



**Attorney General v Kazungu (Civil Appeal (Application)
E078 of 2022) [2023] KECA 498 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 498 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E078 OF 2022
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
MAY 12, 2023**

BETWEEN

THE ATTORNEY GENERAL APPELLANT

AND

DR. JOHNSON KAZUNGU RESPONDENT

(Being an application for stay of execution pending appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Ongaya, J.) delivered on 17th June 2022 in ELRC Cause No. 55 of 2020)

RULING

1. Before us is an application by the Attorney General, the applicant, dated October 28, 2022 in which he seeks an order that pending the hearing and determination of his appeal, there be a stay of execution of the decree emanating from the judgement of the Employment and Labour Relations Court at Mombasa (ELRC) (B Ongaya, J) delivered on June 17, 2022 in ELRC Cause No 55 of 2020 between the respondent, who was the claimant and Kenya Marine & Fisheries Research Institute (the Institute) which was the respondent before the ELRC.
2. The application, as supported by an affidavit sworn by Immaculate Opiio, a State Counsel at the Office of the Attorney General, is based on grounds that the Institute has lodged a notice of appeal intending to challenge the decision of the ELRC; that the appeal discloses sufficient grounds of appeal with likelihood of success; that should the application be denied and the orders sought declined, execution will be effected and the appeal will be rendered nugatory in that contempt of court proceedings may be instituted.
3. Urging the application before us on March 21, 2023, Miss. Opiio, learned counsel, submitted that substantial loss will be occasioned if the orders sought are not granted; that the decree is for Kshs. 28 million and if the execution goes on, the appeal will be rendered futile; that the ELRC had ordered



satisfaction of the decree by September 2022, and the order of stay granted by that court has since lapsed and the decretal amount is accruing interest; that the Institute is a state corporation incorporated under the since repealed *Science and Technology Act* Cap 250 of the Laws of Kenya and it is not possible for it to satisfy the decree on account of public finance procedures; that based on the draft memorandum of appeal the intended appeal is arguable.

4. In opposition to the application, the respondent, Johnson Kazungu, filed a replying affidavit and a further replying affidavit setting out at length the background to the matter. We have considered the same alongside the respondent's written submissions and further submissions by the firm of S. Musalia Mwenesi Advocates for the respondent.
5. The respondent has raised a jurisdictional objection to the application, namely that the jurisdiction of the Court under Rule 5(2)(b) is only exercisable where a notice of appeal has been lodged in accordance with Rule 77 of the *Court of Appeal Rules, 2022*. In that regard, it was urged that there is no notice of appeal by or for the Attorney General.
6. Counsel for the applicant in a supplementary affidavit on the other hand deposed that the assertion that the Attorney General did not file a notice of appeal is false; that the notice of appeal on record is "signed by counsel on behalf of the Honourable Attorney General" who, under Article 156(4) of *the Constitution* undertakes legal representation on behalf of the Government and various public institutions including the Institute.
7. We have considered the matter. It is established that a court can only exercise jurisdiction as conferred by *the Constitution* or other written law as pronounced by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and further that without jurisdiction, the court downs tools and takes no further step in the proceedings. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
8. As pronounced by this Court, per *Githinji, JA in Equity Bank Ltd v West Link Mbo Ltd* [2013] eKLR, a prerequisite for mounting an appeal to this Court in civil cases and related matters is the lodging of a notice of appeal. And in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR this Court expressed that "the court becomes seized of the matter only after the notice of appeal has been filed under Rule

75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365." [Emphasis]

9. Although the applicant did not attach the impugned judgment to the present application, based on the decree exhibited, the parties to the suit before the ELRC were the respondent and the Institute. Counsel for the applicant has deposed that the Institute is a state corporation, an entity with perpetual succession with power to sue and be sued under Section 3 of the *State Corporations Act*.
10. The notice of appeal attached to the application is explicit that, the intended appellant is the Institute. It states in relevant part "Take notice that the respondent, Kenya Marine & Fisheries Research Institute being dissatisfied....". Although the address for service is given in that notice as the Honourable Attorney General and is signed by State Counsel for the Attorney General, as a representative of the Institute, the Attorney General is neither a party to the suit in the ELRC or to the notice of appeal. In effect, the Attorney General is not the appellant or intended appellant. There is therefore no notice of appeal by the Attorney General on which the present application by the Attorney General is anchored. Therefore, as the application dated October 28, 2022 by the Attorney General is not anchored on a notice of appeal, the Court lacks jurisdiction to entertain it. See *Nguruman Limited v Shompole Group*



Ranch & another [2014] eKLR. Consequently, the application dated 28th October 2022 is struck out with costs to the respondent.

11. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

