



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 61 OF 2019

FIRST ASSURANCE CO LTD.....APPELLANT

VERSUS

MARGARET WANJIRU NJOROGE (Suing as Legal Representative of the Estate of

MESHACK NJOROGE KABUTI (Deceased).....RESPONDENT

RULING

1. The applicant vide application dated 20.5.2020 is seeking for the following orders;

a) Spent

b) That the appellant be granted leave to appeal against the ruling and order of this Honorable court (Justice D.K. Kemei) delivered on the 6th day of May, 2020.

c) That the notice of appeal filed in court on the 13th day of May, 2020 be deemed as properly filed.

d) That the costs of this application be in the cause.

2. The application was filed in this court on 20.5.2020; almost a week after judgment had been delivered. It is supported by the affidavit of George Magugu deponed on 20.5.2020. The application is brought under Order 43 Rule 1, Section 75 and section 3A of the Civil Procedure Act as well as Order 51 of the Civil Procedure Rules.

3. The grounds upon which the application is premised are contained in the affidavit and further affidavit of the counsel for applicant and which are:

a) That the ruling dismissing the appellant's application dated 16.4.2019 was delivered on the 6th day of May, 2020 and counsel informed the client of the same.

b) That the deponents' counsel instructed counsel to appeal against the whole of the said ruling.

c) That an appeal under Orders 42 Rule 6, 22 Rule 22 does not lie as of right as the said provisions require an application for leave.

d) That the ruling was delivered on 6.5.2020 in the absence of the parties and the appellant did not have an opportunity to seek leave to appeal against the ruling.

e) That a notice of appeal had been filed and counsel had applied for typed proceedings.

f) That the application had been brought without undue delay and this court had jurisdiction to grant the orders sought.

4. In the affidavit in reply deposed by Lucy Wanjiru Gicharu dated 29.5.2020, she contends that the cause of action arose from a road traffic accident and in which Civil suit 922 of 2008 was filed resulting in a judgement entered in favour of the respondent. It was averred that the applicant failed to satisfy the judgement and as a result a declaratory suit namely **CMCC 1452 of 2010** was filed and that a ruling was delivered striking out the defence. It was averred that the litigation on the subject matter had been going on for the last 12 years and that the respondent has suffered prejudice.

5. The applications was canvassed vide submissions. Wangai Nyuthe & Co Advocates for the applicant in placing reliance on the case of **Highway Furniture Mart Limited v The Permanent Secretary Office of the President & another [2006] eKLR** submitted that this court has inherent jurisdiction to do justice. In the said case, the court of appeal in 2006 in suo moto revoked a decree of the High Court. Counsel cited the provisions of Rule 75 of the Court of Appeal Rules and submitted that the notice of appeal was filed on 14.5.2010 within the 14 days provided for in the Court of Appeal Rules.

6. Counsel for the respondents submitted that the instant application was a ploy to delay justice and urged the court to dismiss the same.

7. I have considered the application and find that the singular issue for determination is whether the application has merit.

8. The application is brought under Order 43 Rule 1, section 75 and sections 3A of the Civil Procedure Act as well as Order 51 of the Civil Procedure Rules.

9. The cited provisions are reproduced herein:

75. Orders from which appeal lies:

(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.

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Order 43, rule 1.] 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).*

[Order 51, rule 1.] Procedure.

1. All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

10. From the evidence as per the affidavit in support of the application and from the reading of the cited sections, the applicant has a right to appeal to this court.

11. I have seen the notice of appeal that the appellant had annexed to the application and the same implies an intention to appeal to the Court of Appeal. What is not known is whether the same has been presented to the Court of Appeal registry for processing.

12. Section 3 of the Appellate Jurisdiction Act, would come to the aid of the applicant. Section 3 provides that:

‘3. Jurisdiction of Court of Appeal

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.”

13. Rule 75 of the Court of Appeal Rules are relevant to the applicant and the provision states as follows:

“Notice of appeal.

75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

(5) Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.

14. Without going to the merits of the intended appeal and without overstepping the jurisdiction of this court and or interfering with what would properly fall within the powers of the court of appeal, I note that the notice of appeal has no receiving stamp of the Court of Appeal. I therefore would be unable to speak as to whether or not the same has been lodged in the court of appeal. The decision that was made by this court that the applicant intends to appeal against was made on 6.5.2020 and the cited Rule 75 of the Court of Appeal Rules is to the effect that the notice ought to have been lodged by 20.5.2020. If indeed this was done then this application is not necessary. If it was not done, then the relevant provisions would be section 7 of the Appellate Jurisdiction Act where the Court has discretion to enlarge the time within which a party to an appeal may do an act if sufficient reason is shown for the enlargement.

Section 7 provides that:

‘The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:.

15. The applicant ought to have cited the proper provisions of the law so as to enable this court grant the appropriate orders. In addition, the provisions of Rule 75(4) of the Court of Appeal Rules seems to do away with the need for leave when filing a notice of appeal, making the prayers sought in the application unnecessary. However, be that as it may, this court must consider the application on its own merits. It is not in doubt that the ruling sought to be appealed against was delivered in the absence of the parties due to the Covid-19 pandemic although the date had been reserved in the presence of the parties. As contended by the applicant’s counsel, had the applicant been present then an oral application for leave to appeal could have been made then. Hence the applicant should be excused in the circumstances. Suffice to add that the applicant duly filed and served the requisite notice of appeal in time before filing the present application. It is also not in doubt that the appeal herein is still pending determination and as such the parties should be given the opportunity to thrash out any interlocutory matters before the appeal is heard in earnest. This court has inherent powers to make such orders as may be necessary to meet the ends of justice. The applicant has expressed its desire to lodge an appeal which is its inalienable right to do so and thus the Respondent ought not to deny them the opportunity to ventilate it. In any case the appellant has not sought for stay of any kind and thus the respondent will not suffer prejudice save only on the fact that the determination of the appeal might delay. Such delay must be accepted as part of the journey parties litigating must be prepared to undergo in the pursuit of their claims. In the case of **Ezekiel Mwenja Ngure Vs Sammy Kipkorir Seroney & 3 Others (2017) eKLR** the Court of Appeal held that the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgement delivered in his favour and that there must be a just cause for depriving the plaintiff of that right. Indeed, the respondent has lamented about her tribulations while pursuing her claim and is opposed to the application. Whereas I do appreciate such concerns, I must also take note of the fact that the appellant is also entitled to pursue its appeal. Granted, all parties in a suit have a right to pursue appeals if deemed necessary as that is the only way of ventilating their respective rights. As such the respondent should not find the applicant’s pursuit as a delaying tactic.

16. I am satisfied that the applicant has given satisfactory reasons why it was unable to attend court on the date the ruling was delivered. I am also satisfied that the applicant has shown that it is desirous of lodging an appeal against the ruling of this court and which merits this court to grant the requisite leave to lodge the appeal. The respondent is not prejudiced in any way since no adverse orders have been issued and further costs will ameliorate her discomfiture.

17. In view of the foregoing observations, it is my finding that the applicant’s application dated 20.5.2020 has merit. The same is allowed in terms of prayers 2 and 3 thereof. The costs of the application are awarded to the respondent.

It is so ordered.

Dated and delivered at **Machakos** this **30th** day of **July, 2020**.

D. K. Kemei

Judge