



**Ochola v Onyango (Suing as the Legal Representative of the Estates of Vincent Atieno Onyango - Deceased) & another (Civil Appeal 95 of 2024) [2024] KEHC 6026 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6026 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 95 OF 2024  
RE ABURILI, J  
MAY 27, 2024**

**BETWEEN**

**VICTOR OCHOLA ..... APPELLANT**

**AND**

**PERES ATIENO ONYANGO (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATES OF VINCENT ATIENO ONYANGO -  
DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**CAR HOUSE LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from Ruling/Orders of the Senior Principal Magistrate's  
Court Civil Case No. E057 of 2021 delivered on 16th May, 2024 at Nyando)*

**RULING**

1. The application dated 16<sup>th</sup> May 2024 seeks for stay of execution of orders and directions issued by Hon. Lilian Kiniale on 16<sup>th</sup> May 2024 in Nyando SPM Civil Case No. E057 of 2021 ordering the arrest of the Appellant/Applicant and committal to Civil Jail for 30 days.
2. I have given counsel for the application the opportunity to address the court on why an interim stay should be granted pending interpartes hearing of the application and he has done so, citing that the orders of the trial magistrate offend Section 42 of the *Civil Procedure Act* since the Appellant had already been committed to civil jail and released hence he could not be recommitted to jail again over the same matter.
3. I have read the Section in question.
4. The Respondent's counsel opposes the grant of an interim stay on the ground that the Appellant was by order of the court committed to civil jail but prisons declined to admit him as no subsistence allowance was paid hence he was returned to court for a fresh committal.



5. I then asked the Appellant's counsel as to whether leave to appeal against the committal order allegedly for the 2<sup>nd</sup> time and in execution of decree was necessary and if so, if such leave was obtained.
6. I have referred counsel for the applicant to read Section 75 of the Civil Procedure Act and Order 43(k) of the Civil Procedure Rules and after reading the provisions, he concedes that indeed, leave was necessary but that it was not sought and obtained. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the court. The section provides thus:

75

- (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.

7. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1), leave to appeal must be obtained before such an appeal can be preferred. The procedure for obtaining leave is provided under Order 43(3) which states as follows:-

- (3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

8. In this case section 75 (1) (g) of the Civil Procedure Act explicitly excludes automatic right of appeal from an order where the arrest or detention is in execution of a decree. The section stipulates as follows:

75

- (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-



(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.

9. That being the case, this court has no jurisdiction to hear and determine the appeal and the application for stay. See case of in *Nyutu Agrovat Ltd v Airtel Networks Ltd* [2015] eKLR where the Court of Appeal held that where there was no automatic right of Appeal stipulated under Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*, then the Appellate Court has no jurisdiction to hear and determine an Appeal unless leave of the court from which the order was made is sought and obtained.
10. Accordingly, the appeal herein and the application dated 16<sup>th</sup> May 2024 are incompetently before this court. They are all struck out with no orders as to costs.
11. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF MAY, 2024**

**R. E. ABURILI**

**JUDGE**

