



REPUBLIC OF KENYA



KENYA LAW
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**Gitari v Ndungu (Environment and Land Appeal E018 of 2025)
[2026] KEELC 323 (KLR) (26 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E018 OF 2025
JM ONYANGO, J
JANUARY 26, 2026**

BETWEEN

JASPER GITONGA GITARI APPELLANT

AND

HARRISON KINUTHIA NDUNGU RESPONDENT

RULING

1. Before me for determination is the applicant's Notice of Motion dated 6th March 2025 seeking a stay of execution of the ruling delivered on 27th February 2025. The Applicant also prays that the Notice of Appeal annexed to the application be deemed to have been properly filed upon payment of the requisite fees.
2. The application is anchored on the Applicant's supporting affidavit sworn on 6th March 2025. The main reason advanced in the said affidavit is that he did not instruct his counsel to enter into a consent and that the said consent was obtained through fraudulent means. It is his assertion that if execution is not stayed, he will suffer irreparably and the appeal will be rendered nugatory.
3. In response to the application the Respondent filed a Replying affidavit sworn on 26th March 2025 in which he deponed that that there was no competent appeal before the court as no leave to appeal had been sought. He added that the application seeks to stay a ruling declining to set aside a consent and there is nothing to stay as there is no application to stay the execution of the consent order itself. He asserted that pursuant to the consent order he had sold the suit property which includes the part leased to the Applicant and he had already received part payment therefore the interests of a third party would be prejudiced if the orders sought were granted.
4. The Respondent also filed a Notice of Preliminary Objection dated 26th June 2025 in which he raised the ground that the application and appeal were filed without the requisite leave of the court and the same are therefore incompetent.



5. The court directed that the Preliminary Objection be canvassed by way of written submissions and both parties filed their submissions which I have considered.

Analysis and Determination

6. The only issue for determination is whether the Preliminary Objection should be upheld.
7. The main ground raised by the Respondent is that the appeal was filed without leave of the court. This is a point of law as defined in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the Court of Appeal emphasized that a Preliminary Objection is appropriate only when it raises a pure point of law where the matters challenged are plainly discernible on the face of the pleadings.
8. In this case, the 2nd Respondent seeks to challenge the ruling dated 27th February 2025 in which the court declined to set aside the consent order dated 29.12.24.
9. Section 75(1) of the *Civil Procedure Act* and Order 43 Rule 1 of the Civil Procedure Rules enumerate the limited categories of decisions from which an appeal lies as of right.
10. The said ruling does not fall within the orders appealable as of right. The right of appeal in such matters is circumscribed to the extent that it is not an automatic right. There must be leave to appeal given by the court which delivered the ruling.
11. In this case no leave to appeal was sought therefore, the application for stay of execution pending appeal together with the prayer that the appeal be deemed to have been properly filed is incompetent.
12. The upshot is that the Preliminary objection has merit and the same is thus upheld. The application is dismissed with costs to the Respondent. This ruling has a ripple effect on all subsequent applications filed within the incompetent appeal. Consequently, the applications dated 9.5.25 and 25.8.25 which was amended on 25.9.25 are also dismissed

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF JANUARY 2026.

J. M ONYANGO

JUDGE

In the presence of:

1. Mr Muthuri for the Appellant
2. Mr Owala for the Respondent
3. Mr Nyairo for Mr. Njagi for the intended interested party

Court Assistant: Hinga

