



**Family Bank Limited v Makori & another (Civil Appeal
123 of 2022) [2023] KEHC 1483 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 123 OF 2022**

**MW MUIGAI, J
MARCH 2, 2023**

BETWEEN

FAMILY BANK LIMITED APPELLANT

AND

PETER OKEMWA MAKORI 1ST RESPONDENT

AFRICA MERCHANT ASSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

Notice Of Motion Application

1. Before this court is Notice of Motion Application brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, Order 42 Rule 6 of the [Civil Procedure Rules](#) seeking the following orders;
 - i. Spent
 - ii. Spent
 - iii. This Court issues an order for stay of execution of the Garnishee order absolute issued in Mavoko CMCC No 1010 of 2018 by the Hon. R Gitau (SRM) on 25th July 2022 pending hearing and determination of this Appeal.
 - iv. The costs of this application be provided for.
2. The Application is supported by the Affidavit of Samuel Kahuhu, the Legal Officer of the Appellant sworn on 14th September 2022 in which he deposed that the 1st Respondent filed a garnishee application dated 25th March 2022 in Mavoko CMCC 1010 of 2018 seeking a garnishee order attaching the funds in the 2nd Respondent's account held with the Applicant to satisfy the decretal amount of Kshs 667,614.



3. By the Ruling delivered on 25th July 2022 by the Hon. R Gitau (SRM), the garnishee order nisi was made absolute and the Appellant was directed to pay the decretal sum plus costs of the suit in satisfaction of the decree.
4. He deposed that as at 21st March 2022, the 2nd Respondent's account held funds in the sum of Kshs 5,290,063.89 and the funds were not available for attachment as they had been frozen Courts by orders issued in;
 - a. Malindi HCC Misc App 14 of 2018 *CG Waitbima Advocates v AMACO & others* claiming Kshs 7,000,000
 - b. Milimani CMCC 2105 of 2020 *Stephen Gachuru v AMACO and Family Bank Limited* claiming Kshs 2,829,326
5. He opined that the advocate for the 1st Respondent filed six other garnishee applications at the Chief Magistrates Court at Milimani against the funds in the 2nd Respondent's account and by consent between the plaintiffs in the matters and the 2nd Respondent herein, garnishee orders absolute were issued.
6. He indicated that the Appellant filed stay of execution in the said matters which are still pending determination. A sum of Kshs 4,973,818.89 was paid out of the Defendant's account in partial satisfaction of the decree in Malindi HCC Misc App 14 of 2018 [*CG Waitbima Advocates v AMACO & others*](#).
7. He contended that as at July 2022, the 2nd Respondent held funds in the sum of Kshs. 2,110,404.04 and are not available for attachment as they have been frozen by the various matters aforementioned and others which have been made absolute as such the Appellant is incapable of complying with the garnishee order absolute as it risks being cited for contempt of the orders which are still in force.
8. He deposed that he has filed an interpleader suit before the High Court in Nairobi HCCOMM E291 of 2022, [*Family Bank Limited v Simon Muinde Nzioka & Others*](#) asking the court to determine which decree holders should be paid with the limited funds in the 2nd Respondent's account.
9. The Appellant has filed the instant Appeal as on 14.9.2022 it was served with warrants of attachment of moveable property by auctioneers acting on the instructions of the 1st Respondent demanding payment of the sum of Kshs 670,114,62 failure to which execution would issue.
10. The Appellant contends that the Appeal will be rendered nugatory if orders of stay of execution is not issued, that it will be exposed to loss if it pays the decretal sum as there is likelihood that the Respondent will not be able to refund the amount of the Appeal is successful. Further, that he will suffer substantial loss as it will be forced to pay the 1st Respondent from the bank's reserve yet it is not the judgment debtor in the matter before the subordinate court. Lastly, that the 1st Respondent will suffer no prejudice and can recover the amount from the Appellant if the Appeal fails.

Response to the Application/Preliminary Objection

11. In response, the 1st Respondent filed Grounds of Opposition/Points of Law/ Preliminary Objection dated 26.09.2022 in which the following grounds were raised;
 - a. The Appeal itself is incompetent having been filed without leave of court rendering itself and any subsequent applications misconceived, null and void ab initio.



- b. By virtue of Order 23 Rule 7 as read with Order 43 Rule 1 (1) (L) CPR 2010, an appeal only lies as of right from an order made in garnishee proceedings involving third party claims which was not the case before the Trial Court.
 - c. All the matters raised were considered by the Trial Court effectively and cannot be relitigated in the motion.
 - d. No Memorandum of Appeal has been served upon the 1st Respondent. The Ruling appealed against has not been exhibited either. Trial by ambush is illegal.
 - e. There is no evidence of substantial loss but plenty of collusion
12. The Preliminary Objection was disposed of by way of written submissions.

Appellant Submissions

- 13. The Appellant filed submissions on 29.11.2022 in which it was submitted that after delivery of the Ruling, the advocate holding brief for the Appellant's advocate requested for leave to appeal and 14 days stay of execution and he informed the advocate that both prayers had been granted.
- 14. Based on this information they filed a Memorandum of Appeal. It was contended that after the Preliminary Objection was filed, they realized that the Court had only considered the prayer for stay of execution and failure to seek leave to file an appeal was purely based on a mistake.
- 15. It was a procedural technicality which cannot render the appeal and application for stay incompetent. It was submitted that the Court had jurisdiction to entertain any matter before it under Article 165 of the Constitution.
- 16. It was submitted that the Preliminary objection should be on pure points of law as stated in the case of *Mukhisa Biscuit Manufacturers Limited v West End Distributors Limited* [1969] E.A.
- 17. Further, that ground 3 and 5 of the preliminary objection raised issues of fact that could only be determined at the hearing of the Appeal and not at the preliminary stage. Lastly, that the issue of substantial loss could only be determined after the hearing of the Application for stay that has been filed.

1st Respondent Submissions

- 18. The Respondent filed submissions on 22.11.2022 in which it was submitted that the appeal was dead on arrival having been filed without leave of court. It was submitted that the proceedings leading to the garnishee order nisi and absolute were taken out by the 1st Respondent under Order 23 rule 1 and under Order 43 rule 1(1), [CPR](#) 2010.
- 19. An appeal lies as of right from Order 23 rule 7, [CPR](#) 2010, Trial of claim of third person in attachment of debts meaning an appeal could only lie from any other order made under said order made under order 23 with leave of court sought and obtained under Order 43 Rule 1 (2). He contended that this is also provided for under section 75 (1) of the [Civil Procedure Act](#).
- 20. It was submitted that there was no appeal by a third party but a garnishee. It was contended that the Appeal was dead at inception and the court had no jurisdiction and cannot take one more step. The remedy was to strike out the Appeal together with the application with costs. Reference was made to the case of [David Kangethe & Another v Dennis Nyangicha Nayiro](#) (2022) eKLR.



21. The 1st Respondent contended that the Appellant disobeyed order nisi and made payments from the attached accounts in collusion with other parties a fact the court took into account in dismissing the banks urgings before. he said that even on merit, the application did not deserve discretion. He further contended that should the court be persuaded otherwise, then the Applicant should deposit in court the sum of Kshs 667,614.62 and security for costs pending appeal. It was submitted that Kshs 100,000 would be reasonable.

Determination

22. I have considered the Preliminary Objection and the submissions of the parties on record.
23. Jurisdiction goes to the root of each matter before the Court. This was stated in the locus classicus in this subject, *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

24. The Court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign.

It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

25. Section 75 (1) of the *Civil Procedure Act* is a proviso on situation where an appeal arises, it provides;

- (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.

(2) No appeal shall lie from any order passed in appeal under this section.....

26. Order 43 Rule (3) CPR 2010 provides;

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.

27. By the Appellants own admission, it failed to seek leave to file an appeal. It is not contended that the Appeal herein is pegged on the absolute nisi order and the Appellant is the garnishee and not a party to the suit.

28. Indeed, the Application by the 1st Respondent was made under Order 23 rule 1 of the Civil Procedure Rules, 2010 that provides that

- (1) A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid
- (2) At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.
- (3) Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or place of business or in such manner as the court may direct.



(4)

29. The order sought to be appealed against does not fall under Order 43 Rule 1(1) of the *Civil Procedure Rules*, 2010 then leave ought to have been sought as provided in the same Order 43 (2) *CPR* 2010 as follows;

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

30. The Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR it was observed that;

“The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.

A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu v. Trusted Society Of Human Rights Alliance & 5 others* Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

Having already found that jurisdiction stands on a higher, firmer and more peremptory position than procedural rules, we can only reiterate that it goes to the very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance-procedure dichotomy of Article 159 of the *Constitution*.

.....

The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie”

31. The same court in *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR stated that

“In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.”

32. Faced with a similar situation, this court in the case of *Tatu City Limited v Calla Limited* [2022] eKLR stated as follows;

“Equally, by virtue of the provisions of Order 43 Rule 1 (l) an appeal in respect of garnishee proceedings only lies as of right from an order made under Order 23 Rule 7 of the *CPR*, and in all other instances, leave is required to appeal.



.....

The onus was upon the Appellant to tender a copy of the order or proceedings in which leave was granted to appeal the order of 8th March 2021. No such order was annexed to the Appellant’s replying affidavit or cited in the memorandum of appeal. In the absence of such evidence, it appears that the appeal herein may not be competently before this court and is liable for striking out along with the accompanying motion.

33. This was also noted by Hon.O. Sewe L J, in *Edith Wairimu Njoroge v Brooks Holdings Co. Ltd* [2018] eKLR that where an appeal does not lie as of right from an order but only with leave, such leave “was a prerequisite to the assumption of jurisdiction by this court on appeal”.
34. The position is fortified by Civil Appeal 269 of 2019 Nbi High Court *David Kangethe & Simon Njangiru Kuria v Dennis Nyangicha Nyairo* where Hon. C. Meoli LJ held that under Order 43 (1) *CPR* where the appeal lies as of right then in all other instances leave of the Court must be obtained.

Disposition

1. From the above legal provisions and case-law applied to the instant appeal, I have perused the record and there is no application for leave that was sought.
2. There is therefore no competent Appeal before this court and the jurisdiction of this court has not been properly invoked.
3. The Preliminary Objection is upheld and as such, the same application/appeal is dismissed with costs to the 1st Respondent.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 2ND MARCH, 2023
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W. MUIGAI

JUDGE

