



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CIVIL APPEAL NO. 17 OF 2018**

*(Being an appeal from the decision of the Hon. Ann Karimi, RM dated 29/8/2018 in Voi RMCC No. 177 of 2013)*

**SIMON KALACHU.....APPELLANT**

**VERSUS**

**1. YUASA INTERNATIONAL LIMITED**

**2. NASIM ANWAR JUMAAN.....RESPONDENTS**

**JUDGMENT**

1. The appeal herein arises from the ruling of Hon Karimi RM delivered on 29/8/2018 in Voi RMCC 177 of 2013, wherein the learned magistrate dismissed the Appellant's application seeking re-issuing and/or extension of summons to enter appearance against the 2<sup>nd</sup> defendant.

2. Being aggrieved by the dismissal, the Appellant filed a Memorandum of Appeal dated 25/09/2018 in which she raised the following grounds:

*a) That the learned magistrate in her interpretation of the provisions of Order 5 rule 2(2) relating to the court power to extend or renew or renew summons and thereby exercised her discretion wrongly.*

*b) That the learned magistrate erred in holding herself bound by previous decisions of the Superior Courts in interpreting her jurisdiction to extend or renew summons to enter appearance without considering that the said decisions were arrived at per incuriam insofar as they were made without adverting to the clear provisions of section 59 of the Interpretation and General Provisions Act, Cap. 2 and thereby dismissed the appellant's application to extend and/or renew summons in respect of the enjoined 2<sup>nd</sup> defendant.*

*c) That the learned magistrate exercised her discretion erroneously in dismissing the entire suit when the suit against the 1<sup>st</sup> defendant was still "alive" and the NTSC proper upon which such dismissal would lie was not before her consideration.*

*d) That notwithstanding her finding in respect of the application for leave to extend or renew summons against the 2<sup>nd</sup> defendant the magistrate erred in proceeding to dismiss the entire suit for want of prosecution when the NTSC was not substantively before her when she had the application dated 9<sup>th</sup> August, 2018. In effect then, the plaintiff was denied a hearing on the NTSC.*

3. The Appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 22/11/2019, while the Respondent's submissions were filed on 11/03/2021.

4. **Mr. Mwakisha** learned counsel for the Appellant cited the provision of Section 59 of the Interpretation and General Provision Act and stated that an Application to extend time may be made notwithstanding that the period sought to be extended has lapsed. Further, counsel submitted that under Order 50 rule 6, where a limited time has been fixed for doing any act or taking any proceedings, the Court has power to enlarge such time upon such terms (if any) as justice may require. Counsel also submitted that the trial Court erred in dismissing the suit for non-prosecution when the suit against the 1<sup>st</sup> Defendant could stand on its own.

5. **Mr. Mutoka** learned counsel for the Respondent submitted that there was no attempt by the Appellant to seek leave of Court to serve the 2<sup>nd</sup> Defendant via substituted service before the lapse of the subject summons. Therefore, the trial Court's discretion could not be exercised in favour of the Appellant.

6. **Mr. Mutoka** further submitted that there is no automatic right of Appeal as against the orders made under the provisions of Order 5 of the Civil Procedure Rules. Counsel cited the provisions of Section 75(1) (h) of the Civil Procedure Act read together with the provision of Order 43 Rule 1(1) of the Procedure Rules and submitted that this Court lacks jurisdiction to entertain the present Appeal.

### **The Determination**

7. I have given due consideration to the appeal as well as the submissions and find the following issues necessary for determination:

- a) Whether this Court has jurisdiction to entertain the instant Appeal.**
- b) Whether the trial Court erred in dismissing the Appellant Application for re-issue and/or extension of summons.**
- (a) Whether this Court has jurisdiction to entertain the instant Appeal**

8. This Court has the jurisdiction to hear and determine appeals from tribunals, subordinate courts, or bodies as prescribed by Article 165 of the Constitution and other Acts of Parliament. Nonetheless a party who desires to file an appeal to this court has a duty to demonstrate under what law that right to be heard on an appeal is conferred or if not, such a party should show that leave has been granted by the court that made the order which is impugned to lodge the appeal before the court. The Respondent argues that there is no automatic appeal against Orders made under any provision of Order 5 of the Civil Procedure Rules. The Appellant on the other hand has not made any submission in response to the argument by the Respondent herein.

9. The general rule is that every decree may be appealed from unless barred by some law. However, an appeal does not automatically lie against every order. Leave to appeal will normally be granted where prima facie it appears that there are grounds, which merit judicial consideration. However, Section 75 of the Civil Procedure Act on Orders from which Appeals lie stipulates:

**“(1) An appeal shall be as of right from the following orders and shall also lie from any other order with leave of the Court making such Order 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 of the Act**
- (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 these rules from which an appeal is expressly allowed by rules**

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

10. On the other hand, Order 43 of the Civil Procedure Rules gives a long list of orders from which an appeal lies from as of right. It therefore follows that if one wishes to appeal on an order that is not on the list under Order 43 of the Civil Procedure Rules, one must seek leave of court that made that very Order. The said Order 43 is the procedural Order for Section 75 of the Civil Procedure Act. It provides: “Appeals from Orders:”

**1. (1) 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).*

*a. An appeal shall lie with the leave of the court from any other order made under these Rules.”*

*(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.*

*(4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.*

11. I have carefully examined the ruling by the trial court. It is noteworthy that the suit before the trial Court was dismissed in accordance to Order 5 and 17 Rule 2. I have also carefully examined Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, and I find no provision that confers upon the Appellant the “**right of appeal**”. The record does not show leave to appeal was sought or obtained after the impugned Ruling and before filing of this appeal and this application.

12. It is evident that leave from the trial Court in this case is mandatory as it confers this court with the jurisdiction to hear the instant appeal. Jurisdictional issues are not matters that fall in the category of procedural technicalities. They go to the root of the matter for without jurisdiction, this court or any other court would do no one more thing than down its tools. (See **Owners of Motor Vessels “Lilian S”**) (**supra**).

13. The Court of Appeal in **CA Nairobi 86 of 2015 Peter Nyaga Murake v Joseph Mutunga**, while dealing with failure to seek leave to appeal from an order stated:

*“without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the procurement of leave*

*to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal and without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. 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”.*

14. Having found that this court’s jurisdiction was not properly invoked, I find that it would be an exercise in futility to delve into the issue of whether or not this Appeal is merited.

15. The upshot of the foregoing observations is that I find no merit in the appeal. The same is struck out with no orders as to costs.

It is so ordered.

**Dated, Signed and Delivered at Mombasa this 28<sup>th</sup> day of July, 2021.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Mr. Mwakisha for Appellant

No appearance for Respondents

Ms. Peris Court Assistant