



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1137 OF 2006

PATRIOTIC GUARD LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA ELECTRICITY GENERATING COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant in this instance has brought the Notice of Motion dated 26th July, 2021 supported by the grounds set out in its body and the facts stated in the affidavit of Titus Kigen. The applicant sought for an order for stay of execution of the judgment delivered by this court on 23rd July, 2021 and consequent decree pending the hearing and determination of an intended appeal against the said judgment.

2. The defendant/respondent opposed the Motion by filing the Grounds of Opposition dated 10th September, 2021 featuring the following grounds:

i. THAT the applicant has not complied with the mandatory provisions of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, 201 and hence the application is defective and tantamount to a gross abuse of the court process.

ii. THAT the applicant has not filed any Notice of Appeal contrary to the mandatory provisions of Order 42, Rule 6(1) of the Civil Procedure Rules, 2010.

iii. THAT the application is bad in law and an abuse of the court process.

3. The respondent also filed the replying affidavit sworn by its acting Legal Manager, George Omino on 30th September, 2021.

4. The parties were directed to file and exchange written submissions on the Motion. This court notes that at the time of writing this ruling, only the submissions by the applicant had been availed. The 1st defendant did not participate at the hearing of the Motion or file any responding documents.

5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing it; the Grounds of Opposition and the submissions availed on record.

6. A brief background of the matter is that the applicant instituted a suit against the respondent vide the plaint dated 21st July, 2004 and sought for the sum of Kshs.5,472,711.30 arising out of the tort of breach of contract.

7. By way of the application dated 23rd May, 2017 the respondent sought to have the applicant's suit dismissed for want of prosecution.

8. Upon hearing the parties on the abovementioned application, the court in its ruling delivered on 16th October, 2018 dismissed it but directed the applicant to prosecute its case within 120 days from that date.

9. The record shows that the applicant did not comply with the above orders, which caused the respondent to approach the court on the issue of costs. The matter proceeded for taxation, with the respondent being awarded costs in the sum of Kshs.422,047.48 to be borne by the applicant.

10. Consequently, the respondent took out the application dated 20th April, 2021 and sought for entry of judgment against the applicant for the abovementioned sum plus interest at 14% p.a. from 5th November, 2020 until payment in full.

11. Upon hearing the parties, this court in the ruling delivered on 23rd July, 2021 entered judgment as prayed above. Being aggrieved by the aforementioned decision, the applicant desires to challenge it on appeal at the Court of Appeal.

12. Returning to the instant Motion, I note that the respondent through the Grounds of Opposition raised two (2) key preliminary issues which according to it would automatically warrant the striking out/dismissal of the instant Motion for being incompetent.

13. The *first* preliminary issue touches on whether the applicant has complied with the proviso of Section 75 of the Civil Procedure Act (“the Act”) and Order 43 of the Civil Procedure Rules (“the Rules”).

14. In its submissions, the respondent argues that the ruling and order sought to be appealed against by the applicant requires the obtainment of leave of the court before the appeal can be lodged, and yet the applicant herein has not sought and obtained leave of the court to file an appeal against the decision of 23rd July, 2021.

15. The respondent cites among others, the case of **KCB Bank (K) Limited v Peter Wainaina Ngugi [2020] eKLR** in which the court held that:

“In my view, failure to obtain leave to appeal where such leave was required was a fundamental omission which went to the root of the competence of an appeal. It is not a procedural technicality which as submitted by Ms Mathenge can be disregarded under Article 159 of the Constitution. It is a matter which affects the jurisdiction of this court to entertain such an appeal and any application filed therein.

Put differently, an appeal filed without leave of the court where such leave is required does not properly invoke the appellate jurisdiction of the court and the court would not consequently have any basis to entertain an application filed in the appeal.”

16. The applicant did not respond to the above issue.

17. Section 75(1) of the Act provides that:

“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.”

18. Order 43 of the Rules goes on to express thus:

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—

(a) Order 1 (parties to suits);

(b) Order 2 (pleadings generally);

(c) Order 3 (frame and institution of suit);

(d) Order 4, rule 9 (return of plaint);

(e) Order 7, rule 12 (exclusion of counterclaim);

(f) Order 8 (amendment of pleadings);

- (g) Order 10, rule 11 (setting aside judgment in default of appearance);***
- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);***
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);***
- (j) Order 19 (affidavits);***
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);***
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);***
- (m) Order 24, rules 5, 6 and 7 (legal representatives);***
- (n) Order 25, rule 5 (compromise of a suit);***
- (o) Order 26, rules 1 and 5(2) (security for costs);***
- (p) Order 27, rules 3 and 10 (payment into court and tender);***
- (q) Order 28, rule 4 (orders in proceedings against the Government);***
- (r) Order 34 (interpleader);***
- (s) Order 36, rules 5, 7 and 10 (summary procedure);***
- (t) Order 39, rules 2, 4 and 6 (furnishing security);***
- (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);***
- (v) Order 41, rules 1 and 4 (receivers);***
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);***
- (x) Order 45, rule 3 (application for review);***
- (y) Order 50, rule 6 (enlargement of time);***
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);***
- (aa) Order 53 (judicial review orders).”***

19. Upon my study of the record and as indicated above, it is apparent that the ruling in question relates to the entry of judgment on taxed party and party costs.

20. Upon my further study of the relevant legal provisions cited above, I am of the view that the nature of the intended appeal does not fall within any of the instances in which an appeal would lie as of right. I am therefore persuaded that the averments being made by the respondent are correct in this respect.

21. Consequently, in the absence of any indicator that the applicant has first sought and obtained leave of the court to lodge the appeal, I am convinced that there would be no proper basis for considering the instant Motion which seeks an order for a stay of execution.

22. The second preliminary issue raised by the respondent concerns whether the applicant has filed a Notice of Appeal as required under Order 42, Rule 6(4) of the Rules, which stipulates that an appeal lying with the Court of Appeal is deemed to have been filed upon giving of notice to appeal.

23. It is the contention of the respondent that the applicant has not filed any Notice of Appeal in respect to the decision made on 23rd July, 2021 and hence the instant Motion is incompetent and fatally defective.

24. The respondent further echoes its sentiments above that even where a Notice of Appeal had been filed, the same would still be rendered incompetent in the absence of leave of the court to lodge the appeal.

25. From my perusal of the record, I note that the applicant filed the Notice of Appeal dated 23rd July, 2021 indicating its desire to challenge the decision made by this court on like date. This dispels the assertion by the respondent that no Notice of Appeal was filed.

26. Nevertheless, having already established the absence of anything to show that leave of the court was first sought and obtained, the Notice of Appeal is rendered invalid.

27. Resultantly, no valid appeal exists and hence I see no reason to consider the merits of the instant Motion.

28. In the end therefore, the Motion dated 26th July, 2021 is found to be lacking in merits and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent