

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E032 OF 2025

EXTRA DIMENSIONS COMPANY LIMITED.....
APPELLANT

VERSUS

ARN SECURITY CONSULTANTS
AND TRAINING SERVICES LIMITED.....1ST
RESPONDENT

ABSA BANK KENYA PLC.....2ND
RESPONDENT

(Being an Appeal from the Ruling and Orders of the Chief Magistrates Court at Naivasha of the Honourable Wilson Rading Outa (PM) delivered on 20th March, 2025 in MCCC E440 of 2022)

RULING

1. By his preliminary objection dated the 1st April 2025, the respondent challenged the property of the appeal and the Notice of Motion filed in it and seeking stay. The gist of the objection is that the ruling against which the appeal has been preferred was a ruling on a garnishee application pursuant to the provision of order 23 rules 1 & 2 Civil Procedure Rules which do not attract appeal as of right in accordance with order 43 Rule 1, unless with the leave of the court.
2. When the parties appeared before the court on 2nd April 2025 the court ordered that the status quo be maintained in that the frozen funds remain frozen as the preliminary objection is heard and determined. The court then gave each party 14 days to file and serve submissions.
3. Pursuant to these directions, the 1st Respondent filed its submissions dated 14th April 2025 with copies of authorities which the appellant did so on the 11/7/2025.

4. Despite the elaborate submissions filed by both sides, the only issue raised and which seek determination by the court is whether there is a right of appeal from a ruling rendered pursuant to Order 23 Rule 1.
5. The concomitant issue, if the above is answered in the is whether any leave was sought and obtained to file the appeal.
6. Of course, before the court delves into that endeavor, it must be satisfied that the point passes the threshold of a preliminary objection on a pure point of law as enunciated in the celebrated case of **Mukysa biscuits Manufacturing Company Limited Versus West End Distributors Limited** that preliminary objection must never require the court to ascertain contested facts.
7. In this matter the court entertains no doubt that whether there is vested upon a right of appeal for a decision appealed for is axiomatically a clear and pure point of law that needs no minute examination of facts but just the law under the rules.
8. On the merits, while the 1st Respondent contends that leave is mandatory before one can prefer an appeal against an order for garnishee, the appellant disagrees and submits that Section 75 (h) of the Act vests the right of appeal wherever any determination is made on any question of law or jurisdiction that finally determines the rights of any party to the dispute. It however concedes that order 43 which deals with appeals for orders does not list Order 23 Rule 1 as one of those orders, for which appeal lies as of right, the same is superseded with the wider stipulations of Section 75 (1) h.
9. To support his argument, the appellant cites to court the decisions in **Nyutu Agrovat Vs Airtel Networks Kenya Limited & Another [2019] eKLR** where the Supreme Court held that appeals are permissible as of right where the impugned decision raises jurisdictional issues or involving manifest procedural injustice, away from the provisions of the Civil Procedure Act and the Rules.

10. The decision in **Equity Bank Limited Vs. West Bank MBO Limited [2013] eKLR** is also cited for the holding by the Court of Appeal that the right of appeal cannot be ousted where there is a final order determining rights without offering to the parties or any of them the opportunity to be heard. The 3rd decision cited is that of **Mumo Matemu - Vs - Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** for the proposition of the law that procedural missteps should never thwart substantive justice where right to be heard on appeal is central. The decision in **Republic - Vs - Chengo Karisa & 2 Others [2017] eKLR** was cited for the law that leave to appeal can be granted in retrospect to cure a procedural lapse while it being stressed that the appellant is ready and willing to make an application for leave to appeal in this matter.
11. On the application for stay, the decision in **James Wangalwa & Another Vs. Agnes Naliaka Chesoto [2012] eKLR** is cited for the position that an application for stay can stand alone and independently if the applicant demonstrates sufficient cause in order that the substratum of the appeal may be preserved.

Analysis and Determination

12. From the submissions filed, it is not in dispute that the decision appealed against was made pursuant to Order 23 Rule 1. There is equally no allegation that leave was ever sought nor granted. The Appellant's position is that because garnishee order determining rights, in the garnished money, it is a final order determining rights and thus the court would employ Section 75 (1) h to infer the right to appeal without leave.
13. The court discerns the determination of the Preliminary Objection to rest on the interpretation of Section 75 (1) h and the cited decisions by the Court of Appeal as well as the Supreme Court of Kenya;
14. Section 75 (1) h reads;

“(1) An appeal shall lie as of right from the following orders and shall also lie from any other order with leave of the court

making such order or if the court to what the appeal would lie if leave were granted: -

(h) Any order made under rules from which an appeal is expressly allowed by rules.

15. The provision lists the orders from which an appeal lies as of right that differs for the Rules to specify under which provisions of the law any appeal lies against an order and which orders are only challengeable on appeal with leave of the court.

16. The statute by itself leaves no room for any interpretation rather than that the right of appeal is either granted by statute or other law or with the leave of the court. The right of appeal is not synonymous with the right to pursue a fresh claim. The law recognizes that by the time a litigant thinks of pursuing an appeal, he has been heard and afforded his right to access the court and justice the court dispenses.

17. That position of the law is not in conflict with the binding decisions cited to court. It is of note that in Nyutu's Case, the Supreme Court at paragraph 40 stated: -

“While we appreciate that unhindered access to courts is one of the key components of access to justice, we do not think that statutory limitations on appeals necessarily infringe on that right. Each case must be evaluated on its own circumstances. That is why even where a right of appeal exists, depending on the circumstances of the case, Courts may still exercise their discretion by refusing to assume jurisdiction. In this case, Nyutu started on the wrong footing by assuming that there exists an unhindered right of appeal. We have shown why that is not so.”

18. Even the ultimate deployment of the words *to prevent an injustice from occurring*, was used in context of when leave would be granted. The decision did not outlaw the statutory limitation on the right of appeal.

19.It thus follows that the provisions of 75 (1) h and Order 43 are themselves good and valid law intended to govern the process of appeal and the court must read and apply the same for their true and plain intendment, objects and purposes.

20.Because by dint of Section 75 (1) h the appellant needed leave to appeal but did not seek and obtain such leave, this appeal is incompetent for having been filed without the mandatory leave. Being incompetent, it cannot be the foundation or pedestal for an application for stay.

21.The remedy the court offers wherever it is demonstrated that an appeal has been filed without the necessary leave is to strike it out so that if the appellant still feels like approaching the court, it may do so.

22.The appeal is thus struck out with costs to the 1st Respondent who resisted it by way of preliminary objection.

Dates, signed and delivered at Naivasha this 2nd day of December 2025.

Patrick J. O. Otieno

Judge

In the presence of:

Mr. Omondi for the Appellant.

Ms. Matu Counsel for the 1st Respondent.

Mr. Wafula counsel for the 2nd Respondent

Ms. Hanna - Court Assistant