



Gatuma & Another v Kensilver Express Limited & 6 others (Civil Appeal E046 of 2022) [2024] KEHC 13697 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E046 OF 2022
CJ KENDAGOR, J
NOVEMBER 6, 2024**

BETWEEN

JUDY NJOKI GATUMA & ANOTHER APPELLANT

AND

KENSILVER EXPRESS LIMITED & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS RESPONDENT

JUDGMENT

Background

1. On 6th November, 2010, a motor vehicle with Registration Number KAW XXXX, an Isuzu Bus, was involved in a road traffic accident in which three passengers succumbed.
2. The Motor Vehicle belonged to the 1st Respondent, Kensilver Express Limited, and was being driven by the 2nd Respondent, an employee of the 1st Respondent.
3. The Appellants, who are the legal representatives of the deceased passengers, sued the 1st Respondent in Maua Civil Suit No. 182 of 2013, Maua Civil Suit No. 187 of 2013, and Maua Civil Suit No. 188 of 2013 for damages under the *Fatal Accidents Act*, under the *Law Reform Act*, as well as special damages arising from the accident. Judgment was delivered on 25th January, 2021, where the Court found the 1st Respondent 100% liable in all the 3 matters and was ordered to pay the Appellants Kshs. 1,910,000/=, Kshs. 1,500,000/=, and Kshs. 1,500,000/= respectively as damages.
4. The 1st and 2nd Respondents were dissatisfied with the Judgment of the court and sought to appeal in the High Court at Meru through Civil Appeal Consolidated Nos 18, 19 & 20 of 2021. But first, they sought stay of execution of the judgment pending the hearing and final determination of their appeal. On 18th March, 2021, the High Court allowed the application for a stay and gave a conditional stay of execution of the judgment in the three matters pending the filing, hearing, and determination of the intended appeal.



5. One of the conditions/terms was that the 1st and 2nd Respondents were to pay each of the Appellants in the respective matters Kshs. 500,000/= within 14 days of the order. The other condition was that the 1st and 2nd Respondents were to deposit the balance of the respective decretal amounts in joint interest earning accounts in names of the respective Advocates for the parties within 14 days of the order. The last condition was that, the orders for stay would lapse and be of no effect if 1st and 2nd Respondents failed to abide by the payment and deposit directions and timelines.
6. The 1st and 2nd Respondents failed to deposit the monies as directed by the Court. On the strength of the lapse of the conditional stay, the Appellants made an attempt to execute the Court decree. On 19th May 2021, the Appellants attached two motor vehicles, KBE XXXX and KBN XXXX, which belonged to the 3rd Respondent, Kensilver Express Limited, and issued a notification of sale against the 2 motor vehicles.
7. The following day, 20th May, 2021, the 3rd Respondent filed an application in the High Court, under the Civil Appeal Consolidated No.s 18, 19 & 20 of 2021, objecting to the Appellant's attachment of the two motor vehicles, and sought the following orders:
 1. That pending the inter parties hearing and determination of this application herein this Honourable Court be pleased to grant a stay of execution of the proclamation and attachment of the [3rd Respondent]'s movable properties being motor vehicles registration numbers KBE XXXX & KBN XXXX sale by action, disposition, repossession or interference with the [3rd Respondent]'s ownership of the properties by the Appellants, their servants, authorized agents and or assigns.
 2. That Pending the inter parties hearing and determination of this application herein this Honourable Court be pleased to grant a stay of execution of the [3rd Respondent]'s movable properties being motor vehicles registration numbers KAT XXXX, KAW XXXX, KAV XXXX, KAV XXXX, KAZ XXXX, KAZ XXXX, KAZ, XXXX, KAZ XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBJ XXXX, KBJ XXXX, KBN XXXX, KBN XXXX, KBN XXXX, KBR XXXX, KBR XXXX, KBW XXXX, KBW XXXX, KB XXXX, KCE XXXX, KCE XXXX, KCE XXXX, KCE XXXX, KCJ XXXX, KCJ XXXX, KCS XXXX, KCS XXXX, KCV XXXX, and KCV XXXX from sale by auction, disposition, repossession or interference with the [3rd Respondent]'s ownership of the properties by the [Appellants], their servants, authorized agents and assigns.
 3. That this Honourable Court be pleased to grant a stay of execution of the attachment of the [3rd Respondent]'s moveable properties being motor vehicles registration numbers KBE XXXX & KBN XXXX from sale by auction, disposition, repossession or interference with the [3rd Respondent]'s ownership of the properties by the [Appellants], their servants, authorized agents and assigns.
 4. That this honourable Court be pleased to grant a stay of execution of attachment of the [3rd Respondent]'s movable properties being motor vehicles registration numbers KAT XXXX, KAW XXXX, KAV XXXX, KAV XXXX, KAZ XXXX, KAZ XXXX, KAZ, XXXX, KAZ XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBJ XXXX, KBJ XXXX, KBN XXXX, KBN XXXX, KBN XXXX, KBR XXXX, KBR XXXX, KBW XXXX, KBW XXXX, KB XXXX, KCE XXXX, KCE XXXX, KCE XXXX, KCE XXXX, KCE XXXX, KCJ XXXX, KCJ XXXX, KCS XXXX, KCS XXXX, KCV XXXX, and KCV XXXX from sale by auction, disposition, repossession or interference with the [3rd Respondent]'s ownership of the properties by the [Appellants], their servants, authorized agents and assigns.



5. That this Honourable Court be pleased to discharge or rescind the attachment of motor vehicle KBE XXXX & KBN XXXX and the notification of same dated 19th May, 2021.
8. The 3rd Respondent swore an affidavit in support of the application stating the attached motor vehicles belong to them, and do not belong to the 1st Respondent as claimed by the Appellants. They also stated that the Appellants cannot attach the 3rd Respondent's property in execution of the decree against the 1st Respondent. They stated that the 1st Respondent and the 3rd Respondent are two separate and distinct companies, and hence the 3rd Respondent's assets cannot be used to settle the 1st Respondent's debts.
9. Seven days later, on 27th May, 2021, the Appellants brought an Application in the High Court, under the Civil Appeal Consolidated No.s 18, 19 & 20 of 2021, seeking the following orders:
 1. That this honourable Court be pleased to issue an order directing the National Transport and Safety Authority to restrain any transfer, registration of an initial notice of registrant, charge and/or any other and/or further dealing on Motor Vehicles Reg. Nos KAZ XXXX, KAZ XXXX, KBN XXXX, KBN XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBB XXX, KAZ XXXX, KAZ XXXX, KAS XXX, KAL XXX, KAV XXXX, KAV XXXX, and KAW XXXX pending the hearing and determination of application and/or further orders of this honourable Court.
 2. That this honourable Court be pleased to issue an order of temporary injunction restraining [3rd Respondent] and [1st Respondent] by themselves, their officials, their directors, shareholders, employees, agents and or through anybody else whomsoever acting on their behalf from selling, transferring, charging, leasing out, disposing off, dismantling and or otherwise howsoever parting or interfering with their titles on Motor Vehicles Registration Numbers especially KAZ XXXX, KAZ XXXX, KBN XXXX, KBN XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBB XXX, KAZ XXXX, KAZ XXXX, KAS XXX, KAL XXX, KAV XXXX, KAV XXXX, and KAW XXXX until this Application is heard and determined or until further orders of this Court are issued.
 3. That this Honourable Court be pleased to order that the creation/formation of [3rd Respondent], and subsequent transfer of the 1st Respondent's vehicles/assets (especially Motor Vehicles Reg. Nos. KAZ XXXX, KAZ XXXX, KBN XXXX, KBN XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBB XXX, KAZ XXXX, KAZ XXXX, KAS XXX, KAL XXX, KAV XXXX, KAV XXXX, and KAW XXXX) is fraudulent, illegal, unlawful, and a sham meant to clog the eyes of this Honourable Court in ensuring the ends of justice are met.
 4. That this Honourable Court be pleased to make an order that the intended 3rd Respondent is acting and holding the Motor Vehicles Reg. Nos KAZ XXXX, KAZ XXXX, KBN XXXX, KBN XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBB XXX, KAZ XXXX, KAZ XXXX, KAS XXX, KAL XXX, KAV XXXX, KAV XXXX, and KAW XXXX as a trustee and or agent of the 1st Respondent, its directors, and or agents and that the said motor vehicles can be lawfully held, impounded, attached, proclaimed, sold and/or auctioned in execution of the judgments/decree in Maua Civil Suit Nos. 182, 187, 188, and/or 189 of 2013.
 5. That this Honourable Court be pleased to lift the Corporate veil(s) in respect of [1st Respondent] and [3rd Respondent] (i.e. Joseph Njoroge Mbugua, Jaine Wambui Koinange, Gedion Ngaruiya Gathuru and/or Paul Gathuru Kariuki) and hold the directors liable to pay the decretal sums as directed in Maua Chief Magistrate's Court Civil Suit No. 182, 187, 188, and 189 of 2013.



6. That this Honourable Court be pleased to enjoin [3rd Respondent] and the directors of the 1st Respondent herein, i.e Joseph Njoroge Mbugua, Jaine Wambui Koinange, Gedion Ngaruiya Gathuru and/or Paul Gathuru Kariuki as parties/respondents in this application for the purposes of the hearing and determination of this application.
 7. That this Honourable Court be pleased to authorize the judgment creditors (through Bealine Auctioneers) in Maua Civil Suit Nos 182, 187, 188, and 189 of 2013 to hold the Motor Vehicles registered under [1st Respondents] and [3rd Respondent] (especially Motor Vehicles Reg. Nos KAZ XXXX, KAZ XXXX, KBN XXXX, KBN XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBB XXX, KAZ XXXX, KAZ XXXX, KAS XXX, KAL XXX, KAV XXXX, KAV XXXX, and KAW XXXX) at Maua, Pangani, Meru, Laare, and Embu Police Stations pending the hearing and determination of this application.
 8. THAT this Honourable Court be pleased to authorize the judgment creditors (through Bealine Auctioneers) in Maua Civil Suit Nos 182, 187, 188, and 189 of 2013 to hold the Motor Vehicles registered under [1st Respondent] and [3rd Respondent] (especially Motor Vehicles Reg. Nos KAZ XXXX, KAZ XXXX, KBN XXXX, KBN XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBB XXX, KAZ XXXX, KAZ XXXX, KAS XXX, KAL XXX, KAV XXXX, KAV XXXX, and KAW XXXX) at Maua, Pangani, Meru, Laare, and Embu Police Stations pending the hearing and determination of Meru High Court Civil Appeal No. 18, 19, 20 & 21 of 2021.
 9. That this Honourable Court be pleased to order the Officers Commanding Maua, Pangani, Meru, Laare, and Embu Police stations to provide security during compliance/execution of the orders issued herein.
 10. That this Court be pleased to hold the 1st Respondent and the [3rd Respondent], its directors, i.e Joseph Njoroge Mbugua, Jaine Wambui Koinange, Gedion Ngaruiya Gathuru and/or Paul Gathuru Kariuki as jointly and severally liable for conducting business in a fraudulent manner and in contravention of section 1002 of the *Companies Act, 2015*, Laws of Kenya.
 11. That this Honourable Court be pleased to order that the transfer of assets/Motor Vehicles Registration Nos. KAZ XXXX, KAZ XXXX, KBN XXXX, KBN XXXX, KBE XXXX, KBE XXXX, KBE XXXX, KBB XXX, KAZ XXXX, KAZ XXXX, KAS XXX, KAL XXX, KAV XXXX, KAV XXXX, and KAW XXXX from [1st Respondent] to [3rd Respondent] is fraudulent, illegal, null, and void.
 12. That this honourable Court be pleased to issue any orders as it may deem fit and just in respect of the hearing of this application considering that court files in Maua CMCC Case No. 182, 187, 188, and 189 of 2013 were forwarded to this Court for appeal purposes.
10. The Appellants swore an affidavit in support of the application stating that subsequent to passing of Judgment in Maua CMCC Case Nos 182, 187, 188, and 189 of 2013, the 1st Respondent had transferred ownership of its motor vehicles to 3rd Respondent in order to defeat execution of the judgment decrees. They accused the 1st Respondent of hiding its movable properties in sham entities, especially the 3rd Respondent. They asked for the Court's approval to execute the decree against the 3rd Respondent.
 11. The 3rd Respondents filed a replying affidavit dated 2nd June 2021, in response to Appellants' Application. It alleged that it is a stranger to Maua CMCC. Nos. 182, 187, 188, and 189 of 2013 and they cannot be enjoined to these proceedings. It also averred that it had already bought all the buses



- belonging to the 1st Respondent and as such it was not a trustee of the 1st Respondent. It further averred that it bought the assets of the 1st Respondent in a transaction that was beyond reproach.
12. While the two applications were filed at the High Court, under the Civil Appeal Consolidated Nos. 18, 19 & 20 of 2021, the Judge was of the view that the said applications be argued before the trial Court. Subsequently, the parties agreed to have the two applications transmitted to the trial Court.
 13. The trial Court heard the two applications and delivered a ruling on 21st March, 2022. It struck out the Appellant's Application dated 27th May, 2021 on grounds that it lacked jurisdiction to deal with the application. It held that the reliefs sought in the application could only be dealt with by the High Court. However, it allowed the 3rd Respondent's Application dated 20th May, 2021 and stopped the execution of attachment of the 3rd Respondent's motor vehicles and assets by the Appellants.
 14. The Appellants were dissatisfied with ruling and appealed to this Court. They filed a Memorandum of Appeal dated 11th April, 2022 in which they outlined 12 grounds of appeal which are as follows;
 1. That learned trial magistrate erred in law when she failed to appreciate that lifting of the corporate veil is a principle under common law and not anchored under Section 3 of the [Companies Act](#) and therefore the Magistrate's Court had the jurisdiction to entertain the application by the Appellants dated 27th May, 2021, thus arriving at the wrong decision.
 2. The learned trial Magistrate erred in law and in fact when she failed to appreciate that the 4th to 7th Respondents had been given a chance to be heard on matters appertaining the satisfaction of decrees of their company, the 1st Respondent/judgment debtor when they were joined as parties to this suit, thus arriving at a wrong conclusion/decision.
 3. The learned trial magistrate erred in law and in fact when she failed to appreciate that the application dated 27th May 2021 intended to establish if the 1st Respondent could satisfy valid Court decrees and therefore the Maua Chief Magistrate was the most suitable Court to hear and determine the said application.
 4. The learned trial magistrate erred in law and in fact when she failed to appreciate that once the Appellants established that the conduct of the 1st Respondent's directors was meant to frustrate the execution of valid Court decrees, the 3rd Respondent, the entity that received all the assets of the 1st Respondent, qualified as a trustee of the 1st Respondent and as such its assets could be attached in a bid of satisfying the decrees of Maua CMCC 182, 187, 188, and 189 of 2013.
 5. The learned Trial Magistrate erred in law and in fact when she failed to appreciate that her ruling dated 21st March, 2022 holding that she lacked the jurisdiction to lift the veil of incorporation for the 1st Respondent would make it impossible for the appellants to execute valid Court decrees for Maua CMCC Nos. 182, 187, 188, and 189 of 2019, thus arriving at a wrong decision.
 6. The learned trial Magistrate erred in law and in fact when she failed to appreciate that the objection dated 20th May, 2021 was filed in bad faith, amounted to asset stripping and was tailor made to frustrate the execution of Court decrees since the transfer of the 1st Respondent's assets was carried out after the Maua Chief Magistrate Court had rendered its judgment and the High Court conditional stay of execution dated 18th March, 2021 had lapsed, thus arriving at a wrong conclusion/decision.



7. The learned Trial Magistrate erred in law and in fact when she failed to appreciate that the purported Business Transfer Agreement dated 17th April, 2021 between the objector/3rd Respondent and the 1st Respondent was a mere sham that was not supported by any evidence of payment of the alleged consideration, thus arriving at a wrong conclusion.
8. The learned Trial Magistrate erred in law and in fact when she failed to appreciate that there was trust created between the 1st Respondent and the 3rd Respondent when the assets of the 1st Respondent were transferred to the 3rd Respondent and therefore the 3rd Respondent was holding the said properties on behalf of the 1st Respondent and thus such assets could be attached in a bid to execute the decrees against the 1st Respondent, thus arriving at a wrong conclusion.
9. The Learned trial magistrate erred in law and in fact when she failed to appreciate that the Business Transfer Agreement between the 3rd Respondent and the 1st Respondent only transferred the assets of the 1st Respondent but was silent on satisfaction of debts/decrees against the 1st Respondent that existed on prior to the purported business transfer agreement, thus arriving at a wrong decision.
10. The learned trial magistrate erred in law and in fact in that she failed to take enough consideration of the submissions tendered by the Appellants.
11. The ruling of the learned trial magistrate was against the weight of evidence presented before her thereby erroneous.
12. The learned trial magistrate ruling was bad in law.
15. They requested the Court to set aside the ruling of the Learned Trial Magistrate. They also requested the court to hold that the Maua Chief Magistrate's Court had jurisdiction to hear and determine the Appellant's application dated 27th May, 2021. Lastly, they asked the Court to hold that the 3rd Respondent is a trustee of the 1st Respondent and as such the assets of the 3rd Respondent can be used to satisfy the decrees against the 1st Respondent.
16. The matter was canvassed through written submissions. The Appellants and 3rd Respondent filed their respective submissions, but the rest of the parties did not file, despite being given the opportunity to file.

Appellant's Written Submissions

17. The Appellants submitted that the trial Court erred on holding that it lacked jurisdiction to hear an application for lifting the veil of incorporation. They submitted that the jurisdiction of a Court to hear and determine an application for lifting the veil of incorporation is founded in common law. They stated that *Companies Act* has no provision that divests the Magistrate Court of the jurisdiction to hear and determine an application for lifting the veil of incorporation. On this point, they relied on the case of *Jepkemoi Versus Zaburi Enterprises Company (miscellaneous civil application 43 of 2023)* [2024] KIEHC 2343 (KLR).
18. The Appellants also submitted that the learned trial Magistrate erred in law and fact in failing to appreciate that the 3rd Respondent was holding its assets in trust for the 1st Respondent. They stated that by the fact that the transfer happened after the delivery of the judgment and after the process of execution had commenced, the 3rd Respondent held the property in trust for the 1st Respondent. They argued that a trust arose due to the fact that the property to be attached was transferred to the



- 3rd Respondent with the intention of defeating the impending execution. On this point, the relied on the case of Arrind Shah and tiles & 7 Others Mombasa Bricks and Tiles & 5 others (2024) eKLR.
19. The Appellants also argued that the assets of the 3rd Respondent can be proclaimed, attached, impounded and auctioned in execution of the decrees in Maua CMCC 182, 187, 188 & 189 of 2013. They argued that having established that there exists a trust, the properties of the 3rd Respondent can be proclaimed and attached. They also argued that Section 44 of the *Civil Procedure Act* allows the Court to approve of a decree against property of the judgment debtor that is held in trust by another party.
 20. Lastly, they submitted that the learned trial magistrate erred in law and fact in failing to appreciate that the business transfer agreement was void. They argued that the transfer agreement was void because it was intended to defeat public policy and hinder execution of a Court decree.
 21. They relied on the following Authorities; Shah and 1 other Versus Mombasa Bricks and Tiles Limited and 5 other (Petition 18 (E020) of 2022) [2023] (KESC 106) KRL, Arvind Shah & 7 Others Mombasa Bricks and Tiles Limited and 5 others (Petition 18 E620) of 2022 [2023] (KESC 106) KLR, KN Aswathnarayana settee (D) Tr. LRS and others versus state of Karnataka and 5 others [2013] INSC, Marete Versus Ndegwa & 2 Others Civil Appeal No. 042 of 2021 (2024) KECA 545 (KLR), Harmony Shipping Company SA Versus Saudi Europe line [1979] 1 WLR 1380.

The 3rd Respondent's Submissions

22. The 3rd Respondent based their submissions on three major points. On the first point, they questioned the competence of the Appeal. They submitted that the appeal is incompetent for lack of the Statutory Leave and that it ought to be struck out. They argued that their Objection Proceedings through their application dated 27th May, 2021 were brought under Order 22, Rule 51 and thus fall within the purview of Orders which requires leave before appeal. They also argued that the 1st Respondent's application dated 27th May, 2021 was brought under Order 22, Rule 35, and hence it too fell within the purview of Orders which require leave before appeal.
23. On the second point of their submission, they submitted that the trial Court did not err in declining jurisdiction to lift veil of incorporation. They argued that the trial Court did not have jurisdiction to adjudicate on the application for lifting the corporate veil brought under the Order 22, Rule 35. They argued that Order 22 Rule 35 relates to an application for the examination of directors of a company and not lifting the corporate veil. They opined that an application for lifting the corporate veil cannot be anchored under Order 22, Rule 35, but rather a preserve of the High Court under Section 3 of the *Companies Act*.
24. In addition, they argued that the examination of directors under Order 22 Rule 35 applies to scenarios where the directors being examined are of a company which was a party to the trial proceedings. In the instant case, they submitted that the trial Court could have been seized with the requisite jurisdiction to examine directors, if the 3rd Respondent were a party to the proceedings. Thus, they opine that, since the 3rd Respondent was not party to the proceedings, the lower Court could not examine the directors in the first place. They submitted that such examination can only be done by the High Court under the *Companies Act*.
25. Lastly, the 3rd Respondent submitted that it cannot bear the debts and liabilities of the 1st Respondent. It submitted that the 3rd Respondent is a separate and distinct person from the 1st Respondent and thus the lower Court was right in allowing the objection application dated 20th May, 2021.
26. It relied on the following authorities; Kolaba Enterprises Ltd v Shamshdin Hussein Varrani & Another {2014} eKLR, Hannah Maina t/a Taa Fiwer v Rift Valley Bottlers Ltd {2016} eKLR, Ida Soman v



Najib Mubiru HCCA NO. 234 OF 2005, Tawakal Airbus Limited v Irene Muthoni Njirati & another [2020] eKLR, *Jepkemoi v Zaburi Enterprises Company Ltd & 2 others (Misc Civil App 43 of 2023)* [2024] KEHC 2343 (KLR), and Michael Kyambati v Principal Magistrate, Milimani Commercial Courts, Nairobi & another [2016] eKLR.

Issues for Determination

27. Each party identified several issues for determination and made considerable arguments around those issues. However, I have looked at their respective submissions and I find that these are the issues for determination;
- a. Whether the Appeal is incompetent for lack of leave to appeal
 - b. Whether the Trial Court had the jurisdiction to lift the corporate veil of the Respondents under Order 22 rule 35 of the Civil Procedure Rules

The Duty of the Court

28. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Appeal is incompetent for lack of leave to appeal

29. The 3rd Respondent submitted that the appeal is incompetent for lack of the Statutory Leave and that it ought to be struck out. They argued that their application dated 20th May, 2021 and the Appellant’s application dated 27th May, 2021 were brought under Order 22, Rule 51 and Order 22, Rule 35, respectively, and hence fell within the purview of Orders which require leave before appeal. They relied on Section 75 (1) of the *Civil Procedure Act*.
30. Since the appeal relates to two applications heard at the lower Court, I will deal with each application separately. I will start with the Appellant’s Application dated 27th May, 2021, which was a Notice of Motion. On the section outlining the enabling provisions, the records show that the Application was founded on Order 22, Rule 35 and Order 40 Rules 1 and 2 of the Civil Procedure Rules.
31. I have relooked at the law governing this area. Section 75 (1) of the *Civil Procedure Act* therefore provides inter alia;
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.
32. In addition, Order [Order 43, Rule 1] of the Civil procedure Rules states;



1. 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—

- (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 application 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.
33. Based on the above rules, it occurs to me that a ruling made under Order 22, Rule 35 does not have an automatic right of appeal and that a person seeking to appeal ought to first obtain leave of the Court. In addition, based on the above rules, it also occurs to me that a ruling made under Order 40, Rules 1 and 2 has an automatic right of appeal right. I have perused the typed court proceedings and there is no indication that the Appellants sought leave to appeal, either orally or in writing.
34. In the instant case, the Appellant’s Application dated 27th May, 2021 was founded on Order 22 Rule 35 of the Civil Procedure Rules. Under Order 22, Rule 35, the Appellants needed to first obtain the leave of the Court, but they did not.
35. The Courts have consistently held that the failure to obtain leave to appeal where one is required renders the appeal incompetent. In the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR, the Environment and Land Court in Kisii held as follows;
- “Thus the applicant did not have an automatic right of appeal against the order made on 18th December 2015 and therefore required to obtain the leave of the court as envisaged under Section 75(1) of the *Civil Procedure Act* and Order 43 subrule (3) of the Civil Procedure Rules. Under Order 43 subrule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order”.
36. Similarly, the court in *Nicholas Ayoro v Kevin Ochieng Jabedo* [2019] eKLR held that;
- “The above provisions clearly stipulate that in all other cases, the party wishing to appeal must first seek leave of court to appeal. What this means is that unless the order sought to be appealed against falls under the express orders which are appealable as of right under Order 43(1) of the Civil procedure Rules, leave to appeal must first be obtained before such an appeal can be preferred, or enlargement of time for filing of an appeal can be sought and obtained.
6. In addition, Under Order 43 Rule 3 of the Civil Procedure Rules, an application 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”.
37. The Appellants had also included Order 40, Rules 1 and 2 in the enabling provisions in their Application dated 27th May, 2021. Can the inclusion of Order 40, Rules 1 and 2 come to the aid of the Appellants? According to the abovementioned rules, a person seeking to appeal a ruling made under Order 40, Rules 1 and 2 of the Civil Procedure Rules does not need the leave of Court. However, it occurs to me that Order 40, Rules 1 and 2 of the Civil Procedure Rules could not be available to the Appellants in the circumstances.



38. Courts have held that a trial court does not have jurisdiction to issue post-judgment injunctive orders under Order 40, Rules 1 and 2 of the Civil Procedure Rules. They have also held that the jurisdiction of a trial Court to issue injunctive reliefs under Order 40 Rules 1 and 2 of the Civil Procedure Rules is only exercisable during the pendency of the suit at the trial Court and before the rendering of the judgment.
39. I associate with the decision of the Environment and Land Court in the case of Stella Wambui Muthoni v Njeri w/o Wangaruro & 15 others [2019] eKLR, where the court held as follows;
- My interpretation of Order 40 of the Civil Procedure Rules is that it provides a legal framework through which a party to a suit can access the trial court and obtain temporary injunctions and other interlocutory reliefs pending the hearing and determination of the suit. Once the suit is heard and determined through a judgment of the trial court, the trial court ceases to exercise jurisdiction under Order 40.
40. The court went on to state as follows;
- “It is therefore my finding that this court has no jurisdiction to issue a post-judgment injunction under Order 40 rule 1(a) and 10(a) of the Civil Procedure Rules. The injunctive reliefs contemplated under Order 40 are available only as long as the trial court is still seized of the substantive dispute”.
41. It is not in dispute that the trial Court heard the matter to the conclusion and issued a judgment on 25th January, 2021. Applying the rule in Stella Wambui Muthoni v Njeri (above) to the present case, I hold that the Appellants cannot obtain post-judgment injunctive orders under Order 40, Rules 1 and 2 as pleaded in their Application dated 27th May, 2021. The trial Court lacked jurisdiction to issue post-judgment injunctive reliefs under Order 40 Rules 1 and 2.
42. The other application was the 3rd Respondent’s Application dated 20th May, 2021, which was also a Notice of Motion. The application states that it was brought under Order 22 Rules 50 and 51 of Civil Procedure Rules. A relook at Order 43, Rule 1 of the Civil Procedure Rules above shows that a ruling under Order 22, Rule 50 and 51 does not have an automatic right of appeal. Consequently, I hold that the Appellants could not appeal, without leave, the Court’s ruling with respect to the 3rd Respondent’s application.
43. Even though the 3rd Respondents had, in their application dated 20th May, 2021 included Article 159 of *the Constitution* of Kenya 2010 as among the enabling provisions, I do find that the inclusion of Article 159 does not cure the need to obtain leave where one is required. I am guided by the Court of Appeal’s decision in Civil Appeal 96 of 2016 Rayleigh W. Wanyama v Lorna Mukhwana Wanyama & 3 Others [2020] eKLR where the court had the following to say on the issue of leave to appeal:-
- “... It is common ground that this appeal did not lie as of right. As such, it was trite that the appellant obtained leave of court before he could lodge it. Leave is a prerequisite to the assumption of jurisdiction by this Court. In the case of Kenya Commercial Bank Limited v Esipeya [2015] eKLR, this Court held that:
- ...having chosen to raise the limitation point by way of a preliminary objection under no particular Order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the Superior Court which was neither sought nor obtained”.



44. As to whether such failure could be cured by the application of Article 159 of *the Constitution*, the Court stated as follows: -

“.....As to whether Article 159 of *the Constitution* can cure the failure by the appellant to obtain leave, we find instructive the observations of this Court in the case of *Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 Others* [2013] eKLR 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”.

45. Similarly, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012* this Court rendered itself thus:

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle of Section 1A and 1B of the *Civil Procedure Act* Cap 21 and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a hand maiden of just determination of cases”.

46. The Court of Appeal in *Nyeri Civil Appeal 17 of 2017 Lucy Wanjiku Nyaga v James Mwaniki Munyi & Another* [2018] eKLR added its voice to the issue as follows: -

“It is common ground that the appellant never sought or obtained leave to appeal against the rejection of the preliminary objection raised on points of law. That was a blatant breach of substantive law which section 75 is, not simply a procedural lapse. All the seven grounds of appeal laid before us relate to the decision on the Preliminary Objection. Only an order could have arisen from the decision of the ELC on such objection and it required leave of that court or of this Court, if sought, to confer the jurisdiction to hear the appeal. We agree with the respondents that the appeal is a non-starter and must be declared a nullity ab initio. We so find”.

47. The 3rd Respondent’s Objection Proceedings dated 20th May, 2021 were brought under Order 22, Rule 51. The Appellants’ application dated 27th May, 2021 was brought under Order 22, Rule 35. The two applications fall within the purview of Orders which require leave before appeal. In this instant Appeal, the Appellants sought to appeal against orders arising from Order 22, Rules 35 and 51 without seeking leave to appeal. In my analysis, the Appellants’ failure to obtain leave to appeal rendered the Appeal incurably incompetent. Thus, the instant appeal is incompetent due to the lack of leave to appeal.

48. Having determined that the Appeal is incompetent and ought to have been struck out, there is no need to belabour other issues for consideration. Addressing the grounds of appeal would be only academic.

49. The Appeal is hereby struck out with costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 6TH DAY OF NOVEMBER, 2024.

.....



C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Chege Kamau Advocate for the Respondent

