



**Jack & Jill Supermarket v Ngunjiri (Civil Suit E317 of 2014)
[2023] KEHC 23428 (KLR) (Civ) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23428 (KLR)

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

CIVIL

CIVIL SUIT E317 OF 2014

JN MULWA, J

OCTOBER 12, 2023

BETWEEN

JACK & JILL SUPERMARKET APPLICANT

AND

VICTAR MAINA NGUNJIRI RESPONDENT

RULING

1. By an application dated 15/3/2023, the defendant/applicant sought leave of Court to appeal against its ruling delivered on the 10/3/2023 in the absence of its advocates, citing provisions of order 43 1 (2) (3); order 51 rule 1 of the *Civil Procedure Rules* and sections 1A, 3A of the *Civil Procedure Act*; on the ground that an appeal from such a ruling requires leave of the court as he could not obtain the said leave on the delivery date as he was absent from court.
2. In opposition to the application, the plaintiff/respondent filed a Replying Affidavit sworn on the 19/ April/2023 by one Schon Noorami, the Managing Director of the Respondent. It is his averments that the ruling date for the application was notified to both parties by messages on 24/2/2023 and by the daily cause list for the 10/3/2023 when the said ruling was to be delivered, and therefore states that the applicant's application is an effort to further abuse of the court process.
3. In his Oral arguments before the court on 19/7/2023, Mr. Odera Advocate for the applicant/defendant submitted that the appeal was filed within the requisite statutory period by way of a Notice to Appeal to the Court of Appeal, but Mr. Munywoki for the Respondent/Plaintiff differs with him submitting that no such Notice of Appeal had been filed.
4. I have considered the affidavits in support and in opposition to the application. The Ruling dated 10/3/2023 was delivered in the absence of the respondent/defendant. It was for leave to satisfy the



impugned decree in the suit by set off from other decrees in other matters as ably stated therein which was dismissed, and the defendant being dissatisfied preferred an appeal against the said ruling.

5. Order 22 of the Civil Procedure Rules generally provides for modes of execution of Decrees. Section 75 of the Civil Procedure Act provides for orders from which an appeal lies as of right. Order 43 rule (1) k of the Civil Procedure Rules provides 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.

(k) order 22, rules 25, 57, 61 (3) and 73 (orders in execution).

6. The above are the only orders whose appeals lie as of right from execution proceedings as is the case in this matter. As ably rendered in the case Civicon Limited v. Collins Omondi Ouko (2016) eKLR;

“Order 43 rule 1 (k) of the Civil Procedure Rules does not anticipate the filing of appeals as of right in respect of matters falling under order 22 rules 51-55 of the Civil Procedure Rules; leave must be obtained before an appeal emanating from the said orders is filed as required by order 43 rule 2 and 3 of the Civil procedure rules. The same position was taken by the court in Simba Cool East Africa Limited –vs- Peter Mwangi Ngunyi & another (2021) e KLR.

Likewise, I fully associate myself with the learned Judges' pronouncements above and find that an appeal from execution proceedings from the High Court to the Court of Appeal cannot be filed as of right, but only by leave of the Court.

7. It is therefore evident that the applicant's application dated 15/3/2023 is properly before the court. Worthy to note is that the application was brought only five (5) days after delivery of the ruling, which by all means is not inordinate, more so that the defendant's Advocate was absent on the said date, despite his admission that he had been duly notified of the ruling date.

8. For the above reasons, I am inclined to allow the application dated 15/3/2023 and grant leave to the defendant/applicant to appeal against the ruling of the 10/3/2023. The Notice of Appeal shall be filed and served within 7 days of this ruling. There shall be no orders as to costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 12TH DAY OF OCTOBER 2023.

JANET MULWA

JUDGE

