the Appellant had not furnished proof that she had obtained leave to appeal the ruling of the lower court, which is a requirement under the [Civil Procedure Act](#) and Rules. Counsel submitted that ‘leave’ is mandatory, and without the same, this court has no jurisdiction to entertain the appeal, or applications arising from the same.
6. In support of the above submission, Learned Counsel cited the decision of the Court of Appeal in *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR in which the court stated as follows:-
 

“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 43 of the Civil Procedure Rules, the procurement of leave to appeal is 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”.
7. In opposition to the PO, Learned Counsel, Mr Kimosop did not dispute that the Appellant had not obtained leave, but rather, he contended that no such leave was required in the present circumstances. Counsel pointed to prayer 1 of the Application, which he stated was based on Section 99 of the [Civil Procedure Act](#), and Order 45, Rule 2 of Civil Procedure Rules. He submitted that the Application was based on review, which was appealable as of right.
8. Further to the above, Counsel cited Order 51, Rule 10 of the Rules in support of his proposition that the Applicant’s failure to indicate or identify the applicable provision relating to review was not fatal.



## Analysis and Determination

9. The relevant provision of the *Civil Procedure Act* for the purpose of determining this PO is Section 75. The same reads as follows:-

“75 Orders from which appeal lies

- (1) 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—
  - (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.”

10. Further to the above, Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right in the following terms:-

“1. 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);
  - (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.”

11. I have carefully examined the Application, Memorandum of Appeal dated December 15, 2022, and the ruling of the lower court. I find no provision that confers the Appellant a right of appeal based on the law above. Further, I am not persuaded that the Application is one for review as contended by the Appellant.

12. The provisions relating to review read as follows:

“Application for review of decree or order [Order 45, rule 1]

- (1) Any person considering himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; (emphasis mine)



(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the Appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review. (emphasis mine)

13. Moreover, based on the above, it is evident that the Appellant may not file an appeal and lodge an application for review at the same time.
14. In the present matter, I am satisfied that what is before me is an Application for stay pending appeal. I am further persuaded that such an Application must be properly anchored in a competent appeal.
15. The Court of Appeal made the above principle clear in its decision of *Nyutu Agrovet Ltd vs Airtel Networks Ltd* [2015] where it held that where there was no automatic right to appeal stipulated under Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*, then the Appellate Court had no jurisdiction to hear and determine an appeal unless leave of the court from which the order was made is sought and obtained.
16. Further, in *Kakuta Maimai v Peris Tobiko & 2 Others* (2013) eKLR, the Court of Appeal stated that:-

“The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) of the *Constitution* to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation.”
17. It is trite that without jurisdiction, a court must down its tools.
18. In any event, the relief the Applicant is seeking is a negative order which is not capable of being granted, and would not have been allowed.
19. Based on the reasons set out above, I find that the Preliminary Objection (PO) is with merit and is upheld.
20. Accordingly, I find that the Memorandum of Appeal dated December 15, 2022, together with the Application of even date, are incompetently before me. The same are hereby struck out with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF JUNE 2023**

**ALEEM VISRAM**

**JUDGE**



**In the presence of;**

.....for the Appellant

.....for the Respondent

