



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, JA. (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI. 261 OF 2010 (UR. 184/2010)**

**BETWEEN**

**NYERI WHOLESALERS LIMITED .....APPLICANT  
AND**

**KASTURI LIMITED .....RESPONDENT**

*(An application for stay and or setting aside an order made on 7<sup>th</sup> October, 2010 (Sergon, J.) and judgment dated 23<sup>rd</sup> April, 2010.I*

**in**

**NYERI HIGH COURT CIVIL CASE NO. 109 OF 2009)**

\*\*\*\*\*

**RULING**

This matter was placed before me under **rule 47 (5)** of the Court of Appeal Rules (“the rules”) subsequent to my rejection of an application to certify as urgent the motion dated 1<sup>st</sup> November, 2010. The motion was taken out under **rule 5 (2) (b)** of the rules seeking an order for “*stay or setting aside the order of stay of execution*” granted by the superior court on 9<sup>th</sup> July, 2010. The applicant says he was aggrieved by that order.

When the matter was first placed before me for certification as urgent on 9<sup>th</sup> November, 2010, I could not find any notice of appeal in the record which would cloth me with the jurisdiction to deal with it. The same issue was raised by the respondent’s counsel, Mr. Gori at the *inter partes* hearing but the applicant’s counsel, Mr. Geoffrey Mahinda, readily conceded that he had not filed any. Mr. Mahinda’s contention was that he was perfectly entitled to come to this Court under **Order 41** of the Civil Procedure Rules and prosecute the motion now before the court without filing any notice of appeal. With respect, that contention is totally misconceived.

In the first place, **Order 41** of the Civil Procedure rules has nothing to do with this Court. It is a provision strictly confined to the superior court in the exercise of its jurisdiction. Such jurisdiction is coterminous with the jurisdiction of this Court under **Rule 5 (2)** of the rules and the court has independent original jurisdiction to apply its mind *de novo* on the suitability or otherwise of the relief sought. This position was clarified by the court as long ago as 1988 in **Githunguri v Jimba Credit Corporation Ltd [1988] LLR 284 (CAK)**. See also **De - Len v Muteshi [1995 – 1998] 1 EA 25**.

In the second place, this Court is a creature of statute and its jurisdiction is circumscribed in an Act of

Parliament – the Appellate Jurisdiction Act, Cap 9. It can only hear and determine appeals from the High Court where such appeals lie under any law, and the only way a party can show dissatisfaction with a decision of the High Court is by filing a notice of appeal. That is the document which clothes this Court with jurisdiction and **rule 5 (2) (b)** cannot be invoked unless such notice is on record. The rule states as follows: -

**“(2) Subject to the provisions of *sub-rule (1)*, the institution of any appeal shall not operate to suspend any sentence or to stay execution, but the court may:**

**(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution or injunction or a stay of any further proceedings”.**

**Rule 74 (3)** of the rules states:

**“(3). Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the names and addresses of all persons intended to be served with copies of the notice.”**

The notice of appeal is thus the “be all and end all” of this Court’s jurisdiction. The legal position was better put by this court in Nairobi City Council v Resley [2002] 2 EA 493, where it stated in part:

**“It is trite law that without a notice of appeal against particular orders, we would have no jurisdiction to grant a stay of those orders and we cannot, therefore, accept Mr Oduol’s argument to the effect that the notice of appeal against the ruling of 11 April 2002, entitles him to apply for a stay of execution of orders made on 11 March 2002. That argument is fallacious.**

**It is also trite law that once we have no jurisdiction we must down tools and say we can go no further, we must stop here.”**

So that, although as a single judge of this Court, I cannot strike out the record before me, I cannot equally close my eyes to the glaring fundamental defects inherent in the matter. Nothing has been said before me, even at the *inter partes* hearing, to persuade me that I have the jurisdiction to handle the record before me. On the contrary, the applicant’s confirmation that there is no notice of appeal reinforces my earlier decision. Consequently, I reject the application for urgency. Costs of the application shall be borne by the applicant.

***Dated and delivered at Nairobi this 4<sup>th</sup> day of February, 2011.***

**P.N. WAKI**  
.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**