



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 80 OF 2019

ISAAC MBUGUA NGIRACHU.....APPELLANT

VERSUS

STEPHEN GICHOBI KAARA.....RESPONDENT

JUDGMENT

1. This is an appeal arising from the Ruling of Hon.T.K.Kwambai (RM) delivered on 27/11/2019 in Embu Chief Magistrates Civil Case No.261 of 2009.

2. A brief outline of the genesis from which the appeal emanates is that the respondent had filed an application under certificate of urgency which was dated the 19/09/2019 and filed on the 20/09/2019; the respondent served the appellant on the 7/10/2019 and the application was scheduled for hearing on the 27/11/2019; on this hearing date the appellant filed his Replying Affidavit and served it upon the respondent on the same day; the trial court struck out the Replying Affidavit on the grounds that it had been filed out of time;

3. The appellant being aggrieved by the decision instituted this Appeal and listed eight (8) grounds of appeal which are summarized as follows;

- (i) The trial court erred in allowing the application dated 19/09/2019 without delving into the substance of the application;
- (ii) The trial erred in law when it expunged from the record the Replying Affidavit on the grounds that it had been filed out of time which was a mere technicality and therefore failed to do substantive justice;
- (iii) The trial court erred in assuming an unopposed application ought to be allowed without looking into the merits; and ought to have analyzed the Supporting Affidavit.

4. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the parties respective rival submissions;

APPELLANT'S CASE

5. The appellant submitted that the delay in filing the Replying Affidavit was due to the unavailability of the appellant who worked and resided in Kitui;

6. The appellant invoked the provisions of Article 159 of the Constitution 2010 and stated that the issue was a mere technicality which ought not to have affected the dispensation of justice; case law relied on **Daniel Omondi Okoth v Charles Kirimi (2020) eKLR**;

7. The opposed application shouldn't have been allowed as of right and the trial court ought to have satisfied itself that the application was meritorious; case law relied on **Gideon Sitela Konchellah v Julius Lekakeny Sunkuli & Others (2018) eKLR**;

8. In conclusion the appellants humbly urged the court to scrutinize the Supporting Affidavit made by the respondent which was deponed on falsehoods and to allow the appeal with costs.

RESPONDENT'S RESPONSE

9. In response the respondent opposed the appeal and filed a Preliminary Objection on the grounds that the appeal offends the provisions of Section 75 of the Civil Procedure Act and Order 43 Rule 1(3) and (4) of the Civil Procedure Rules which require leave be sought before an appeal from a Ruling made under Order 51 Rule 14 of the Civil Procedure Rules is filed;

10. Order 51 Rule 14 of the Civil Procedure Rules required the appellant to have filed a Replying Affidavit three (3) clear days before the date of the hearing; it is on these premises that the trial court struck out the appellants Replying Affidavit; the respondent contends that leave ought to have been obtained prior to the appeal being instituted; that Order 43 Rule 1 of the Civil Procedure Rules lists under which an appeal lies as of right; whereas under Order 51 Rule 14 under which the Replying Affidavit was struck out is not among the stipulated orders where an appeal lies as a matter of right;

11. Reference was made to the mandatory terms of Section 75 of the Civil Procedure Act and based on that the appellant ought to have obtained leave of the court before lodging the instant appeal;

12. The respondent submitted that the appeal was irregular, incurably defective and procedurally flawed and without such leave of the court the appellate court lacked jurisdiction to hear and determine the appeal; case law relied on **Sukari Industries Limited vs Olale George Onyango Misc Civil App.No61 of 2019** and **The Owners of the Motor Vessel Lilian S vs Caltex (Kenya) Ltd (1989) KLR1**.

ISSUES FOR DETERMINATION

13. Upon reading the parties respective written submissions the only issue framed by this court for determination is whether the appeal is competently before this court;

ANALYSIS

14. The respondent raised a Preliminary Objection and contends that leave ought to have been obtained prior to the appeal being instituted; the appeal was therefore irregular, incurably defective and procedurally flawed and without such leave this appellate court lacked jurisdiction to hear and determine the appeal; the appellant did not respond to the Preliminary Objection raised by the respondent but limited his response to failure by the court to indulge the delay in filing of the Reply; counsel invoked the provisions of Article 159 of the Constitution 2010 and submitted that the issue was a mere technicality which ought not to have affected the dispensation of justice; and therefore the trial court ought to have satisfied itself on the merits of the application;

15. The applicable law is found at Section 75 of the Civil Procedure Act (Act) and Order 43 Rule 1(1) of the Civil Procedure Rules;

16. **Section 75 of the Act reads as follows;**

Appeal shall lie as of right from the following orders:-

- 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 an award 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 provision 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) An order made under rules from which an appeal is expressly allowed by the rules.**

17. **Order 43 Rule 1 of the Civil Procedure Rules provides as follows;**

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 12, rule 7(setting aside judgment or dismissal for non attendance);
- i) Order 15, rule 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, rules 5 (compromise of a suit);
- o) Order 26, rules 1 and 5(2) (security of a costs)
- p) Order 27, rules rules 3 and 10 (payment into court and tender);
- q) Order 28, rules 4 (order in proceedings against the Government);
- r) Order 34(interpleader);
- s) Order 36, rule 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, rules 6 (enlargement of time);
- z) Order 52,rules 4,5,6 and 7 (advocates);
- aa) Order 53 (Judicial review orders)

An order superseding an arbitration where the award has not been completed within the period allowed by the court;.....

18. From the reading of the provisions of the above Order 43(1) it is clear that it sets out the orders from which appeals would lie as a matter of right; and at Order 43(2) which is couched in mandatory terms and provides that any appeal from orders not listed in Order 43(1)(1) ‘**shall**’only lie with the leave of the court (emphasis mine); Section 75 of the Act then states that such leave to appeal shall be made to the court of first instance and can be made orally at the time the order is made or within fourteen days from the date of such order; and Order 43(4) expounds on the order which includes an order granting the relief applied for or an order refusing such relief;

19. It is not in dispute that the genesis of the appeal emanates from the appellant’s failure to comply with Order 51 Rule 14 of the Civil Procedure Code which clearly lies outside the ambit of the orders set out in Order 43 Rule 1(1); and upon perusal of the court record it does not reflect any leave to appeal being sought or obtained by the appellant before he filed the instant appeal;

20. The consequence of failure to seek leave of the court to file an appeal is explained in the Court of Appeal decision of **NyutuAgrovet vs Airtel Networks Ltd [2015] eKLR**; wherein a five (5) judge bench held that where there was no automatic right to appeal as stipulated under Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained;

21. From the above decision the omission in this instance touches on jurisdiction of the court; and this court is guided by the aforesaid decision which also held that “.....**the right to appeal is conferred by statute and cannot be inferred.**”

22. Jurisdictional issues are not matters that fall in the category of procedural technicalities and it is this courts considered view that the invoking of the provisions of Article 159(2)(d) cannot salvage the instant appeal as jurisdiction goes to the root of the matter; case law referred to **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR**; and without jurisdiction this court or any other court can do nothing more than down its tools; as was held in **Owners of Motor Vessel ‘Lilian S’ vs Caltex Oil (K) Ltd (1989)**

KLR.

23. This court is satisfied that the appeal is not competently before this court.

FINDINGS & DETERMINATION

24. From the foregoing reasons this court makes the following findings and determinations;

(i) The Preliminary Objection is hereby upheld as the appeal is found not to be competently before this court;

(ii) The appeal is hereby struck out with costs to the respondent;

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 25th day of March, 2021.

HON.A.MSHILA

JUDGE