



Supernova Properties Limited v Kenya Ports Authority & 2 others (Civil Appeal (Application) E004 of 2023) [2025] KECA 1083 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1083 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E004 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JUNE 20, 2025**

BETWEEN

SUPERNOVA PROPERTIES LIMITED APPLICANT

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

(Being an application to strike out the appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (Sila Munyao, J.) dated 22nd April 2022 in E.L.C No. 40 of 2005)

RULING

1. By a Notice of Motion dated 22nd February 2023 and filed pursuant to rule 86 of the Court of Appeal Rules, 2022 the applicant, Supernova Properties Limited, seeks orders to strike out the 1st respondent's appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (Sila Munyao, J.) dated 22nd April 2022. The applicant also prays for costs of the application.
2. The applicant's Motion is supported by the annexed affidavit of Ashok Labshanker Doshi (Doshi) sworn on 22nd February 2023 essentially deposing to the grounds on which the application is founded, namely: that the 1st respondent has no automatic right of appeal against the impugned ruling and order; and that, it did not seek and obtain leave to appeal.
3. In his affidavit, Doshi avers that the suit in the superior court was filed by the 1st respondent against the applicant and the 2nd and 3rd respondents whereupon summons to enter appearance were issued on 25th February 2005, but which expired before service upon the applicant; that, on 20th March 2019, the applicant successfully applied to have the 1st respondent's suit against it struck out for want of



service of summons to enter appearance; that vide the impugned ruling dated 22nd April 2022, the 1st respondent's suit was struck out in its entirety; and that the orders striking out the 1st respondent's suit are not liable to appeal as of right.

4. In support of the Motion, learned counsel for the applicant, M/s. Oluga & Company filed written submissions and list of authorities dated 22nd February 2024. Counsel cited the cases of Andrew Kimani Ngumba & Another v Zakaria Muigai Gakibe [1997] eKLR in which the word “decree” was defined; and 4MB Mining Limited, Juba Republic of South Sudan v Union Link Logistics & 3 Others [2020] eKLR, submitting that, where leave is required to lodge an appeal, there is no competent appeal before the Court unless such leave is first obtained. Counsel urged us to allow the Motion.
5. In opposition to the applicant's Motion, the 1st respondent filed a replying affidavit sworn on 26th January 2024 by Michael Sangoro, its Manager, Litigation and Disputes, who stated, inter alia, that, whereas the 1st respondent's suit was struck out, there was no application to strike out the 1st respondent's case against the 2nd and 3rd respondents; that the more fundamental cause of action in the 1st respondent's suit was and remains as against the 2nd and 3rd respondents; that, for appeals from decrees of the court, no leave is required; and that the applicant's Motion is misconceived and intended to entrench a position that is untenable at law.
6. In rebuttal, learned counsel for the 1st respondent, M/s. A. B. Patel & Patel LLP, filed written submissions dated 15th January 2025. Urging us to dismiss the applicant's Motion, counsel cited, inter alia, the cases of Mbarak Issa Kombo v IEBC & 3 Others [2017] eKLR where the Court defined the terms “dismissal” and “striking out”; Mjahid Suo Richard v Joseph Kashuru [2006] eKLR, submitting that striking out a suit determines the rights of the parties; and Raila Odinga v IEBC & 4 Others [2013] eKLR, submitting on the essence of Article 159(2) (d) of *the Constitution* in the administration of justice.
7. The 2nd and 3rd respondents did not file any affidavit in reply or submissions in opposition to the applicant's Motion. It is noteworthy, though, that no application had been made to strike out the 1st respondent's suit against the 2nd and 3rd respondents.
8. The two main issues before us are: whether the 1st respondent had an automatic right of appeal against the ruling and orders of the ELC at Mombasa (Sila Munyao, J.) dated 22nd April 2022; and whether the learned Judge was at fault in dismissing the 1st respondent's suit against the applicant and the 2nd and 3rd respondents in its entirety.
9. On the 1st issue, we hasten to observe that the automatic right of appeal against orders of a trial court is stipulated in Section 75(1) of the *Civil Procedure Act* as read with Order 43 rule 1 of the Civil Procedure Rules, 2010 both of which list the orders from which a right of appeal lies as of right. It is instructive that Order 5 Rule 2 under which the applicant moved the superior court to strike out the 1st respondent's suit against it is not among the orders listed in the provisions aforesaid. Accordingly, the 1st respondent was obligated to first obtain leave of the superior court before lodging its appeal to which the applicant's Motion relates.
10. Section 75(1) of the *Civil Procedure Act* (Cap. 21) lists the orders against which an appeal lies as of right and reads:

75. Orders from which appeal lies

1. An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making



such order or of the court to which an appeal would lie if leave were granted—

- a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- b. an order on an award stated in the form of a special case;
- c. an order modifying or correcting an award;
- d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- e. an order filing or refusing to file an award in an arbitration without the intervention of the court;
- f. an order under section 64;
- g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- h. any order made under rules from which an appeal is expressly allowed by rules.

11. Order 43, rule 1 of the Civil Procedure Rules goes further and provides:

1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1) (h) of the Act—
.....
2. An appeal shall lie with the leave of the court from any other order made under these Rules.
3. An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

12. The applicant moved to this Court pursuant to rule 86 of the Court of Appeal Rules, 2022 seeking orders to strike out the 1st respondent's appeal against it on the ground that no appeal lies. Rule 86 of this Court's Rules reads:

86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground –
 - a. that no appeal lies;
 - b.



13. Having carefully considered the provisions of section 75(1) of the *Civil Procedure Act*, Order 43 rule 1 of the Civil Procedure Rules and rule 86 of the Court of Appeal Rules, we reach the inescapable conclusion that the 1st respondent had no automatic right of appeal against the impugned ruling absent leave of the superior court.
13. That said, and for avoidance of doubt, it would be remiss of us not to comment albeit obiter on the overall effect of the learned Judge’s decision that raises a second issue. In that regard, the learned Judge had this to say:
- “ 27. In our case, no summons has been served upon the 1st defendant for more than 15 years after the case was instituted. In fact, there appears to be consensus that the 1st defendant only got wind of the case in January 2019, about 14 years after the suit was filed, and this was only after an application for consolidation was advertised. There was absolutely no attempt to serve summons or inform the 1st defendant of the presence of this suit until more than 14 years lapsed. The 1st defendant has not entered appearance to this suit and has not filed any defence. She has not actively participated in the suit.
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29. For the above reasons, I strike out the suit against the 1st defendant. There cannot be any cause of action that can be maintained against the 1st and 2nd defendants in the absence of the 1st defendant who is the person who holds title to the disputed property. The result is that the entire suit is hereby struck out.”
14. It is noteworthy that the applicant’s Notice of Motion dated 20th March 2019 sought orders to strike out the 1st respondent’s suit against the applicant only. To that extent, that was the only order open to the learned Judge to grant. To our mind, the learned Judge’s decision went beyond what the applicant sought.
15. Mindful of the jurisdictional issue as to whether courts can grant reliefs or orders not sought, we wish to point out right at the outset that this has been the subject of various judicial pronouncements. For instance, this Court in *Caltex Oil (Kenya) Limited v Rono Limited* [2016] KECA 457 (KLR) held that granting relief not sought by a party:
- “ ... would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary.”
16. In the comparative decision of the Supreme Court of Nigeria in *Odukwe v Ogunbiyi* (1998) 6SCNJ 113, stated that:
- “ A court is without power to grant a party that which he has not claimed or which is more than that claimed.”



17. We also share the sentiments expressed by the High Court’s decision in *Karin and Challis v the Attorney General & 6 Others* [2002] eKLR where the superior court had this to say:

“It is a cardinal principle of the court that it will only grant reliefs sought by a party. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs”

18. In view of the foregoing, the learned Judge was at fault in striking out the 1st respondent’s suit against the 2nd and 3rd respondents.

19. Having considered the applicant’s Motion, the affidavits in support of and in reply thereto, the rival submissions, the cited authorities and the law, we reach the conclusion that the Notice of Motion dated 22nd February 2023 succeeds and is hereby allowed. Consequently:

- a. the 1st respondent’s appeal as against the applicant is hereby struck out pursuant to rule 86 of the Court of Appeal Rules, 2022;
- b. the learned Judge’s ruling dated 22nd April 2022 and the appurtenant order to strike out the 1st respondent’s suit against the 2nd and 3rd respondents be and is hereby set aside;
- c. the 1st respondent’s suit against the 2nd and 3rd respondents be and is hereby reinstated; and
- d. the costs of the applicant’s Motion be borne by the 1st respondent.

Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

