

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HCCOMM MISC. APP. NO. E199 OF 2025

RAFIKI PHARMACEUTICAL LIMITED.....APPELLANT

-VERSUS-

NELLY KEMUKA OMORE.....1ST RESPONDENT

VIEWLINE AUCTIONEERS.....2ND RESPONDENT

RULING

1. The appellant filed a Notice of Motion application dated 24th February 2025 pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, and Order 40 of the Civil Procedure Rules, 2010. The appellant prays for orders that it be granted leave to appeal out of time against the Judgment delivered by Hon. Rawlings Liluma Musiega on 10th July 2023 in MCEL/491/2018, an order for stay of execution of the said Judgment and the decree therefrom pending the hearing and determination of the intended appeal, and an order that the annexed Memorandum of Appeal be deemed as duly filed within time.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Yussuf Mohamed, a Director of the appellant company. Mr. Mohamed averred that in 2018, the 1st respondent instituted a suit, MCEL/491/2018, at the Chief Magistrate's Court at Milimani Commercial Courts against the appellant. He contended that the appellant was to present its defence before the Covid-19 lockdown, but upon resumption of Court operations, the 1st respondent failed to notify it of the hearing, causing the matter to proceed to conclusion in its absence. That Judgment was subsequently delivered on 10th July 2023 by Hon. Rawlings

Liluma Musiega, without the appellant's knowledge, and thereafter, on 6th February 2024, the 1st respondent through the 2nd respondent served the appellant with warrants of attachment in execution of the decree.

3. Mr. Mohamed deposed that aggrieved by the aforesaid *ex parte* Judgment, the appellant filed an application dated 15th February 2024 before the Trial Court, seeking to set aside the said Judgment and to be allowed to defend the suit. The application was however dismissed in a Ruling delivered on 12th April 2024. Dissatisfied with that decision, the appellant moved to the High Court on 17th April 2024 seeking leave to appeal out of time, but the then Advocate failed to annex a draft Memorandum of Appeal. He stated that although the application was certified urgent on 18th April 2024, the Court in a Ruling delivered on 10th February 2025 downed its tools for lack of jurisdiction due to the said omission, hence the matter was not determined on merits. He asserted that the appellant should not be punished for its Advocate's mistake and averred that the appellant has now filed the instant application with a properly annexed draft Memorandum of Appeal to properly invoke this Court's jurisdiction.
4. Mr. Mohammed claimed that upon perusal of the lower Court record, the appellant discovered that the affidavit of service relied upon by the 1st respondent was defective, having been commissioned more than a year before the purported service. Moreover, the email address used for service, lawmosiadvocates@co.ke, was incorrect and non-existent, as demonstrated by bounced emails. For that reason, he averred that the appellant believes that the 1st respondent intentionally failed to effect proper service, thereby frustrating its defence. He further averred that the 2nd respondent is now threatening to auction the appellant's property, hence the urgency of the instant application to forestall loss. Mr. Mohammed asserted that the appellant is willing to deposit security.

5. In opposition to the application, the respondents filed a replying affidavit sworn on 28th February 2025 by Ms Nelly Kemuma Omoke, the 1st respondent herein. She averred that the Judgment sought to be set aside was regular and properly entered. She confirmed that her Advocates engaged the 2nd respondent to proclaim, attach and sell the appellant's movable property in execution of the decree. She stated that the instant application is a replica of an earlier application dated 15th February 2024, which was duly heard and determined, and in which the Court found that the appellant had been properly served before the impugned Judgment was entered.
6. Ms Omoke asserted that there has been inordinate and unexplained delay of over two years in the filing of the application herein, despite the appellant having been notified of the said Judgment on 24th January 2024. She contended that the appellant has demonstrated indolence throughout the proceedings and that the instant application is a ploy by the appellant to deny her the right to enjoy the fruits of her Judgment. She averred that this Court lacks the requisite jurisdiction to entertain this matter, as it had already been dealt with in the lower Court and no proper appeal has been filed. She claimed that no plausible reason has been advanced to warrant the setting aside of the impugned Judgment since the draft Memorandum of Appeal lacks merits and has no chances of success.
7. The instant application was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Kaveke Mwanja & Company Advocates on 31st March 2025, whereas the respondents' submissions were filed by the law firm of Ndemo Mokaya & Company Advocates on 21st March 2025.

8. Mr. Kaveke, learned Counsel for the appellant relied on the Court of Appeal case of **Baiwo v Bach** [1987] KLR 89 cited by the Court in **Peter Ndeti Ndolo v William Mutisya Muindi** [2021] KEHC 1507 (KLR), and submitted that the Trial Court erred in relying on the Process Server's affidavit without subjecting it to scrutiny, despite the appellant having challenged the issue of service. Counsel argued that the Process Server was never called for cross-examination and that the Trial Magistrate failed to make any express finding on the validity of the hearing notice. He stated that the Judgment delivered on 10th July 2023 was irregular and cannot stand. He further stated that the appellant is ready and willing to provide security for costs by depositing its motor vehicle logbook in Court to ensure due performance of the decree.
9. Mr. Mokaya, learned Counsel for the respondents relied on the cases of **First American Bank of Kenya Ltd v Gulab P Shah & 2 Others** [2002] 1 EA 65 and **Leo Sila Mutiso v Helen Wangari Mwangi** [1999] 2 EA 231 and submitted that the appellant bears the burden of giving a satisfactory explanation for the delay in filing an appeal against the impugned Judgment and to show that the intended appeal is arguable and deserving of consideration. He cited the Supreme Court case of **Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] KESC 12 (KLR), and contended that in this case, there has been an unexplained and inordinate delay of nearly two (2) years in filing the instant application.
10. Counsel noted that the appellant was duly served with the Judgment Notice on 24th January 2024, yet no appeal was filed thereafter. He submitted that the intended appeal has no chances of success, as it revolves around the issue of service in the lower Court, a matter that was conclusively heard and determined by the Trial Court in a Ruling delivered on 12th April 2024, from which no

appeal has been filed. On the issue of stay of execution, Mr. Mokaya relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, and asserted that the appellant has not satisfied the conditions for being granted an order for stay of execution pending appeal, as the application was made after inordinate delay and no evidence of substantial loss has been provided.

11. Counsel argued that granting an order for stay of execution, would unjustly hinder the 1st respondent's enjoyment of the fruits of a valid Judgment, whereas a successful litigant is *prima facie* entitled to the benefits of their decree. He contended that the appellant's mere assertions of potential loss are unsupported by evidence, and therefore the application herein lacks merits. In conclusion, the Mr. Mokaya urged this Court to dismiss the application herein with costs, but in the unlikely event that it is allowed, the appellant be ordered to deposit Kshs.512,413.49 as security for the due performance of the decree.

ANALYSIS AND DETERMINATION.

12. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the respondents' replying affidavit and the written submissions by Counsel for the parties. The issues that arise for determination are –

- i) **Whether the application for leave to file an appeal out of time is merited; and**

- ii) **Whether the appellant has satisfied the conditions set down for stay of execution pending appeal.**

13. Before considering the merits and demerits of the identified issues, this Court finds it necessary to first address the glaring preliminary issue of jurisdiction. Although neither party has raised this issue, it is well established that

jurisdiction being a fundamental issue, may be raised by the Court suo motu, as affirmed by the Supreme Court in the case of **Ibren v Independent Electoral and Boundaries Commission & 2 others** [2018] KESC 75 (KLR) where it was held that -

A jurisdictional issue is fundamental and can even be raised by the court suo motu, as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:

“25.What I understand the court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”

Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before us, it is our considered opinion that the issue of jurisdiction of this court to hear and determine this appeal warrants settlement upfront.

14. Although the parties herein did not address this issue in detail, this Court finds that the question of its jurisdiction to entertain the instant application must be settled at the outset.

15. In the Court of Appeal case of the **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** [1989] KECA 48 (KLR), Nyarangi, JA., held that as follows on the issue of jurisdiction-

...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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

16. Upon perusal of the pleadings filed in the lower Court as annexed to the appellant’s supporting affidavit and the respondents’ replying affidavit, it is evident that the 1st respondent’s claim against the appellant was instituted as an employment matter rather than a commercial dispute. Notably, the case was registered as MCEL/491/2018, where “EL” denotes “Employment and Labour”, as opposed to the usual Milimani Commercial Civil Suit designation used for commercial cases.
17. Moreover, a review of the impugned Judgment clearly shows that the 1st respondent’s claim arose from an employment dispute. The 1st respondent sought various employment-related dues, including unpaid leave amounting to Kshs.30,000/=, three months’ maternity leave totaling Kshs.90,000/=, 12 months’ compensation for unlawful termination amounting to Kshs.360,000/=, severance pay for three years of Kshs.90,000/=, one month’s notice pay of Kshs.30,000/=, and license fees totaling Kshs.160,000/=. It is therefore evident that the 1st respondent’s claim was premised, among other things, on unfair termination of employment.
18. The High Court and Courts of equal status are established under Article 162 of the Constitution which provides that –

- 1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*
- 2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*
 - a) *employment and labour relations; and*
 - b) *the environment and the use and occupation of, and title to, land.*
- 3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*
- 4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

19. The jurisdiction of the Employment and Labour Relations Court is set out under Section 12 of the Employment and Labour Relations Court Act, which provides as follows -

- 1) *The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –*
 - a) *disputes relating to or arising out of employment between an employer and an employee;*
 - b) *disputes between an employer and a trade union;*
 - c) *disputes between an employers' organisation and a trade unions organisation;*
 - d) *disputes between trade unions;*

- e) disputes between employer organizations;*
 - f) disputes between an employers' organisation and a trade union;*
 - g) disputes between a trade union and a member thereof;*
 - h) disputes between an employer's organisation or a federation and a member thereof;*
 - i) disputes concerning the registration and election of trade union officials; and*
 - j) disputes relating to the registration and enforcement of collective agreements.*
- 2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.*
- 3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders*
- i) interim preservation orders including injunctions in cases of urgency;*
 - ii) a prohibitory order;*
 - iii) an order for specific performance;*
 - iv) a declaratory order;*
 - v) an award of compensation in any circumstances contemplated under this Act or any written law;*
 - vi) an award of damages in any circumstances contemplated under this Act or any written law;*

vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

viii) any other appropriate relief as the Court may deem fit to grant.

4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

5) The Court shall have jurisdiction to hear and determine appeals arising from -

a) decisions of the Registrar of Trade Unions; and

b) decisions of any other local tribunal or commission as may be prescribed under any written law. (Emphasis added).

20. Having found that the suit before the Trial Court, as well as the Judgment the appellant seeks to appeal from, arose from an employment dispute, this Court holds that any appeal against the Judgment delivered by Hon. Rawlings Liluma Musiega on 10th July 2023 in MCEL/491/2018 ought to have been filed, or should be filed, before the Employment and Labour Relations Court.

21. In the circumstances, it is my finding that the instant application is fatally defective as I lack the jurisdiction to hear and determine the same. I therefore down my tools in line with the holding by the Court of Appeal in the case of the **Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd** (supra). The instant application is hereby struck out with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 7th day of November 2025. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence;-

Mr. Kareke for applicant

No appearance for the respondents

Ms B. Wokabi – Court Assistant.