National Land Commission v Tom Ojienda & Associates; National Bank of Kenya & another (Garnishee) (Civil Appeal E247 of 2022) [2023] KECA 1537 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1537 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E247 OF 2022

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

DECEMBER 8, 2023

BETWEEN

NATIONAL LAND COMMISSION ..... APPELLANT

AND

PROF TOM OJIENDA & ASSOCIATES ..... RESPONDENT

AND

CENTRAL BANK OF KENYA ..... GARNISHEE

NATIONAL BANK OF KENYA ..... GARNISHEE

(Being an appeal from the Ruling and Order of the High Court of Kenya at Eldoret (Ogola, J.) dated 2nd August, 2022inMisc. Appln. No. 29B of 2016)

JUDGMENT

JUDGMENT OG JOEL NGUGI, JA.

1. This appeal arises from the ruling and order of the High Court (E.K. Ogola, J.) dated 2nd August, 2022. The ruling relates to a notice of motion application (garnishee proceedings) dated 14th July, 2022, filed by the respondent herein, which sought the following orders:

    1. That this application be certified urgent and heard ex-parte in the first instance.

    2. That the honourable court be pleased to make a Garnishee Order *Nisi* against National Bank of Kenya Hill Plaza Branch Account Numbers xxxxxxxx and xxxxxxx, the 1st Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of National land Commission the Judgment Debtor herein; be attached to answer the Certificate of Order dated 15th June 2022 for the sum of Kshs

397,300,323,32.00/- being the amount in respect of which judgment was entered in favour of the applicant herein.

3. That the honourable court be pleased to make a Garnishee Order *Nisi* against Central Bank of Kenya Account Numbers xxxxxxx and xxxxxx, the 2nd Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the 2nd Garnishee respectively to the credit of National land Commission the judgment Debtor herein, be attached to answer the Certificate of Order dated 15th June 2022 for the sum of Kshs 397,300,323,32.00/- being the amount in respect of which judgment was entered in favour of the applicant herein.

4. That an order *nisi* upon the 1st and 2nd Garnishees do issue and the same be served on the 1st and 2nd Garnishees forthwith.

5. That the 1st and 2nd Garnishees do appear before this court on an appointed date and time to show cause why they would not pay the applicant the sum of Kenya Shillings Three Hundred and Ninety-seven Million, three Hundred thousand and Three Hundred and Twenty three shillings and Thirty Two Cents (Kshs 397,300,323.32/-) being the decretal sums as per the certificate of order dated 15th June 2022.

6. That upon the inter-partes hearing of the application the honourable court be pleased to issue a Garnishee Order absolute in terms of prayers 2 and 3 as is enough to satisfy the decretal amount of Kshs 397,300,323.32/- as per the Certificate of Order dated 15th June 2022.

7. That the said sum of money being Kshs 397,300,323,32.00/- be remitted into the applicant/judgment Holder's Bank Account particulars whereof are given hereunder: Prof. Tom Ojienda & Associates, Absa Bank of Kenya, Account No xxxxxxx Hurlingham Branch (Swift Code Barckenx) within 24 hours from the date of the issuance of Garnishee Order Absolute.

8. That the cost of this application be borne by the respondent/judgment debtor.

2. The somewhat torturous background to the appeal is as follows.

3. The respondent herein was instructed by the appellant through an instruction letter dated 21st November, 2014, to represent it in Petition No 1 of 2013, *Nathan Tirop Koech & others v The Commissioner for Lands (now National Land Commission) & 5 others*. The petitioners in the suit sought the following prayers: - to be declared the owners of land parcel LR No 17542 and LR No 10492, otherwise known as Eldoret Municipality Block No 23 (King'ong'o); and for orders of mandamus compelling the 1st to 5th respondents to pay the 1st petitioner Kshs 1,601,173,020.50 and the 2nd petitioner Kshs 1,772,260,997.06 as compensation for loss of 546 acres and 604 acres of land respectively. Subsequently, on 2nd October, 2014, the petitioners amended their petition and prayed for orders of mandamus to compel the 1st to 5th respondents to pay the 1st petitioner Kshs 3,736,070,381.23 and 2nd petitioner Kshs 4,132,942,326.49 as compensation for loss of 546 acres and 604 acres of land respectively. Additionally, the petitioners also prayed for mesne profits in the sum of Kshs 2,690,603,339.00. The Petition was heard and determined through a judgment dated 15th April, 2016, wherein the court issued orders of mandamus compelling the 1st to 5th respondents to pay the petitioners a total sum of Kshs 7,871,012,707.72 as compensation for the loss of their land;

effectively awarding the petitioners the said sum. The court also directed that the petitioners be paid Kshs 500,000,000.00 million as mesne profits.

4. The respondent filed an appeal on behalf of the appellant at the Court of Appeal and was successful: the Court of Appeal reversed the decision of the Environment and Land Court in its entirety.

5. The respondent stated that upon the conclusion of the matter, the appellant declined to pay its legal fees as calculated under the *Advocates Remuneration Order*, prompting the respondent to file a Bill of Costs dated 24th October, 2015, being Miscellaneous Application No 29B of 2016, Prof. *Tom Ojienda & Associates v National Lands Commission*, for Kshs 282,337,074.50. The Bill of Costs was taxed and by a Certificate of Costs dated 20th September, 2016, the same was allowed in the sum of Kshs 220,735,840.88. The appellant never filed any reference under Rule 11(1) of the *Advocates Remuneration Order*. Thereafter, the respondent filed an application under section 51(2) of the *Advocates Act*, dated 3rd November, 2016, seeking to have the Certificate of Costs adopted as the judgment and decree of the court. Subsequently, on 24th November, 2016, the appellant filed an application seeking stay of execution of the Certificate of Costs dated 20th September, 2016 and enlargement of time for filing a reference. However, in a ruling dated 21st June, 2017, the High Court entered judgment in favour of the respondent in the sum of Kshs 220,735,840.88 as prayed and dismissed the appellant's application dated 24th November, 2016. The appellant filed yet another application dated 12th September, 2017 seeking a stay of execution of the ruling dated 21st June, 2017; but the same was again dismissed in a ruling dated 11th July, 2018.

6. Upon dismissal of the appellant's stay applications, the respondent filed a notice of motion application (garnishee proceedings) dated 22nd May, 2019, against the appellant's account no. xxxxxxxxxxx held at National Bank of Kenya (1{{^st} garnishee), Hill Plaza Branch. During the hearing of the proceedings, the 1st garnishee appeared before court on 28th May, 2019 and confirmed the existence of the said account to the credit of the appellant and also informed the court via the affidavit of one Timothy K. Kosgei sworn on 28th May, 2019, that as at 27th May, 2019, the balance in the said account was Kshs 5,512,458,159.00. There was however no appearance by or for the appellant. Based on this premise, the court granted the respondent a garnishee order *nisi* dated 28th May, 2019, upon confirmation by the bank that the account had sufficient funds to satisfy the decretal sum.

7. Thereafter, the respondent filed another application dated 29th May, 2019, seeking a garnishee order absolute. On the other hand, the appellant also filed an application dated 29th May, 2019 seeking to stay and set aside the garnishee order *nisi* issued on 28th May, 2019, and also stay the execution of the Certificate of Costs. The appellant argued that the account held by the 1st garnishee was a special compensation account as contemplated under section 115(2) of the *Land Act*, 2012, used only for purposes of receiving and making payments to persons whose parcels of land have been compulsorily acquired by the government. In addition, the appellant argued that monies in the said account are deposited by government agencies or departments for purposes of conveying payments to projects-affected persons and for any other purpose. Thus, the said monies therein were not for the use, benefit or disposal by the appellant but was meant for compensation arising out of compulsory acquisition of land required for public purposes. Consequently, the appellant averred that that the subsistence of the garnishee order *nisi* had not only stopped payments of compensation, but also halted all ongoing governmental projects at the time. In its ruling, the court relied on section 115 of the *Land Act* in finding that the appellant had demonstrated that the land compensation account was indeed a special account for the safe custody or committed funds received by it on behalf of various government agencies or departments for compensation purposes. For this reason, in a ruling dated 10th June, 2019, the court set aside the garnishee order *nisi* issued on 28th May, 2019, but dismissed the prayer for stay

of execution of the Certificate of Costs and stated that the court already pronounced itself thereon in its ruling dated 11th July, 2018.

8. The respondent, then, filed an application dated 14th July, 2019, seeking to review the order setting aside of the garnishee order *nisi* issued on 28th May, 2019, and also sought to cross examine Brian Ikol and the Kabale Tache, the Director of Legal Affairs and Dispute Resolution and the Ag CEO, respectively, of the appellant. Thereafter, in a ruling dated 18th July, 2019, the court granted the orders sought by the respondent for the cross examination of the Brian Ikol and Kabale Tache. However, the respondent later withdrew the review application through a notice of withdrawal dated 12th July, 2022, owing to failure and/or refusal of the two officials to appear before court as had been directed.

9. Afterwards, upon finding out that the appellant had separate accounts with the 1st and 2nd garnishees herein, the respondent filed yet another notice of motion application (garnishee proceedings) dated 14th July, 2022, against the 1st garnishee account nos. xxxxxxxxxxxx and xxxxxxxxxxxxx; and the 2nd garnishee account nos. xxxxxxxxxxxxxx and xxxxxxxxxxxxx, as the respondent's debt remained unpaid and continued accruing interest which stood at Kshs 397,300,323.32, as per the Certificate of Order dated 15th June, 2022. The High Court was satisfied that the respondent had raised a prima facie case for the decree *nisi*, which was issued in the following terms:

    1. That interim conservatory Garnishee order *nisi* be issued against National Bank of Kenya Hill Plaza Branch Account Numbers xxxxxx and xxxxxxxx, the 1st Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of National Land Commission the Judgment Debtor herein; be attached to answer the certificate of order dated 15th June 2022 for the sum of kshs.397,300,323.32/- being the amount in respect of which Judgment was entered in favour of the applicant herein.

    2. That interim conservatory Garnishee order *nisi* be issued against Central Bank of Kenya Account Numbers xxxxxxx and xxxxxxxx, the 2nd Garnishee herein, ordering that all monies deposited, lying and being held in deposit by the 2nd Garnishee, respectively to the credit of National Land Commission the Judgment Debtor herein be attached to answer the certificate of order dated 15th June 2022 for the sum of kshs.397,300,323,32.00/- being the amount in amount in respect of which judgment was entered in favour of the applicant herein.

    3. An order *nisi* upon the 1st and 2nd Garnishees do issue and the same do issue and the same be served on the 1st and 2nd Garnishee forthwith.

    4. Application together with orders shall be served upon the respondent and the Garnishees for inter-parties hearing on 26th July 2022.

10. The appellant reacted by filing a replying affidavit sworn by the said Brian Ikol. Additionally, it also filed a notice of motion application dated 25th July, 2022, and prayed for the following orders:

    1. That this application be certified as urgent and heard on the first instance.

    2. That pending the hearing and determination of this application inter – parties this honourable court be pleased to grant a stay of execution of the interim conservatory garnishee order *nisi* issued on 14th of July 2022.

3. That this honourable court be pleased to set aside and/or vary the interim conservatory garnishee order *nisi* issued on 14th of July 2022.

4. Any other order this court may deem fit to make in public interest.

5. That the costs of this application be granted to the applicant.

11. The High Court gave directions that it would consider the appellant's application dated 25th July, 2022 and the respondent's application dated 14th July, 2022 contemporaneously. It is the learned Judge's ruling dated 2nd August, 2022 that is the subject of this appeal. The learned Judge formed the opinion that there was no plausible explanation advanced by the garnishee or the appellant as to why the order *nisi* should not be made absolute. In this regard, the learned judge opined that the respondent herein satisfied all the three requirements as follows:

a. First, that there was a valid judgment against the appellant entered for the respondent through the ruling dated 21st June, 2017, for Kshs 220,735,840.00 and that the same had since accrued interest to the tune of Kshs 397,300,323.32 as per the Certificate of Order dated 15th June 2022. The learned judge further held that respondent had served the garnishee order *nisi* upon the garnishees and the appellant. Additionally, the respondent had established that the garnishees held funds for the judgment debtor that were sufficient to settle the outstanding debt of Kshs 397,300,323.32 as per the Certificate of Order dated 15th June 2022. As a consequence, the learned Judge ruled that the application ought to be allowed as prayed. Also, the learned judge agreed with the respondent's submission that in the absence of any objection to the Certificate of Costs by the appellant and by the respondent's act on taking steps to execute the same, the taxing master's decision stood; as there was no pending reference and/or appeal against the taxation ruling dated 21st June, 2017, that was in favour of the respondent. As such, the learned judge opined that the first limb of proving whether an applicant should obtain a garnishee order absolute was satisfied and relied on the decision in *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee)* [2021] eKLR, wherein the court held that:

> " The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with."

b. Second, that the decree *nisi* had been appropriately served as per Order 23 Rule 1(2).

c. Third, that the garnishee had not demonstrated to the required proof that the funds in its possession were not due to the appellant or that a third party's rights were involved. The court relied on *Otieno Ragot & Co Advocates v City Council of Nairobi* [2015] eKLR, wherein the court held that the general rule is that the burden of proof lies with the garnishee to show that the funds in its possession are not due to the applicant, or that a third party's rights are involved. The court also cited Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) (supra) wherein it was held that:

> " 4. The above provision is explicit where the debt is not disputed. The Garnishees admitted the claim in its affidavit sworn by Gordon Winani dated 21st May 2020. It not only confirmed the credit balances in the accounts but it also attached Bank Statements in support thereof. The

garnishee confirmed willingness to comply with this court's orders. Consistent with the provisions of Order 23 Rule 4 of the *Civil Procedure Rules, 2010*, I find absolutely no bar either legal or equitable preventing this court from invoking the provisions of Order 23 Rule 4."

12. After dismissing the plea of res judicata and holding that the appellant was not a government entity for purposes of execution and garnishee proceedings, the learned Judge allowed the respondent's application dated 14th July, 2022, and dismissed the appellant's applications dated 25th July, 2022 and 26th July, 2011 in their entirety; and ultimately gave the following orders:

    1. The appellant's application herein dated 25/7/2022 and filed heroin on 26/7/2022 is dismissed in its entirety.
    2. Costs therein shall be for the respondent.
    3. The respondent's application dated 14/7/2022 has merit and is allowed as prayed.
    4. In particular, Garnishee Order absolute in terms of prayers 2 and 3 as is enough to satisfy the decretal amount of Kshs 397,300,323.32 as per the Certificate of Order dated 15th June 2022 be and is hereby issued.
    5. That the sum of money being Kshs 397,300,323,32.00/- be remitted into the respondent/judgment holder's bank account particulars whereof are given hereunder: Prof. Tom Ojienda & Associates, Absa Bank of Kenya, Account Noxxxxx Hurlingham Branch (Swift Code BARCKENX) within 24 hours from the date of the issuance of Garnishee Order Absolute.
    6. That the cost of this application be borne by the appellant/judgment debtor, who shall also pay the costs herein incurred by the garnishees.

13. Aggrieved by the decision, the appellants filed a Notice of Appeal dated 5th August, 2022, and a Memorandum of Appeal dated 3rd November, 2022, in which they raised seven (7) grounds of appeal. These were that the learned judge of the superior court erred in law and in fact in:

    a. Finding that the appellant, being a government entity, can be subjected to garnishee proceedings and not execution under Order 29, Rule 2 of the *Civil Procedure Rules* and Section 21 of the *Government Proceedings Act*.
    b. Finding that it (the High Court) had jurisdiction to entertain, hear and determine the application dated 14th July, 2022, being an application for garnishee orders of a matter that emanated from the Environment and Land Court, Eldoret and the taxation of bill of costs filled therein.
    c. Finding that the Notice of Motion Application dated 14th July, 2022, was not res judicata.
    d. Finding that the figure of Kshs 397,300.323.32 as claimed by the respondent was certain, correct and capable of being attached.
    e. Failing to consider that the funds held in the special compensation account do not belong to the appellant but constitute compensation funds for project

affected persons whose property had been compulsorily acquired by the appellant for public purpose projects and was subject to statutory obligations and safeguards like the *Public Finance Management Act*.

f. Failing to consider public interest and the submissions of the appellant.

g. Finding that the officials of the appellant failed and/or refused to attend court for cross examination by the respondent.

14. Prior to the hearing of this appeal, the appellant filed a notice of motion application dated 17th August, 2022, in Civil Application No E106 of 2022, *National Land Commission v Prof. Tom Ojienda & Associates & 2 others*, for stay of execution of the High Court orders. In a ruling dated 7th October, 2022, this court granted orders in the following terms:

a. Thatthe applicant shall pay the sum of Kshs 100,000,000 (One Hundred Million Shillings) being a quarter or thereabouts of the decretal sum into the respondent's bank account provided in the High Court's orders above within FOURTEEEN (14) days of the date hereof.

b. Thatthe applicant shall institute the intended appeal and serve the record of appeal, written submissions and authorities within THIRTY (30) days of this date.

c. Thatshould there be default of payment or filing as set out in (a) and (b) above, this stay order shall lapse and the entire decretal sum be immediately due and payable.

d. Thatthe costs shall be in the intended appeal.

15. Thereafter, the respondent filed a notice of motion application dated 27th April, 2023, in Civil Application (Appeal) No E247 of 2022, *National Land Commission v Prof. Tom Ojienda & Associates & 2 others*, seeking the following orders:

a. The conditional stay issued in Civil Application No E106 of 2022, National Land Commission v Prof. Tom Ojienda & Associates on 7th October, 2022 in favour of the appellant be deemed to have lapsed for reason that the appellant has failed to satisfy the conditions upon which the stay orders were issued.

b. The Record of Appeal dated 3rd November, 2022 be struck out for having been filed without leave of the trial court in violation of Order 43 of the Civil Procedure Rules 2020 and Rule 11 of the Advocates Remuneration Order.

c. The Record of Appeal dated 3rd November, 2022 be struck out for having been filed in violation of the Orders issued on 7th October, 2022 in Civil Application No 106 of 2022, National Land Commission v Prof. Tom Ojienda & Associates that directed the appellant to file the Record of Appeal together with written submissions and List of Authorities within 30 days from the date thereof.

d. The Record of Appeal dated 3rd November, 2022 be struck out for having been filed in violation of the Orders issued on 29th November, 2022 that granted the appellant leave to appeal on condition that it paid the decree holder a total sum of Kshs 198,650,162.16/= (being half of the decretal sum of Kshs 397,300,323.32).

e. The Costs of the application to be provided for.

16. The appellant opposed the above application by the respondent through its replying affidavit and submissions, both dated 23rd May, 2023, and implored this Court to deem its submissions, list of authorities and any other relevant documents, belatedly filed, to be duly admitted on record and considered as properly filed, and extend the time for such filing. In this regard, the appellant invoked Rule 4 of the Court of Appeal Rules which empowers this Court to extend the time limited by the Rules or by any decision of this Court or a superior court, whether before or after doing the act. Further, the appellant argued that the late filing was occasioned by inadvertent oversight that same had been filed with the record of appeal, while on the other hand it also sought to source for the Kshs 100,000,000.00 which it had been ordered to pay to the respondent, and, indeed, paid.

17. When the respondent's notice of motion application dated 27th April, 2023, came up for hearing on 12th June, 2023, this Court directed, with consent from all parties present, that the same be preserved and heard together with the appeal and the issues of jurisdiction raised therein be raised at the hearing of the appeal proper.

18. During the virtual hearing of the appeal on 3rd July, 2023, learned counsel, Mr. Kamunde, appeared with Mr. Brial Ikol, for the appellant and learned senior counsel, Prof. Tom Ojienda, appeared with learned counsel Ms. Lucy Awuor, for the respondent, whereas Mr. Chege appeared for the 2nd garnishee. There was no appearance for the 1st garnishee. Parties filed written submissions and relied entirely on them.

19. The respondent's application, in the main, challenged this Court's jurisdiction to hear the appeal as filed. While the Court had directed the parties to argue both the application seeking the striking out of the appeal on the grounds of jurisdiction and the main appeal together, it behooves the Court to, first, deal with the jurisdictional challenge because it is potentially dispositive. This was because we appreciated the need to make a determination on the jurisdictional issue right away as informed by the timeless words of Nyarangi, JA in In the *Owners of MV Lillian "S" v Caltex Oil Kenya Ltd* [1989] KLR 1 at pg 14:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

20. It is not disputed that the appellant needed leave of the High Court to file the present appeal. The question is whether they, in fact, obtained that leave before initiating the appeal. The respondent is categorical that they did not; the appellant appears unsure whether they, in fact, obtained such leave but hopes that we can regularize the appeal if they did not.

21. The governing provisions of the law are Order 43 of the *Civil Procedure Rules 2020* and Rule 11(3) of the *Advocates Remuneration Order*.

22. Rule 11(3) of the *Advocates (Remuneration) Order* provides that:

> "Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal."

23. On the other hand, Order 43 Rule 1 lists all the orders and rules under which an appeal lies as of right. It is common between the parties that the ruling dated 2nd August, 2022 which the appellant has appealed from is not one of those listed in that rule. Yet, Order 43, Rule 2 stipulates:

> " An appeal shall lie with the leave of the court from any other order made under these Rules."

24. In the present case, the appellant argues, and it is borne out by the record that when the impugned ruling was delivered, its advocate then on record told the court that:

> " "I seek to for leave to file an appeal together with typed proceedings. I also pray for limited stay of execution for purposes of appeal. We are willing to put security and are willing to abide by any orders. We have an arguable appeal."

25. The record also shows that after the respondent's lawyer objected to the application for stay, the court ruled that:

> " By the very nature of the orders I have given, I would not be comfortable to grant stay of execution on the basis of an oral application. However, I am willing to grant stay for a period of seven days from the date hereby (*sic*) to enable the Respondent/Applicant to file a formal stay. There shall be a stay for 7 days."

26. Both parties agree that the learned Judge of the High Court did not, in his ruling, grant leave for the appellant to appeal. That was on 2nd August, 2022. Yet, on 15th August, 2022, the appellant lodged its Notice of Appeal and, then, on 3rd November, 2022, the appellant lodged its Record of Appeal in this Court. As narrated above, thereafter, pursuant to orders given by this Court following the appellant's application for stay, this Court gave certain directions, including orders on expedited filing of the Record of Appeal. The respondent complains that the appellant only complied with some but not all the orders given. As it will soon become clear, that does not really matter.

27. The bottom line is that the appellant did not obtain leave to appeal against the High Court ruling and orders of 2nd August, 2022 when that ruling was delivered. The appellant argues that out of abundance of caution, they later on made a formal application for leave and it was subsequently granted by the learned Judge which was delivered after they filed both their Notice of Appeal and Record of Appeal. However, Mr. Kamunde was candid enough to admit that that does not change the fact that the appellant did not have leave to appeal on 5th August, 2022 when it lodged its Notice of Appeal. Neither did it have leave when it lodged its Record of Appeal on 3rd November, 2022. The appellant also concedes that the directions given by this Court on 7th October, 2022 cannot legally be understood to have given, by operational of law, leave to the appellant to appeal. Any misconceptions in that regard would be quickly disabused by the provisions of Order 43, Rule 1(3) which requires an application for leave to first be made to the court making the order sought to be appealed from.

28. That, really, leaves a very simple question for resolution. Is it fatal that the appellant did not have formal leave to appeal when it lodged its Notice of Appeal on 5th August, 2022 and Record of Appeal on 3rd November, 2022? Differently put, is it a procedural technicality which can be cured by dint of Article 159(2) that leave had not been obtained by the time the appeal was lodged but was subsequently obtained?

29. The respondent contends that lack of leave bereaves this Court of jurisdiction to hear the appeal and that, therefore, it is not a procedural technicality. The respondent cites the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & others*

[2014] eKLR, wherein the Supreme Court held that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires. Otherwise, by filing an appeal out of time before seeking extension of time, and subsequently seeking leave for the court to extend time and recognize such an appeal, the same is tantamount to moving the court to remedy an illegality; and would also be presumptive and inappropriate. Thus, the respondent argues, an appeal filed out of time with no leave of court renders the documents so filed a nullity and of no legal consequence. The respondent also relies on this Court's decisions in *Kakuta Maimai Hamisi v Peris Tobiko & others*, Civil Appeal No 154 of 2013 and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR; *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara* [2021] eKLR and *Nyutu Agrovet v Airtel Networks Ltd* [2015] eKLR, and contended that the notice of appeal dated 3rd November, 2022, ought to be struck out as it was filed without leave of court and in violation of Order 43 of the *Civil Procedure Rules 2020* and Rule 11 of the *Advocates Remuneration Order*.

30. In aid of the argument that this is not merely a procedural technicality, the respondent relied on this Court's decision in Civil Application 26 of 2016, *Mohamed Shally Sese (Shah Sese) v Fulson Company Ltd & another* [2006] eKLR, wherein it was held that a litigant must be vigilant in the conduct of his affairs. The respondent also relied on the Supreme Court decision in Application 12 (E021) of 2021, *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others*, wherein it was held that equity aids the vigilant and not the indolent. In that case, the Supreme Court observed that it was apparent to the court from the numerous infractions and omissions identified in the matter that the appellants had not taken the court process and their own appeal with the seriousness it deserved.

31. On its part, the appellant argued that it sought oral leave to appeal against the decision of the superior court, but admits that it was not granted on record. Further, the appellant argued that the stay granted by this Court takes precedence to the orders of the superior court, therefore, the appellant cannot be said to be in contempt of the superior court orders when there were clear orders of stay of execution of this Court varying the same.

    Additionally, the appellant contended that the respondent's application was filed with the sole aim of frustrating the appellant from prosecuting its appeal which has been clearly demonstrated by the fact that on one hand, the respondent disputes the jurisdiction of this Court and on the other hand, the respondent purportedly seeks to enjoy the fruits of its ruling as handed down by the superior court.

32. Further, the appellant argued that this Court was empowered to extend the time limited by the rules or by any decision of this Court or of a superior court, for the doing of any act authorized or required by the rules whether before or after the doing of the act, in line with Article 159(2)(d) of *the Constitution* and Rule 4 of this Court's Rules. For this proposition, the appellant relied on the decision in *Kiu & another v Khaemba & 3 others* (Civil Appeal Application) E270 of 2021 [2021 KECA 318 (KLR). Of course, this last argument would only address the delay in filing submissions but not the issue of leave.

33. Finally, the appellant argued that the respondent's application was ill-fated because it was not timeously brought as required by Rule 86 of the *Court of Appeal Rules*. That Rule requires that an application to strike out an appeal to be brought within thirty (30) days of service of the Notice of Appeal or record of appeal. The appellant argues that in this case the respondent brought his application way after the expiry of the thirty days prescribed in Rule 86.

34. I agree with the respondent's response to that last volley: the respondent's application goes to the question of jurisdiction of the Court and it can be raised at any time. It is not restricted to the thirty days prescribed in Rule 86 of the *Court of Appeal Rules, 2022*. The argument that the respondent advances

is that lack of leave vitiates the jurisdiction of this Court to hear the appeal. That is not an argument that can be defeated by invoking Rule 86 of the *Court of Appeal Rules*.

35. Turning to the main argument advanced on the question of leave, I do not think the requirement of obtaining leave to appeal is a technical requirement at all. It goes to the jurisdiction of the Court to hear and determine a dispute. If a party does not obtain the leave required by statute or the rules, that deficiency deprives the Court of the jurisdiction to entertain the appeal. That deficiency cannot be cured by a later acquisition of that leave and neither can it be said to have been waived by any directions given by this Court in an application for stay. The requirement for leave is a substantive requirement of law that goes to the root of the jurisdiction of the Court. As the Supreme Court remarked in *Samuel Macharia Kamau v KCB & others* [2012] eKLR, the Court cannot arrogate for itself jurisdiction by judicial craft: jurisdiction is a bright-line analysis: the Court has it or not. In this case, failure to obtain leave before moving to this Court deprives this Court of the jurisdiction to entertain the appeal.

36. Our constitutional schema is such that the right to appeal against judgments or orders to this Court is not absolute in all cases and leave to appeal in certain situations is a condition precedent for the exercise of the right to appeal. As such, the requirement of leave to appeal where a statute or rule so prescribes is a jurisdictional prerequisite for hearing of an appeal, the object of which is to protect this Court from baseless appeals or to otherwise provide legitimate strictures for the exercise of the right to appeal.

37. Having reached this consequential decision, this Court must down its tools. It cannot move a single step further to consider the appeal on its merits: The appellant did not have leave to lodge its Record of Appeal in this Court. While its lodgment of the Notice of Appeal could be saved by dint of Rule 77(4) of the *Court of Appeal Rules* (provided that leave was later obtained), the deficiency respecting the Record of Appeal is simply incurable.

38. The upshot is that I would propose that the Record of Appeal filed herein must be struck out with costs for lack of jurisdiction.

JUDGMENT OF KIAGE, JA

1. I have read in draft the judgment of my brother Joel Ngugi, JA, with which I readily agree.

2. Our decision herein is in the form of judgments as opposed to rulings because, consistent with Rule 34 of the *Court of Appeal Rules* 2022, it was reserved at the close of the hearing of the appeal, and not of an application.

3. Indeed, we had directed, with the concurrence of learned counsel for the parties, that it is the appeal we were to hear. We preserved the rival applications filed by opposing parties pending the hearing of the appeal, into which they were subsumed. As it turned out, the issue of whether leave had been obtained before the filing of the appeal in the end proved dispositive of the appeal and it was not necessary for us to determine the other matters raised in the appeal. Indeed, we could not.

4. I need not repeat what my brother has so ably addressed on the jurisdictional import of leave to appeal. Where an appeal lies only with leave and a partly purports to file one absent such leave, the appeal so filed is no appeal at all. It is a nullity for all purposes and once it is agreed or determined that the leave never was granted, this Court would be embarking on a barren misadventure since it would be acting in vain, having no jurisdiction. It is a substantive issue not a mere procedural technicality capable of being ignored or cured by reference to some lofty ideals of justice. Justice can only be done within jurisdiction or else it pronouncements are mere empty platitudes.

5. Being a jurisdictional question, it is one that can be raised at any point, even by the Court itself suo motu, and is therefore free of the time strictures in Rule 86.

6. I only wish to add that where leave is required, the Rules dictate in mandatory term that whether it be in first appeal (Rule 88(1)(i)), or a second appeal (Rule 88(2)(a)), the order granting such leave must be part of the record of appeal.

7. In this case the appellant admits freely and candidly to not having obtained leave and that is fatal to the appeal.

8. One last comment I would make, while careful to avoid the merits, is that during the hearing of the appeal it emerged, as is clear from the transcript of our proceedings, that the appellant acknowledges that it received legal services from the 1st respondent. Indeed, its learned counsel spoke of the work done by the respondent in glowing terms. It knows it owes and must pay the fees but its officers, under some strange phobia of "audit queries," would rather await a court order before performing their duty-never mind that in the process the Kenyan public gets saddled with wholly avoidable and ever-burgeoning interest on those taxed costs. This is where courts might well consider themselves ill-used by litigants unwilling to do that which they must unless the courts speak. Now we have, as did the Superior Court below, and I would say no more.

9. In the end, and inevitably, I agree that the appeal is for striking out with costs, and in consequence, the applications subsumed therein must stand spent.

10. As Tuiyott, JA is of the same view, it is so ordered.

JUDGMENT OF TUIYOTT, JA.

1. I have had the advantage of reading in draft the judgment of J. Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF DECEMBER, 2023.

JOEL NGUGI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR