



**Aosa v Makwolo & 3 others (Miscellaneous Civil Application
54 of 2022) [2023] KEHC 21667 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION 54 OF 2022**

PN GICHOHI, J

JULY 24, 2023

BETWEEN

SAMUEL BENJAMIN AOSA APPLICANT

AND

JAMES NYACHWAYA MAKWOLO 1ST RESPONDENT

MONICAH BOSIBORI NYACHWAYA 2ND RESPONDENT

JANET MOKE ANGIMA 3RD RESPONDENT

TIMOTHY ABUGA NYANCHWAYA 4TH RESPONDENT

RULING

1. The subject of this ruling is the Applicant's Notice of Motion dated 14th February 2022 and filed on 23rd February 2022 through the firm of Asati , Anyona & Company Advocates and brought under Section 75, 1A & 3A of Civil Procedure Act , Order 42 Rule (1) and Order 51 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya 2010. He seeks orders that:-
 1. The Applicant be granted leave to appeal against the orders issued on 26th May 2021.
 2. Upon grant of the orders in prayer (1) above, the Applicant be granted leave to file an appeal out of time.
 3. Costs of the Application be in cause.
2. The grounds on the face of the application are that the Applicant had filed an appeal before this Court that is No. 66 of 2021 without leave of the Court which issued the orders on the date the ruling was made. That the said appeal was filed within which has since been withdrawn. That the time of filing appeal from the orders is almost eight (8) months. That the Applicant has been holding that there is a proper appeal before court. That the Applicant is likely to be blocked from being heard in a genuine



case where his goods were attached but was not a party in the proceedings in the lower court. That the Respondent shall not suffer any prejudice if this application is allowed.

3. These grounds are emphasised in the affidavit in support sworn by Samuel Benjamin Aosa on 14th February 2022 and while attaching documents, he states that that the appeal has high chances of success and that he is likely to suffer substantial loss and damage if the application is not allowed. For he will be condemned unheard.
4. The Respondents have filed grounds of opposition dated 18th July 2022 through the firm of Bosisre Gichana & Co Advocates. They term the application as misconceived , frivolous and an abuse of Court process ; in competent and fatally defective and an affront to expeditious dispensation of justice.

Submissions

5. The Applicant’s submissions dated 2nd May 2023 are a duplication of the application and the affidavit in support and need not be reproduced here.
6. In their submissions dated 5th July 2023, counsel for the Respondent relies on the case of *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara* [2021]eKLR and submitted that the application does not lie for reasons that Applicant has not sought leave to appeal from the court of the first instance as provided for under Order 43 Rule 1 subrule 2 and (3) of the Civil Procedure Rules.
7. That having not sought leave from the court of the first instance, the application to appeal out of time is invalid. That what the applicant is seeking is to have an appeal that was filed without leave of the court deemed as valid.
8. Further and while quoting the five -bench decision by Court of Appeal in *Nyutu Agrovet vs Airtel Networks Ltd* [2015]eKLR on consequences of failure to seek leave of the Court, counsel submits that the omissions in this instance of not seeking leave to appeal is not a procedural technicality as the right is conferred by statute and cannot be salvaged by Article 159 of *the Constitution* but touches on jurisdiction and without jurisdiction this court or any other court can do nothing more than to down its tools. They therefore seek that the application be dismissed with costs to the Respondents .

Determination

9. After considering the application, the annexures thereto, the grounds of opposition and the submissions by parties, the broad issue for determination is whether this court has jurisdiction to entertain this application.
10. The Applicant wishes to appeal against the orders made in the ruling dated 26th February 2021 that :
 1. The objector’s application dated 12/2/2021 lacks merit and is dismissed.
 2. The 2nd Defendant ‘s application dated 12/2/2021 lacks merit and is dismissed with costs.
 3. The objector is to pay the costs of the objection proceedings to the decree- holder.
11. The background of that ruling is that the Samuel Benjamin Aosa , who as the 2nd Defendant filed an application to stay of sale of attached property sized on 9th February 2021 pending thee hearing and determination of an application pending in High Court being High Court Kisii On. 119 of 2019 on the grounds that he was likely to suffer great loss and damage.
12. There was also an application by objectors that is Thomas Omanga Momanyi , Andrew Miyienda Obaga and John Mokaya Obaga (1st, 2nd and 3rd objectors respectively seeking that the execution of the decree and subsequent attachment of the objectors’ property be vacated.



13. Those applications had been opposed by grounds of opposition and the trial court ultimately found that the objectors had failed to demonstrate and there was no evidence, that the objectors had equitable interest in the attached property and had not shown any direct, indirect or remote relation to the attached property. As regards the 2nd Defendant's (Samuel Benjamin Aosa) application, the trial magistrate found that the appeal had already been struck out for want of prosecution and therefore, the court found that the application lacked merit.
14. Though Order 43 was not invoked on the face of the application before this Court ,it is that this application is anchored under Order 43 of the Civil Procedure Rules and for the sake of clarity, this Court reproduces the said provisions that :
- (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.
- (3) An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
- (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.
[Emphasis added]

15. The question to ask then is whether the Applicant required leave. The orders issued by the trial court are not among orders where appeal lies as a matter of right. There is no evidence of leave having been sought from the trial court which had jurisdiction to entertain it. In the manner that Order 43 so couched in mandatory terms, there is no room for argument that Article 159 (2) (d) of *the Constitution* can come to the aid of the Applicant. Failure to seek leave from the court of the first instance that issued the impugned orders when it is specifically provided for is fatal. This Court lacks jurisdiction to entertain it.

16. Further, the Applicant admits that the Civil Appeal No. 66 of 2021 was filed without leave of the court and it cannot be validated by this application in the circumstances. In the circumstances this application is dismissed with costs to the Respondents.

DATED,SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS AT KISII THIS 24TH DAY OF JULY 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for the Applicant

N/A for Respondents

Isindu, Court Assistant

