

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: D. K. MUSINGA, J.A.)

CIVIL APPEAL NO. 229 OF 2019

BETWEEN

SAKAYO MWIMBI.....APPLICANT AND

KITHOME KATUMI.....RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Machakos (O. Angote, J.) delivered on 29th March 2019 *in E.L.C. Appeal No. 17 of 2017.*)

RULING

1. By an application dated 9th February 2021, the respondent seeks leave to lodge an application against this Court's decision delivered on 20th November 2020 vide which the Court granted the applicant stay of execution of the judgment of the Environment and Land Court at **Machakos, E.L.C Appeal No. 17 of 2017**. The application is brought under "Article 39 and Article 42 of the Court of Appeal Rules Cap 9." We do not have such Articles in this Court's Rules. I believe the applicant intended to cite **rules 39 and 42** of the **Court of Appeal Rules**.

2. The gist of the application is that the applicant was not served with a hearing notice in respect of the application for stay of execution that was heard and granted in favour of the respondent as earlier stated. The applicant therefore "**seeks to stay and/or set aside the Ruling delivered on 20th November 2020**", according to his affidavit in support of the application for "**leave to lodge an application against this Court's decision delivered on the 20th November 2020.**"

3. This application is premised on wrong provisions of the law and seeks inappropriate orders. The applicant is aggrieved by the fact that the respondent's application for stay of execution of the lower Court's judgment was heard in his absence because he was not served with a hearing notice for the said application. In that case, the applicant should have invoked **rule 56(3)** of this **Court's Rules** to set aside the ex-parte ruling and have the application re-heard with his participation. **Rule 39** (not Article 39) applies to applications for leave to appeal in civil matters.

4. Although the application is not opposed, I cannot grant it because it is bad in law for reasons stated above. I hereby dismiss it with no order as to costs.

Dated and delivered at Nairobi this 23rd day of April, 2021.

D. K. MUSINGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR