

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 138 OF 2019

FELISTAS WANJIRU.....APPELLANT

VERSUS

PRISCILLA WAIRIMU.....RESPONDENT

R U L I N G

1. For determination is the Respondent's preliminary objection filed on 28th October, 2019 seeking that the Appellant's memorandum of appeal and motion for stay of execution filed herein be struck out. On grounds that this court lacks jurisdiction to entertain the said appeal and motion for want of leave.
2. In opposition to the preliminary objection, the Appellant filed her grounds of opposition on 18th February, 2020. It was her contention that she did not require leave of the subordinate court to appeal against the ruling and the judgment in the lower court as appeal therefrom lie as of right.
3. The court directed that the preliminary objection be canvassed by way of by way of oral arguments. For the Respondent it was argued that the Memorandum of Appeal relates to both the ruling of 30/8/2018 and the judgment of 22/6/2019 by the lower court ; that time for filing the appeal in respect of the judgment had lapsed by July 2019 and as for the said ruling, the Appellant does not have automatic right of appeal and she ought to seek leave.
4. Counsel for the Appellant submitted that the court can entertain both the appeal and the motion which were properly before it. She contended that the appeal is within time as the ruling was delivered on 30/8/2019 while the appeal was filed on 25/9/2019. It was argued that the appeal lies as of right in respect of the application to set aside an *ex parte* judgment.
5. The court has considered the arguments of the parties and the pleadings on record. As to what constitutes a preliminary objection, the Court of Appeal of Eastern Africa stated (per Sir Charles Newbold, President), in **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd (1969) EA 696** at page 701:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
6. Any motion seeking to stay execution under Order 42 rule 6(1) of the Civil Procedure Rules must be premised on the existence of a valid and competent appeal. A reading of Order 42 rule 6(1) leaves no doubt that the existence of an appeal is a condition precedent to the granting of an order to stay execution pending appeal.
7. The appeal herein arose from a ruling delivered in the lower court on 30th August 2019. A copy of the said ruling is annexed to the Applicant's supporting affidavit. The ruling in the lower court was in respect of two motions primarily brought under Order 51 rule 1 of the Civil Procedure Rules. While the memorandum of appeal on record impugns the said ruling, it also purports to challenge the judgment of the lower court which was admittedly delivered in June 2018.
8. In so far as the appeal before the court seeks to challenge the said judgment, there was no leave granted to do so out of time, hence it is incompetent. Similarly, by dint of the provisions of Section 75 and Order 43 of the Civil Procedure Rules, appeals do not lie as of right from orders or rulings arising from applications brought under Order 51 Rule 1 of the Civil Procedure Rules.
9. The Applicant herein did not seek leave to appeal the ruling of the or judgment of the lower court. Hence the appeal herein and motion for stay of execution are both incompetent. I associate myself with the sentiments of **Sewe J**, in **Edith Wairimu Njoroge v Brooks Holdings Co. Ltd [2018] e KLR** that where an appeal does not lie as of right from an order but only with leave, such leave “*was a prerequisite to the assumption of jurisdiction by this court on appeal.*” In **Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 Others [2013] e KLR** the Court of Appeal held that the right of appeal goes to the court's jurisdiction, is a fundamental matter and that the absence of statutory conferment of such right is not a mere technicality.
10. In the circumstances, the memorandum of appeal filed on 25th September 2019 is an incompetent pleading and is hereby struck out together with the motion filed on 25th September 2019. Costs are awarded to the Respondent.
12. The sum of KShs.250,000/= deposited into court as security pursuant to the order made on 25/9/19 is to be released to the Respondent.

SIGNED AND DELIVERED ELECTRONICALLY THIS 9TH DAY OF OCTOBER 2020.

C. MEOLI

JUDGE