

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**(CORAM: R. MWONGO, J.)**  
**CIVIL APPEAL NO. E017 OF 2025**

GABRIEL NJUE MURIUKI.....1<sup>ST</sup> APPELLANT/RESPONDENT

LUCY RUGURU NYAGA.....2<sup>ND</sup> APPELLANT/RESPONDENT

**-VERSUS-**

EQUITY BANK LIMITED.....1<sup>ST</sup> RESPONDENT/OBJECTOR

SAMUEL KARITHI T/A QUICKLINE AUCTIONEERS.....2<sup>ND</sup> RESPONDENT

**RULING**

**The Preliminary Objection**

1. The 1<sup>st</sup> respondent/objector filed a preliminary objection dated 17<sup>th</sup> April 2025 on grounds that:
  - 1) The appeal is incompetent, bad in law and fatally defective for it has been filed out of time and without leave of the honourable court.
  - 2) The appeal offends the mandatory provisions of Section 79G of the Civil Procedure Act.
  - 3) The appeal was filed on 27<sup>th</sup> February 2025 which is over the mandatory 30 days since the ruling was delivered on 23<sup>rd</sup> January 2025.
  - 4) The appeal is an abuse of the court process and the same ought to be struck out with costs to the 1<sup>st</sup> Respondent.

**Background**

2. The appellant/respondents filed a notice of motion dated 12<sup>th</sup> March 2025 seeking an order for stay of execution of the ruling of the trial court in Embu MCCC Misc. E032 of 2024 delivered on 23<sup>rd</sup> January 2025. They stated that they had already appealed against the said decision by filing a memorandum of appeal dated 27<sup>th</sup> February 2025 and the stay order should be put in place pending the said appeal. The court time stamp on the memorandum of appeal indicates that it was filed on 03<sup>rd</sup> March 2025. These facts are not disputed.
3. The 1<sup>st</sup> respondent/objector opposed the application through grounds of opposition. It also filed the preliminary objection herein.

## Submissions

4. The court directed parties to file written submissions of the preliminary objection but only the objector complied.
5. The 1<sup>st</sup> respondent/objector stated that the objection meets the requirements for one as stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 at page 700**. It stated that the appellants filed an appeal out of time without seeking leave to do so as provided for under section 79G of the Civil Procedure Act. As such, that the appeal ought to be struck out for not being properly before court. It relied on the case of **Kemboi v Kangogo & another [2024] KEHC 1801 (KLR)**.
6. The appellant/respondents indicated that they will not be submitting on the preliminary objection.

## Issue for Determination

7. The only issue for determination is whether the preliminary objection has merit.

## Analysis and Determination

8. The merit or otherwise of a preliminary objection is determined by considering the nature of issues raised therein. It is trite that a preliminary objection can only be raised based purely on legal issues. Additionally, the determination of those legal issues should have the overall effect of determining the primary suit if the preliminary objection succeeds. This was the position taken by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (supra)** where it was held thus:

***“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....A preliminary objection is in the nature of 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.”***

9. The issue raised though the objection is that the appeal filed by the appellant is not properly before court as it was filed out of time without the leave of court as required according by section 79G of the Civil Procedure Act. The notice of motion dated 12<sup>th</sup> March 2025 seeks stay of execution of the trial court’s ruling, ending appeal. According to that application, the appeal is dated 27<sup>th</sup> February 2025 while the impugned ruling

was delivered on 23<sup>rd</sup> January 2025. The court record shows that the memorandum of appeal was filed on 03<sup>rd</sup> March 2025. This means that it was filed 8 days too late because the 30 days to appeal ended on 23<sup>rd</sup> February 2025.

***“79G. Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”***

10. The appellants did not move the court through an application for extension of time to appeal even though they had the option. Stay of execution orders cannot be granted in a vacuum. There are conditions to be met and execution is granted pending certain events so that the decree-holder is not unjustly denied enjoyment of the fruits of his judgment.

### **Conclusion and Disposition**

11. In the circumstances, it is clear that a stay application would be a futile exercise because the purpose of the order would have been extinguished, given that the appeal is improperly before the court.

12. Accordingly, the preliminary objection has merit and it is hereby allowed. Orders are hereby given for striking out the notice of motion dated 12<sup>th</sup> March 2025 and the memorandum of appeal dated 27<sup>th</sup> February 2025, as I hereby do.

13. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 12<sup>th</sup> day of November, 2025.**

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**R. MWONGO  
JUDGE**

### **Delivered in the presence of:**

1. Kipnetich for 1<sup>st</sup> App/Respondent
2. No Representation for Samuel Kariithi
3. Njagi for 1<sup>st</sup> and 2<sup>nd</sup> Apps

4. Francis Munyao - Court Assistant