



**Faulu Microfinance Bank Ltd v Kibochi (Miscellaneous Civil Case 295 of 2018)  
[2021] KEHC 109 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 109 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL CASE 295 OF 2018  
MW MUIGAI, J  
SEPTEMBER 16, 2021**

**BETWEEN**

**FAULU MICROFINANCE BANK LTD ..... CLAIMANT**

**AND**

**JOHN MWARA KIBOCHI ..... RESPONDENT**

**RULING**

**BACKGROUND**

1. The 1<sup>st</sup> matter before this Court was by Respondent's Notice of Motion seeking to stay the enforcement of Arbitral Award of 14<sup>th</sup> November 2016 and Further Award of 29<sup>th</sup> March 2018 pending hearing and determination of the applications.
2. This Court found that the Arbitral awards were not contrary to public policy as the statutory obligation to pay tax was recognized by Arbitrator and the contested issue was computation/ calculation of tax to be withheld by the Claimant.
3. This Court lacks jurisdiction to undertake the exercise and could not remit the issue to the Arbitrator under Section 34 of *Arbitration Act* as the Respondent filed such application on 9<sup>th</sup> December 2016 and the Arbitrator declined and stated that he lacked jurisdiction as it was not one of the issues raised as dispute(s) before the Arbitral Tribunal. This Court ordered;

The Final Award of 14<sup>th</sup> November 2016 and Further Award of 29<sup>th</sup> March 2018 are hereby recognized and enforceable SUBJECT to the following condition(s)

The Claimant and Respondent through their respective Counsel shall jointly approach Kenya Revenue Authority (KRA) within 30 days of this decision and consult their respective positions with regard to tax computation in enforcement of the Arbitral award.



This is with a view to assessment of tax on Claimants gains and profits from Respondent in accordance with provisions of *Income Tax Act* and Kenya Revenue Authority 's Employers Guide on PAYE and/or any other relevant law in force.

In default of assessment and deduction of tax in accordance with the law as outlined above each /any party may invoke Section 39 of *Arbitration Act* and raise the question of law for the Court to determine.

4. The 2<sup>nd</sup> matter before this Court was Certificate of Urgency filed on 26<sup>th</sup> November 2019 the Claimant /Applicant sought orders;

- a. That Pending and determination of the instant application stay of execution is granted of Kenya Revenue Authority computation contained in its letter of 8<sup>th</sup> November 2019 pending inter partes hearing.
- b. That Kenya Revenue Authority computation contained in its letter of 8<sup>th</sup> November 2019 be declared invalid, null and void and of no legal effect.

5. This Court considered;

'The Final& Further awards emanate from Arbitration proceedings by the parties arising from a dispute(s) from the Settlement Agreement. The issue of tax arose from the implementation and enforcement of the Awards while ensuring that compliance of tax remittance. The dispute did not arise from tax calculation/payments.

The Respondent raised the issue of tax before the Arbitrator who declined due to lack of jurisdiction, and raised the issue before Court and the Court similarly lacked jurisdiction to hear and determine the issue regarding tax computation.

The Court by Ruling of 29<sup>th</sup> July 2019, directed parties through Counsel to seek out the statutory body in charge of Tax, Kenya Revenue Authority (KRA).

By the letter of 8th November 2019, KRA calculated tax from the sum of Ksh 76,058,998/- and not Ksh 46,210,348/-. The KRA Tax Computation is still contested by parties and may interfere /amend/change the figures in the Arbitral Awards.'

6 This Court found;

'Since the application to set aside the Arbitral Awards by virtue of Section 35 of the *Arbitration Act* was dismissed by the Court due to lack of proof of any action contrary to public policy, the Court recognizes and enforces the Final Award of 14th November 2016 and Further Award of 29th March 2018 subject to computation of tax.KRA did its computation of tax according to the Tax Laws Regime, they were/are not parties to the Arbitration process but relied on the Court's direction to compute tax remittance. The parties to the Arbitration did not find the computation agreeable. There was no consensus and the Court lacks mandate to impose the computation of tax on the parties.

To the extent the computation as outlined by letter of 8<sup>th</sup> November 2019, changes terms/ orders of the Arbitral awards, it is hereby set aside and the application to recognize and enforce the awards is upheld. Issues regarding tax computation shall be resolved in separate proceedings and/or different forum.'

#### **APPLICATION FOR LEAVE TO APPEAL OUT OF TIME**



7. The 3<sup>rd</sup> matter presented before this Court is by certificate of urgency filed by the Claimant on 22<sup>nd</sup> September, 2020 seeking the following orders;
- a. A temporary stay of the decision of this Court vide Ruling (2) delivered on 28<sup>th</sup> August 2020 pending the hearing and determination of the instant application.
  - b. The Court grants extension of time for such period as the Court may deem fit and proper for the Applicant to seek leave to appeal and lodge and serve Notice of Appeal against the Ruling of the Court of 28<sup>th</sup> August 2020.
  - c. The Court grants leave for the Applicant to appeal the Ruling Delivered on 28<sup>th</sup> August 2020 by filing Notice of Appeal and requesting typed proceedings and certified copies of the Ruling[s]
8. The Claimant/Applicant deposed that the parties filed applications on 31<sup>st</sup> January 2020 & 26<sup>th</sup> November 2019 respectively and were heard inter partes on 20<sup>th</sup> May 2020. The Applicant opposed the KRA computation of tax vide letter dated 8<sup>th</sup> November 2019 and the Respondent found that the computation finalized the matter as the Final Award and Further Award were recognized and enforced vide Court's Ruling of 2019. The Ruling reserved on 26<sup>th</sup> June 2020.
- The Applicant deposed that the delivery of the Ruling was deferred from 26<sup>th</sup> June 2020 – 6<sup>th</sup> July 2020-13<sup>th</sup> July -25<sup>th</sup> August 2020.
9. On 25<sup>th</sup> August 2020, the matter was not listed and therefore the Applicant's Counsel failed to appear virtually online. Counsel liaised with the Court Clerk who indicated that in the usual practice, a ruling would be delivered on Notice.
10. Based on the advice, through innocent mistake Counsel learnt of the delivery of the Ruling was not on Notice but was delivered on 28<sup>th</sup> August 2020 vide a letter dated 14<sup>th</sup> September 2020 from Respondent's Counsel.
11. The Respondent demanded payment of Ksh 22,657,535.11 from the Applicant based on the Ruling of 28<sup>th</sup> August 2020.
12. The Applicant intends to appeal the Ruling out of time and seeks leave to do so by filing Notice of Appeal out of time and the delay was based on a mistake not attributable to it. It is fair equitable and in the interest of justice that the Application is granted.
13. The Applicant has an arguable appeal as disclosed by the draft memorandum of Appeal annexed to the affidavit and seeks stay of execution of the Ruling.

#### **REPLYING AFFIDAVIT**

14. The Respondent filed Grounds of Opposition and submitted that the instant application should be dismissed as the Court lacks jurisdiction to grant leave to appeal as no right of appeal lies under Section 36 of *Arbitration Act*. The Court lacks jurisdiction under law to grant extension of time.
15. The Respondent vide Replying Affidavit deposed that Counsel was present on the Court's virtual link on line and she did not see or hear Counsel for the Applicant. The Cause List of 25<sup>th</sup> August, 2020 had 13 matters listed (Copy of Cause List attached to the Affidavit) and upon the Court finishing the Cause List, Counsel requested the Court to confirm the Ruling date and the Court indicated the 28<sup>th</sup> August 2020.



16. On the same date at 12.57 pm on the same date Counsel sent a text to the Applicant/Client confirming date of delivery of the Ruling as 28<sup>th</sup> August 2020 (copy of SMS message is annexed to the Affidavit).
17. Accordingly, the failure by the Applicant to know of the Ruling of 28<sup>th</sup> August 2020 was not on the basis of innocent mistake as alleged. In any case, the matter was listed on 28<sup>th</sup> August 2020 (a copy of the Cause List is annexed)
18. The Respondent deposed that if Applicant's Counsel was present on the Court's virtual link as he alleged, and he believed that, matter was coming up on 25<sup>th</sup> August 2020, Counsel would have caused the matter be called out as Counsel for the Respondent did. Secondly, both Counsel had enquired from Court on their matter even if not listed before as exhibited by Cause Lists of 13<sup>th</sup> July 2020 & 6<sup>th</sup> July 2020 (annexed) and 26<sup>th</sup> June 2020. Further, on 6<sup>th</sup> & 7<sup>th</sup> May 2020, despite the matter not being listed, both Counsel addressed the Court virtually online.
19. Upon delivery of the ruling on 28<sup>th</sup> August 2020, Respondent's Counsel sought copy of the Ruling from the DR Commercial & Tax Division and obtained a copy on 11<sup>th</sup> September 2020 and on 14<sup>th</sup> September 2020 on instructions of the Respondent, Counsel wrote to the Applicant and forwarded copy of the Ruling.

### **SUBMISSIONS**

20. The Applicant relied on Order 50 Rule 6 of CPR 2010 in seeking for enlargement/extension of time to appeal.
21. The Applicant submitted that the Ruling sought to be appealed against is not one prescribed by Order 43 Rule 1 CPR 2010 where there is an automatic right of appeal.
22. Order 43 Rule 1 (2) & (3) CPR Rules envisage an appeal may lie with leave of Court from any other order made under these Rules and allows for leave to be sought in the 1<sup>st</sup> instance from the Court the order is sought to be appealed was granted. See *JP Machira T/A Machira & Co Advocates vs Wangethi Mwangi & Anor* [2002] eKLR
23. The Applicant was out of time to seek leave to appeal within 14 days from the date of the Ruling due to the circumstances relating to the delivery of the Ruling on 28<sup>th</sup> August 2020 without Notice which explains the reason and length of delay to seek leave within the requisite period.
24. The Applicant relied on the case of *Stanley Kaiyongi Mwenda vs Cyprian Kuba* [2000] eKLR citing *Leo Sila Mutiso vs Hellen Wangare Mwangi* [1999] 2 EA on the fact that the decision to extend the time for appealing is essentially discretionary. The Court takes into account Length and reason of delay, chances of success and degree of prejudice.
25. In consideration of chances of success, the Applicant relied on *Gerald Kithu Muchangi vs Cathrine Muthoni Ngare & Anor* [2020] eKLR that the role of the [Trial] Court is not to definitively determine the merits of appeal but understand if the intended appeal has issues worth serious judicial consideration.
26. The Applicant sought stay of execution as vide the letter dated 14<sup>th</sup> September 2020, the Respondent demanded Ksh 22,657,535.11 and seeks to execute for the perceived balance of the Final Arbitral Award based on that tax computation. Relying on the case of *James Wangalwa & Anor vs Agnes Naliaka Cheseto* [2012] eKLR stay of execution should considered 'where substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'



27. The Claimant/Respondent submitted that the Civil Procedure Act /Rules 2010 are inapplicable to Arbitration proceedings as held by the Court of Appeal in *Anne Mumbi Hinga vs Victoria Njoki Gathara* [2009] eKLR. See also Mall Developers Ltd vs Postal Corporation of Kenya [2014] eKLR on the same point.
28. The Respondent submitted that this Court lacks jurisdiction to grant orders sought as it lacks requisite jurisdiction to determine the instant application and referred to the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, 27. The Respondent submitted that the Applicant has no right of appeal. Section 3(1) of the Appellate Jurisdiction Act Cap 9 stipulates that the right of appeal is not automatic but created by law;
 

The Court of Appeal shall have jurisdiction to hear and determine appeals from high court and any other Court or Tribunal prescribed by an act of parliament in cases in which an appeal lies to the Court of Appeal under law.
29. The Claimant further submitted that Rule 11 of Arbitration Rules 1997 does not confer substantive rights as was held in the case of KamConsult Ltd vs Telkom Kenya Ltd & Anor [2001] & [2016] eKLR and was upheld in the Court of Appeal that there was no jurisdiction to review or appeal a matter determined under Section 17 of the Arbitration Act in the High Court.
30. The Claimant relied on Nyutu Agrovet Ltd vs Airtel Networks Ltd [2015] eKLR on appeal for the 1<sup>st</sup> time in Court of Appeal where Hon. Mwera JJA opined that Article 164(3) of CoK 2010 Section 3(1) Appellate Jurisdiction Act & Section 75 of Civil Procedure Act do not confer automatic right of appeal to the Court of Appeal.
31. The Respondent's absence online virtually on 28<sup>th</sup> August 2020 was not a bona fide mistake as the alleged facts surrounding events of 25<sup>th</sup> August 2020 were not proved by evidence.
32. The Claimant submitted that there is no dispute pending or unsettled after delivery of the Ruling and there is no computation of tax dispute as the KRA computation was set aside as it was contrary to the Arbitrator's award and the said award was upheld by the Court.

### **DETERMINATION**

33. After consideration of the pleadings and submissions by parties through respective Counsel, the issues for determination are;
  - a. Whether this Court has jurisdiction to determine the application
  - b. Whether the Applicant has right of appeal
  - c. Whether the Applicant should be granted leave to file appeal out of time.

### **JURISDICTION**

34. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, Hon. Nyarangi J. Court of Appeal held;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”.....



“Further, the court is in the instance not seized of the requisite jurisdiction to set aside an arbitral award in a manner not specifically provided for in the *Arbitration Act*. It would be ultra vires for the Court to deny an award its finality and speedy enforcement which are major objectives of arbitration and the ultimate intention of the parties.”

35. The Respondent submitted that the instant application should be dismissed as the Court lacks jurisdiction to grant leave to appeal as no right of appeal lies under Section 36 of *Arbitration Act*. The Court lacks jurisdiction under law to grant extension of time.
36. The Certificate of urgency /Notice of motion by the Applicant was/is brought under Article 159 CoK 2010, Sections 1A, 1B, 3A & Section 95 of CPA, Order 42 Rule 6, Order 43, Order 50 Rule 6 & Order 51 Rule 1 of CPR 2010.
37. The Supreme Court in *Republic vs Karisa Chengo & 2 Others* SC Petition 5 of 2017 [2017] eKLR defined jurisdiction as ‘the Court’s power to entertain, hear and determine a dispute before it also; [it means] the sphere of the Courts operations’
38. Therefore, the above provisions including Article 165 3(a) & (e) COK 2010 grant the Court jurisdiction to hear, read and consider the instant application in order to determine whether the Court can or not based on its jurisdiction grant or not grant the orders sought by the Applicant.

#### **RIGHT OF APPEAL.**

39. The Applicant sought temporary stay of Ruling (2) delivered on 28<sup>th</sup> August 2020, extension of time for the Applicant to seek leave to appeal and to lodge and serve Notice of Appeal and grants leave to by filing Notice of Appeal and obtaining typed proceedings and certified copies of the Ruling[s].
40. In *Nyutu Agrovet Ltd vs Airtel Networks Ky Ltd & Chartered Institute of Arbitrators -Kenya Branch (Interested Party)* Supreme Court Petition No 12 of 2016 held that at Paragraph 34;  

‘With regard to the right of appeal, our position is that such right can either be conferred by Constitution or a Statute.’
41. It follows therefore, that in considering the Application, there must be a right of appeal before leave to appeal or leave to appeal out of time is considered.
42. To establish the Applicant’s right of appeal, the Court shall consider the following an agreement by parties before the Final Arbitral Award that they shall pursue an appeal on matters of law.
43. The Arbitration Agreement/Clause reads;

6.1 Any dispute arising out of or in connection with this shall be referred to arbitration by a single Arbitrator being a practising lawyer of not less than fifteen years standing to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom.”

The Agreement of the parties’ choice of forum does not include an agreement to pursue an appeal. There is no evidence furnished to the Court that at any stage of Arbitration proceedings before the Final Award was published, parties agreed on right of appeal to the Court of Appeal.



44. The *Arbitration Act* 1995 prescribes opportunity to appeal in Section 39 of the Act as follows;

- (1) Where in the case of a domestic arbitration, the parties have agreed that—
  - (a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
  - (b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.
- (2) On an application or appeal being made to it under subsection (1) the High Court shall—
  - (a) determine the question of law arising;
  - (b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.
- (3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—
  - (a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or
  - (b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).
- (4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.
- (5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.

45. This Court has not heard an appeal by the parties but 2 Applications on whether to recognize and enforce the Final Awards or set them aside under Section 35 of *Arbitration Act*. The Court Ruling of 29<sup>th</sup> July 2019 was that the Final Awards were recognized to be enforced subject to/on condition the computation of tax would be carried out by Kenya Revenue Authority, the legal and statutory body whose mandate is tax. The Court Ruling of 28<sup>th</sup> August 2020 was to set aside KRA's computation as it was contrary to the Hon. Arbitrator's awards and the Court lacked jurisdiction to vary amend or



tamper with the Award(s). From these Applications and Rulings the parties have not pursued an appeal in the High Court and the right of appeal envisaged in Section 39 of the Act is not applicable.

46. Pre 2019, the Court would end the inquiry of the right of appeal here, but new and emerging jurisprudence on the right of appeal that binds this Court was established by the Supreme Court in *Nyutu Agrovat Ltd vs Airtel Networks Ky Ltd & Chartered Institute of Arbitrators -Kenya Branch (Interested Party)* Supreme Court Petition No 12 of 2016 ( Majority decision) Pg 42 which held;

In concluding on this issue, we agree with the interested party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should be so sparingly exercised that only in clearest of cases should the Court of Appeal assume jurisdiction.

*Synergy Industrial Credit Ltd vs Cape Holdings Ltd* SC Petition No 2 of 2017, the Supreme Court ( Majority decision) Pg 42 held

For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows, therefore, that an intended appeal, which is not anchored upon the 4 corners of Section 35 of the *Arbitration Act*, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award.

47. The Supreme Court in both Appeals granted the Appellants right of Appeal before the Court of Appeal because after the High Court set aside the Final Awards, the parties were left in limbo as with the setting aside and the advanced sums of monies advanced, the fate of the said moneys advanced to the Respondents remained unknown as no decision was made as to fresh arbitration proceedings should commence or not.
48. In the instant matter, parties agreed to their choice of forum and participated in Arbitration proceedings. The Hon. Arbitrator published the Award on 14<sup>th</sup> November 2016. Parties applied to the Hon. Arbitrator under Section 34 of the *Arbitration Act* and the Arbitrator declined due to lack of jurisdiction as it was not part of the dispute before the Arbitrator. The parties sought recognition and enforcement of the award(s) and setting aside of the award on grounds of public policy. This Court found that tax payment was recognized as a statutory mandate what was in issue was the tax amount to be withheld and remitted to KRA.
49. On submissions of the party, the Court allowed the parties to approach KRA on computation of tax. The KRA response of 8<sup>th</sup> November 2020 was accepted by one party and refused by the other party. To the Court the computation varied, amended the Arbitrator's award which this Court has no jurisdiction to allow as shown in the previous Rulings delivered by the Court. Similarly, despite the parties' contention on whether the tax computation would be based on the lumpsum or not, this Court lacks jurisdiction to re-evaluate the evidence or facts or calculations of the amounts payable by and to parties.



*Cape Holdings Ltd vs Synergy Industrial Credits Ltd* [2016] eKLR the court held;

“The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.”

50. The Court upheld the Final Award of 14<sup>th</sup> November 2016 and 29<sup>th</sup> March 2018. Unlike the cases on appeal to the Supreme Court, the parties herein are not left in limbo, they chose their dispute resolution forum as arbitration and after the parties fully participated in the proceedings and raised the tax issue with the Arbitrator, there are valid regular and legal awards from the Arbitrator
51. To the claim that the Court by its Ruling of 28<sup>th</sup> August 2020, that ‘any dispute on tax computation shall be addressed in separate proceedings or forum’ meant that the parties had right of appeal. The Court envisaged a situation where parties agreed to approach the Arbitrator again, or through mediation and/or negotiation through their advocates reached consent on implementation of the Arbitral award or during enforcement engaged in separate proceedings with KRA.
52. The right of appeal cannot be conferred but must be stipulated either in the Constitution or statute or in the case of Nyutu and Synergy cases post 2019, the Applicant shall prove or demonstrate either that ‘in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong which has completely closed the door of justice to either of the parties’ or ‘that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award’. In this instance, the Applicant has not proved either of the tests laid down in the case-law above.
53. In light of the above and in totality of the circumstances of the matter, the Applicant has not established its right of appeal.

#### **LEAVE TO APPEAL OUT OF TIME**

54. In *Anne Mumbi Hinga vs Victoria Njoki Gathara* [2009] eKLR held;

In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate Arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo moto because jurisdiction is everything as so eloquently put in the case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* 1989 KLR 1.

55. *Kenyatta International Convention Centre (KICC) vs Greenstar Systems Ltd* [2018] eKLR which provides;

Thus, there being no Provision in the [Arbitration Act](#) for extension of time, it is to be understood that strict compliance with the timeline set out in Section 35 (3) of the Act is imperative, and comports well with the principle of finality in arbitration. In deed in the Ann Mumbi Hinga case, the Court of Appeal proceeded to hold, in no uncertain terms, that Section 35 of the [Arbitration Act](#) bars any challenge even for a valid reason after 3 months from delivery of the award.



56. The Applicant relied on Order 43 Rule 1 (2) & (3) CPR Rules that an appeal may lie with leave of Court from any other order made under these Rules and allows for leave to be sought in the 1<sup>st</sup> instance from the Court the order is sought to be appealed was granted.
57. The Court takes the view that if the right of appeal is established then the Court may consider the application to file appeal out of time and stay execution pending appeal. Leave to file appeal out of time is an application filed and/or granted upon establishment of the right of appeal. In this case, the Court finds at this stage that the Applicant has no right of appeal. Secondly, the requirements to be considered and time lines relied upon are stipulated in the Civil Procedure Rules to enlarge or extend time to file Notice of Appeal and Memorandum of Appeal is not applicable in the circumstances.

#### **DISPOSITION**

- 1) The Application of 22<sup>nd</sup> September 2020 is dismissed.
- 2) Each party to bear own Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

**MS MATHANGANI FOR CLAIMANT- PRESENT**

**MR GATUGUTI FOR RESPONDENT-PRESENT**

**COURT CLERK - TUPET**

