REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM. CASE NO. E899 OF 2021

BETWEEN

BEVAJ FURNITURE LIMITED…… PLAINTIFF

AND

GULF AFRICA BANK LIMITED…… RESPONDENT

AND

ARMIC LIMITED…… ……OBJECTOR

RULING

Introduction & Background

1. By the Notice of Motion dated 22nd September 2025, the Plaintiff seeks an injunction to stop the execution of the decree dated 4th July 2023 pending the hearing and determination of its appeal at the Court of Appeal. In the alternative, the Plaintiff seeks orders to stop the execution pending the filing of an application for stay at the Court of Appeal. The application is supported by the affidavit of the Plaintiff's director, Roselyne Wambui Mbugi sworn on 22nd

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September 2025 and opposed by the Defendant through the replying affidavit of its Manager – Recoveries, Rashid Chidzangi sworn on 28th October 2025. The application has been canvassed by way of written submissions that I have considered together with the pleadings I will be making relevant references in my analysis and determination below.

Analysis and Determination

2. From the pleadings and the submissions, the main issue for determination is whether the Plaintiff has demonstrated a proper case for issuance of orders of injunctions to restrain the Defendant from executing in any way the decree issued by this court on 4th July, 2023. On the stay of execution, it is not in dispute that under **Order 42 Rule 6** of the ***Civil Procedure Rules***, an applicant must demonstrate that they will suffer substantial loss if the order is not granted, that the application has been made without unreasonable delay; and that they are willing to provide such security as the court may order for the due performance of the decree.
3. However, I am in agreement with the Defendant's submission that the prerequisite to this entire inquiry is the existence of an executable order or decree. An order for stay of execution

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presupposes that there is something to "execute" or enforce. This foundational point is where the Plaintiff's case for stay of execution falters and I will explain why. I note that the intended appeal and application is in respect of a dismissal order as the court, on 19th September 2025 dismissed the Objector's application with costs. Such is in the nature of a negative order because it does not order any of the parties to do anything or restrain from doing anything. It is for this reason that negative orders have been held to be incapable of execution and for that reason, such an order is incapable of being stayed. The Court of Appeal, in **Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] KECA 346 (KLR)** held the same position when it stated that an order dismissing a suit with costs is a negative order incapable of execution as the same does not order any of the parties to do anything or refrain from doing anything or to pay any sum.

4. I find this reasoning directly applicable to the present case. An order dismissing an application is a negative order that does not command any positive action from the successful party. A negative order cannot be stayed and this prayer by the Plaintiff is only available for rejection (see **Nywele Nzuri Limited v Captain Real Estate Limited [2025] KEHC 11515 (KLR)].**

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5. Turning to the prayer for an injunction pending the appeal, Visram J.,(as he was then) in **Patricia Njeri & 3 Others v National Museum of Kenya [2004] KEHC 1614 (KLR)** outlined the following principles applicable in considering an application for an injunction pending appeal. That an order of injunction pending appeal is discretionary and will be exercised against an applicant whose appeal is frivolous. That the discretion should be refused where it would inflict greater hardship than it would avoid and that the applicant must show refusal of the injunction would render the appeal nugatory. The court added that the court should also be guided by the principles in **Giella v Cassman**

Brown & Co., Ltd. [1973] E.A. 358

6. However, the Defendant has stated that there is in fact no pending appeal as there is no Notice of Appeal capable of founding the appeal in accordance with the ***Court of Appeal Rules.*** It relies on the Court of Appeal's decision in **Asiligwa v Baumgartner & another [2021] KECA 308 (KLR)** where it was held as follows:

> *25. The procedure of instituting an appeal is laid out under Rule 75 of this Court's Rules, with the pertinent portion thereof being that;*
>
> *"(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.*

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(2) ……"

26. The rule specifically requires that the notice not only be in writing, but formally lodged with the registrar. In this case, it is not in doubt that a written notice may have been filed by the appellant as required. But was the same lodged within the meaning of Rule 75(1) aforesaid? Rule 10 of this Court's Rules provides some guidance in answering this question; as it provides for the endorsement of documents presented to the Deputy Registrar and requires that:

"Whenever any document is lodged in the Registry or in a sub-registry or in the registry of a superior court under or in accordance with these Rules, the Registrar or deputy registrar or registrar of the superior court, as the case may be, shall forthwith cause to be endorsed showing the date and time when it was so lodged."

27. It is common ground that no such endorsement was made on the notice in question. Indeed, the notice of appeal included in the record of appeal does not bear such endorsement of the date and time that it was received by the Deputy Registrar. The 1st respondent is of the view that this is a fatal defect which the appellant seems to take lightly by taking refuge in Article 159 of the Constitution. It is however to be appreciated that the institution of appeals and the jurisdiction of this Court with regard to appeals is determined in part by timelines. In fact, the importance of proper and timely lodging of the notice of appeal cannot be gainsaid. It determines the running of time and the attendant accommodations to be given to the appellant in

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terms of compiling the record of appeal and securing of proceedings from the trial court. (See. Rules 75 (2), 77(1), 82 & 83 of the Court of Appeal Rules). Indeed, the notice of appeal defines the starting point in the computation of timelines in relation to the appeal. The effect of a notice of appeal lodged without endorsement by the Registrar automatically impacts on the timelines of all the other steps to be taken in the appeal. How for example, would the Court or a respondent know whether the notice of appeal was lodged within time (as required by Rule 75(2) of the Rules?). How will the Court and the respondent know whether service of the notice of appeal was effected within 14 days of the lodging of the notice (as envisioned by rule 77(1) of the Rules?) How is the Court and the respondent to tell if the record of appeal has been lodged within sixty days of the lodging of the notice (as required under rule 82(1) of the Rules?) or whether there has been a default in instituting an appeal and when or whether steps ought to be taken under Rule 83?

28. In our view, the failure to properly lodge the notice of appeal is a fatal defect which throws the appellate process into disarray and if allowed, is likely to occasion prejudice and injustice to respondents. The fact that the notice of appeal has a court stamp does not necessarily mean that the same was lodged with the Registrar of the court as required. After all, we are not oblivious to the fact that fake court stamps are in use all over in this country. For avoidance of doubt, we reiterate that for a notice of appeal

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to be properly lodged, it must be stamped with the court stamp, endorsed by the Registrar by sealing, signing and dating it. This issue has been dealt with by this Court in the case of Daniel Nkirimpa Meniere Vs. Sayialel Ole Koilel & 4 Others [2016] eKLR, where it was held that under Rule 77 (1), the appellant must not only be seen to have lodged the Notice of Appeal, but must have served it upon the respondent; that a notice of appeal which bears no rubberstamp of the High Court and or which lacks any other endorsement by the Registrar of the High Court is fatally defective. The Court went on to add that such a notice cannot be said to have been duly lodged and termed it a glaring deficiency in authentication.

29. We see no reason to depart from that finding as in doing so we would send a message out there that parties can ignore the Rules and introduce a notice of appeal any time in the cause of the appeal without a signature or endorsement. Signature and endorsement is a form of authentication of a document that eventually forms the foundation of an appeal.

30. To us, it is clear that if there is no notice of appeal that is in accordance with the law, there can never be a proper appeal arising therefrom as the notice of appeal is the foundation of the appeal. It is the proper notice of appeal that gives this Court jurisdiction to determine the subsequent appeal. It follows therefore that there was no proper notice of appeal as well as record of appeal capable of being served or at all. We are convinced that on the

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authorities cited, this Court has been quite consistent on the validity, utility and binding force of its Rules. It has never been the practice of this Court to sympathise with an appellant on account of the importance of the subject matter of the appeal so as to save an otherwise incompetent appeal. We take the view that, the greater the importance of a particular appeal, the more the care and scrupulous attention an appellant should take to ensure compliance with the Rules. This Court must be seen to maintain that consistency.

31. We therefore wish to let the law and the Rules take their course as the omission is flagrant and obvious. Yet the appellant's attitude to his defaults is clearly bold and cavalier. The circumstances of this case provide an ideal appeal that is for striking out with costs, and we hesitate no more in so doing. To hold otherwise would amount to declaring Rules superfluous, not workable and or invalid. Accordingly, we strike out with costs the notice of appeal as well as the record of appeal as beseeched by the 1st respondent. Having reached this conclusion we do not think that it is necessary to deal with the other aspects of the application.

7. In this case, while I can see and agree that there is a Notice of Appeal dated 22nd September 2025 and that the same was filed on 23rd September 2025, the Court of Appeal above distinguished between merely filing the Notice and properly lodging it with the

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Registrar of the superior court. There is no official court endorsement showing that the Deputy Registrar of this Court or that of the Court of Appeal received and authenticated it. Even if there was court stamp, as the Court of Appeal stated, "*The fact that the notice of appeal has a court stamp does not necessarily mean that the same was lodged*." Further, the Court of Appeal held that one must not only lodge the Notice properly but also serve it. The Defendant explicitly denies being served with the Notice and if it has not been served, the appellate process is already defective as the timelines for it as the respondent to act cannot run until service is effected.

8. I am therefore in agreement with the Defendant that whereas the Plaintiff is asking the Court for an injunction pending appeal, the foundation of that appeal which is the Notice of Appeal is defective due to improper lodging and lack of service and there is technically no appeal pending in the eyes of the law. If there is no valid appeal pending, this Court cannot exercise its discretionary jurisdiction to grant orders “pending appeal." The Court of Appeal further stated that not even **Article 159** of the Constitution which mandates that courts administer justice without undue regard to procedural technicalities can cure such defects. The appellate court rejected

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that argument, stating that the ***Rules*** are not superfluous and that parties cannot take a cavalier attitude toward compliance. Thus, even if the Plaintiff argues that the court should overlook the defects, it is clear that defects in the Notice of Appeal especially regarding lodging and endorsement are fatal and cannot be cured by **Article 159**.

9. In any event, I am in further agreement with the Defendant that even if I am to assume these defects and determine the application on its merits, the Plaintiff will still not be successful for a number of reasons. First, the Plaintiff intends to appeal the Ruling of 19th September 2025 which dealt with the objection to execution. However, the substantive debt arises from the Decree of 4th July 2023. An appeal against an interlocutory ruling cannot be used to challenge a final decree. The

appeal does not challenge the existence of the debt itself.

10. Second, the Plaintiff has not disputed the existence of the consent judgment or the outstanding amount. Their argument is about how the Defendant should recover it and not whether they owe it. An appeal arguing over the method of recovery, while the debt remains unpaid, is unlikely to succeed. Third, the Plaintiff must show that if the injunction is not granted, its appeal will be rendered

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nugatory. It fails this test for two reasons. One, the decree is for a liquidated sum of Kshs. 21,648,603.00. If the Plaintiff succeeds in its appeal, it can recover that money from the Defendant. There is no evidence that the Defendant is insolvent or unable to refund the money. As such, the appeal would not be rendered nugatory. Two, the Defendant already holds personal guarantees from the directors and a debenture over the Plaintiff's assets. If the Plaintiff wins the appeal, it has a remedy against the Defendant. Conversely, if the Defendant wins, it has a remedy against the Plaintiff. Ultimately, the balance favors allowing the execution to proceed.

11. Fourth, applying the ***Giella(supra)*** principles, as stated above, the Plaintiff has not demonstrated an arguable appeal. It is attempting to stop a money decree without disputing the debt. The Plaintiff claims execution would cause it harm, however, loss that can be compensated by damages is not considered irreparable. If the goods are sold, the Plaintiff can claim their monetary value. It has not demonstrated that the Defendant would be unable to pay those damages. As stated, the balance tilts heavily in favor of the Defendant as it holds a decree for a debt that has been outstanding since at least July 2024. The Plaintiff has had multiple opportunities

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to challenge the process and has failed as its application of 5th May 2025 was dismissed. The Plaintiff has also not offered to pay any security or deposit, as suggested by the Defendant

12. The Defendant also stands to suffer hardship by being kept away from its money, to which it is legally entitled, for an indefinite period while a likely incompetent appeal limps along. If the injunction is refused, the Plaintiff suffers the execution of its goods, however, this hardship is self-inflicted due to its failure to pay the debt and comply with the consent order. Therefore, granting the injunction would inflict greater hardship on the Defendant than refusing it would inflict on the Plaintiff.

Conclusion & Disposition

13. In the upshot, I find that the Plaintiff's application dated 22nd September 2025 fails on both technical and substantive grounds and I hereby dismiss it with costs

to the Defendant.

DATED SIGNED AND DELIVERED virtually at NAIROBI this 8th DAY of MAY 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Tuwei holding brief for Mr. Kirimi for the Plaintiff
2. N/A for the Defendant
3. N/A for the Objector
4. Amos - Court Assistant

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