



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E515 OF 2021

GLORIA MAUNCHO ONYAMBU..... APPLICANT/APPELLANT

VERSUS

TIM LIKO T/A LIKO & ANAM ADVOCATES..... RESPONDENT

RULING

The respondent filed a preliminary objection dated 7th September 2021 on the following points of law for the dismissal of the entire appeal and related motions

- a. The appeal seeks to challenge the decision by the lower court made on 9/8/2021 striking out the appellants response (grounds of objection/opposition) that the appellant concedes was filed out of time. The lower court therefore was exercising its jurisdiction under Order 51 Rules 14 (4) of the Civil Procedure Act
- b. Under order 43 rule 1 (1) an appeal against a decision made under order 51 rule 14 of the Civil procedure rules shall only lie to this court with leave granted under section 75 of the Civil procedure Act.
- c. Prior to the filing this appeal, there was no such leave to appeal applied for and granted by the lower court pursuant to order 43 rule 1 (3) of the Civil Procedure Act.
- d. This honorable court therefore has no jurisdiction to entertain this appeal and related motions for want of leave to appeal.

Counsel for the respondent submitted that Order 43 rule 1 (3) of the Civil procedure Rules provides that an application for leave can be made orally in the lower court at the time of delivery of judgement or via a formal application within 14 days but the appellant failed to do so. It was argued that this is a jurisdiction issue and in support cited the case of **Isaac Mbugua Ngirachu v. Stephen Gichobi Kaara [2021] eKLR** where it was stated

“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 Nyutu Agrovet 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.”

The appellants in their submissions opposed the application and argued that the enabling provision to which the lower court application was brought the appellant need not seek leave to appeal and as a result this appeal is rightly before this court. In support counsel for the appellant cited the case of *Circuit Business Systems Limited v County Government of Siaya* [2020] eKLR where it was held;

“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.

18. The said Order 43 is the procedural Order for section 75 of the Civil Procedure Act. It provides: “Appeals from Orders:”

“An appeal shall lie with 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.”

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, show that leave has been granted by the court that made the order which is impugned to lodge the appeal before the court.

I have carefully examined the ruling made by the trial court. Hon Ongondo in his ruling dismissed the application brought under Order 2 Rule 15 of the Civil Procedure Rules which is for striking out pleadings in the form of a defence, and he directed the parties to take a hearing date on priority basis and without any further adjournments.

I am persuaded by the applicant’s counsel on record that under Order 43 of the Civil Procedure Rules, an appeal lies as of right from the following orders and rules under the provisions of section 75 (1)(h) of the Act: “ (b) Order 2 (pleadings generally);”

A defence which was being sought to be struck out was a pleading generally hence the applicant could appeal from an order striking out or refusing to strike out the defence. It follows that the order made on 23/9/2020 was made in error and that there is an error apparent on the face of the record, which error can be corrected by this court because the appellants’ counsel too erroneously withdrew the appeal on the basis that it was filed without leave of court.

For the above reason, I am satisfied that this application for review and setting aside of the order of 23/9/2020 has merit. The same is allowed. The said order is hereby reviewed, vacated and set aside. The appeal as withdrawn is hereby reinstated for hearing on its merits.”

Counsel urged the court to dismiss the preliminary objection.

Analysis and determination

A preliminary objection has been defined by the courts in a number of cases, the celebrated one being **Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd [1969] E.A.696** where the courts defined it as; -

“a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

The respondents herein have raised a preliminary objection on the ground that this court has no jurisdiction to hear the appeal herein as the appellants did not seek leave in the lower court to file an appeal.

The appellants have appealed against a decision by the lower court which found that the reasons for late filing of her response were not sufficient. This falls within the ambit of pleadings under Order 43 and any appeal arising from the striking out of pleadings does not require the leave of the court. The appeal is thus of right according to **Order 43 (y) of the Civil Procedure Rules**. This court has jurisdiction to hear the appeal herein.

In light of the above this court finds that the preliminary objection is without merit and is consequently dismissed with costs to the appellants.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021.

.....

S. CHITEMBWE

JUDGE