



**Said ((Legal representative of the Estate of Saod Abdallah Azubeidi (Deceased)) v Ikumbu  
(Civil Application E058 of 2023) [2024] KECA 69 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KECA 69 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E058 OF 2023  
F SICHALE, LA ACHODE & WK KORIR, JJA  
FEBRUARY 2, 2024**

**BETWEEN**

**FEISAL SAID ..... APPELLANT  
(LEGAL REPRESENTATIVE OF THE ESTATE OF SAOD ABDALLAH  
AZUBEIDI (DECEASED)**

**AND**

**SAMUEL MBUGUA IKUMBU ..... RESPONDENT**

*(Being an Application to strike out Civil Appeal No. E058 of 2023 arising  
from the Ruling and Orders of the Environment & Land Court at Nakuru  
(Mutungi J) dated 1st March 2023.) In (Nakuru ELC Case No. 178 of 2015)*

**RULING**

1. Before us is a motion dated 3<sup>rd</sup> June 2023, brought pursuant to the provisions of Sections 3A and 3B of the *Appellate Jurisdiction Act* (CAP 9), Rules 44 (1) (2), 45 (1), 77 and 86 of the Court of Appeal Rules 2022, in which Samuel Mbugua Ikumbu (the applicant herein) seeks the following orders;
  - “a. That this Honourable court do strike out Court of Appeal Civil Appeal Number E058 of 2023 dated 2<sup>nd</sup> May 2023.
  - b. That costs for this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that the respondent had contributed to the delay to hearing of this matter for the last 7 years. He further deposed that on 1<sup>st</sup> March 2023, Mutungi J had delivered a ruling in Nakuru ELC Case No. 178 of 2015, for preservation of the suit property pursuant to Order 40 Rule 10 of the Civil Procedure Rules 2010 and that being dissatisfied with the aforesaid ruling, the respondent had preferred an appeal.



3. That, the impugned appeal was filed without obtaining leave of the trial court that made the determination contrary to Section 75 of the *Civil Procedure Act* and Order 43 Rule 2 of the Civil Procedure Rules as the orders appealed against were not categorized as those whose an appeal lie as matter of right.
4. The motion was opposed vide a replying affidavit sworn by the respondent on 13<sup>th</sup> June, 2023, who deposed inter alia that failure to serve the Notice of Appeal within 7 days cannot be a ground for striking out the appeal and that further, the applicant had not indicated the prejudice they had suffered due to the 4-day delay period.
5. When the matter came up for plenary hearing on 26<sup>th</sup> July, 2023, Mr. Mwangi learned counsel appeared for the applicant whereas Mr. Musembi appeared for the respondent. Both parties relied on their written submissions dated 21<sup>st</sup> June 2023 and 14<sup>th</sup> July, 2023 respectively.
6. It was submitted for the applicant that the instant motion had been filed within 30 days after service as stipulated by Rule 86 of this Court and that further, that no order for leave was obtained.
7. It was further submitted that the instant appeal emanated from the ruling of 1<sup>st</sup> March 2023, pursuant to Order 40 Rule 1 of the Civil Procedure Rules 2010, which was not one of the orders from which an appeal under Section 75 of the *Civil Procedure Act* would lie and that as such, the respondent ought to have sought and obtained leave to appeal from the impugned ruling.
8. On the other hand the respondent while conceding that indeed he had not sought leave, submitted that it was not necessary as the application giving rise to the impugned orders was brought pursuant to the provisions of Order 40 Rules 1, 2 and 10; Order 51 Rule 1&3; Order 20 Rules 1& 3 of the Civil Procedure Rules 2010 and that it was improper for the applicant to isolate and separate Order 40 (10) of Civil Procedure Rules with the main injunctive orders of 40 (1) & 40
  - (2) to defeat the cause of justice. Further, that if indeed the applicant intended to rely solely on Order 40 (10), nothing would have been easier than to exclude Order 40 Rules (1) and
  - (2) in the application.
9. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
10. The applicant is seeking to strike out the respondent's appeal dated 2<sup>nd</sup> May 2023. Rule 86 of this Court's Rules which donates to this Court powers to strike out a Notice of Appeal or an appeal as the case maybe provides as follows;

“ 86. Application to strike out notice of appeal or appeal

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; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the



notice of appeal or record of appeal, as the case may be.”

11. The applicant’s motion was filed on 5.6.2023 and is therefore within the 30 days’ period provided by Rule 86 (supra). Be that as it may, the application that gave rise to the ruling delivered by Mutungi J on 01.03.2023 which has given rise to this appeal is the motion dated 25.07.2022, brought pursuant to the provisions of Order 40 Rules 1, 2 and 10, Order 51 Rules 1 and 3 and Order 20 Rules 1 and 3 of the Civil Procedure Rules 2010 in which the applicant herein had sought an order of temporary injunction to restrain the respondent from remaining in possession and or collecting rent in the suit property. The applicant had further sought an order to render an account in respect of the suit property.
12. In a ruling delivered on delivered on 01.03.2023 Mutungi J, dismissed the respondent’s motion with no order as costs save for giving an order that a property management agent be appointed pending the hearing and determination of the suit. In essence the applicant’s prayers for temporary injunction and rendering of accounts were dismissed.
13. Being aggrieved with the aforesaid ruling, the respondent subsequently filed this appeal vide a Notice of Appeal dated 9th March 2023. Section 75 of the Civil Procedure Act, CAP 21 of the Laws of Kenya provides Orders from which appeal lies as of right. The same provides as follows:

“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.
2. No appeal shall lie from any order passed in appeal under this section.”



14. It is evident that an appeal does not lie as of right under Order 40 Rules 1,2 and 10, Order 51 Rules 1 and 3, and Order 20 Rules 1 and 3 of the Civil Procedure Rules as envisaged by Section 75 of the Civil Procedure Act as the provisions of Order 40 of the Civil Procedure Rules are not one of the Orders captured in Section 75 (supra). Equally, pursuant to Order 43 (1) (u), of the Civil Procedure Rules, appeals lie as of right in respect to temporary injunctions only which is not the case here as the order for injunction was not granted. That Order provides:

“ 1. Appeals from Orders [Order 43, rule 1.]

(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—

a) .....

u) Order 40, Rules 1,2,3,7 and 11 (temporary injunctions)” (Emphasis ours).

15. In view of the above and the respondent having failed to obtain leave before filing the instant appeal, there can be no and there is no competent appeal before us and the instant appeal as filled is dead on arrival.

16. Faced with a similar scenario in the case of Peter Nyaga Muvake V Joseph Mutunga [2015] eKLR, this Court differently constituted stated as follows: “As to whether the appeal is competent, there is no contest that the appeal arises from the decision of Mabeya J made under Order 42 Rule 6 of the Civil Procedure Rules. Section 75 of the Civil Procedure Act Cap 21, stipulates the thematic orders from which appeals lie as of right. Appeals from other orders lie only with leave of the court. An order made under Order 42 Rule 6 is not exempt from the requirement of leave. It does not lie as of right. In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. as the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.”

17. We fully agree and reiterate the position taken by the Court in the above case we have cited. In view of the above and having found that there is no competent appeal before us, the inevitable conclusion that we arrive at is that the applicant’s motion dated 03.06.2023 is for allowing.

18. Accordingly, the respondent’s appeal dated 02.05.2023, is hereby struck out with costs to the applicant.

19. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**L.A ACHODE**



.....  
**JUDGE OF APPEAL**  
**W KORIR**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.\*\*

Signed

**DEPUTY REGISTRAR**

