



REPUBLIC OF KENYA

IN THE HIGH COURT

AT GARISSA

CIVIL CASE NO 5 OF 2019

ALMOND RESORT LIMITED.....PLAINTIFF

VERSUS

MOHAMED MAHAT KUNO.....1ST DEFENDANT

PALM OASIS RESORT LIMITED.....2ND DEFENDANT

RULING

Introduction:

1. Coming up for determination is the Defendants applicant's application dated 20th May, 2020 and filed on even date, brought under Order 43(2) & rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Article 159 of the Constitution and all other enabling provisions of the law. They seek the following orders that:

1) This Honorable Court be pleased to enlarge time for making of an application for leave to appeal against its decision made on 10th March, 2020.

2) This Honorable Court may be pleased to grant the defendant leave to appeal against its decision delivered on 10th March, 2020.

3) The costs of the application be provided for.

2. In response to the application the Plaintiff Respondent filed a replying affidavit sworn by Abdi Aziz Mahat Kuno dated 8th June, 2020. This prompted the applicants to further file a supplementary affidavit sworn by Mohamed Mahat Kuno dated 18th June, 2020.

3. The application was dispensed by way of written submissions. The applicants filed their submissions dated 15th June, 2020 and filed on even date and also filed further submissions dated 19th June, 2020 and filed on 22nd June, 2020. The Respondent relied on their replying affidavit.

Applicants Case:

4. It is the applicant's case that this court on 10th March, 2020 delivered a ruling on Plaintiff application dated 18th April, 2019, where it allowed their application partially. They contend that they are aggrieved by the decision requiring them to furnish accounts of the plaintiff in that they are unable to comply with the same as they do not have control or custody of the Plaintiff accounts, documents and records.

5. They contend that an appeal on the said decision of the court does not lie as a matter of right but requires the leave of this court as envisaged under Order 20 and Order 43 rule 2 and 3 of the Civil Procedure Rules. They aver that pursuant to Order 43(3) an applicant ought to make an application for leave to appeal immediately in the first instance when the order is issued, and in this case it is their averment that when the orders was issued the Advocate holding their brief inadvertently thought that that the application had failed entirely and therefore failed to seek the sought leave to appeal.

6. Additionally, they allege that the failure to file an application immediately thereafter was occasioned by the closure of the courts on 17th March, 2020 due to the Covid 19 Pandemic.

7. Vide their filed written submissions, they identified two issues for determination, the first one is as to whether the import of Order 43(1) (3) of the Civil Procedure Rules precludes the defendants from making an application for extension of time for leave to file an appeal. And in this regard they submitted that in the spirit of justice and fairness the law empowers courts with Jurisdiction to extend the time in which an aggrieved party may apply for leave to apply arguing that the instant application has been brought expeditiously and in good faith and urged the court to extend time.

8. The other issue is on whether the defendant ought to be denied audience for breach of court orders, and in this respect, they submitted that the allegation that the defendants are in breach of court orders are unsubstantiated and has no basis but merely designed to circumvent the legal process.

9. They relied in the following authorities of **Ataka, Kimori and Okoth Advocates vs Surestep Systems and Solutions Ltd Jr Application 22 of 2018**, **Francis Gitau t/a Femfa Auctioneer v Trans Mattresses Supermarket Ltd Civil Appeal No. 2 of 2016** and **Philip Kipkoskei Koech v Dennis Kiprop Langat ELC MISC Application No. 2 of 2018**. In sum they urged the court to allow their application.

Respondent's Response

10. Vide their replying affidavit; the Respondents opposed the instant application. It is their averment that the applicants ought to have immediately made an application for leave when the challenged orders were issued pursuant to Order 43(3) of the Civil Procedure Rules. It is their case that the applicants have not proffered a reason as to why they failed to make an oral application for leave to appeal.

11. Additionally, they aver that the applicants ought not to be given audience as the Plaintiff directors have been denied access to the Hotel, and therefore they are in breach of court orders and the instant application is intended to shadow the mismanagement of the accounts by the 1st Defendant, which action continues to prejudice them and opposed the instant application.

Determination:

12. I have carefully considered the applicant application, the respondent response and the applicant submissions, and in my view the following are the issues that arise for determination:

a) Whether the orders sought to be appealed against herein was appealable as of right?

b) Whether the applicants have established sufficient grounds for the grant of the orders sought.

Whether the orders sought to be appealed against herein was appealable as of, right?

13. It is the applicants' contention that Section 75 of the Civil Procedure Act read together with Order 43 of the Civil Procedure Rules establish that they do not have an automatic right of appeal against the ruling of this court delivered on 10th March, 2020 pursuant to Order 20 of the Civil Procedure Rules, as their contention is on an order directing them to provide for accounts.

14. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

75(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 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 rule**

15. Order 43 of the Civil Procedure Rules on the other hand gives a long list of orders from which an appeal lies from as of right. 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.

16. It is therefore apparent that Order 43 Rule (1) of the Civil Procedure Rules above sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1) leave to appeal must be obtained before such an appeal can be preferred. In this case the challenged orders are in respect to provision of accounts which fall under Order 20 of the Rules and therefore not within those orders that are appealable as of right as rightly stated by the applicant.

Whether the applicants have established sufficient grounds for the grant of the orders sought?

17. The procedure for obtaining leave to appeal is provided for under Order 43(3) of the Civil Procedure Rules which states as follows: -

(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.

18. In this regard, the court in the case of **Serephen Nyasani Menge v Rispah Onsase [2018] eKLR** held that:

***“In the instant matter the Notice of Motion dated 18th December 2015 pursuant to which the learned magistrate granted the orders of the same date sought to be appealed by the applicant did not fall under any of the Orders set out under Order 43 Rule (1) in respect of which an appeal lies as of right...Thus the applicant did not have an automatic right of appeal against the order made on 18th December 2015 and therefore required to obtain the leave of the court as envisaged under Section 75(1) of the Civil Procedure Act and Order 43 subrule (3) of the Civil Procedure Rules. Under Order 43 subrule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order. I find that is the situation in the present matter. The application before this court is for extension of time to bring an appeal out of time and is not one for leave to appeal. Such an application under the rules could only be made before the court that made the order.*”**

19. It is clear to me that the above relevant sections of the law is couched on mandatory terms and therefore this court is required to exercise its discretion on whether to grant the sought leave for appeal. The main issue that is alleged to be appealed by the applicant is the order for provision of accounts in respect to the plaintiff as issued by this court pursuant to its ruling dated 10th March, 2020. As held above the issue *clearly falls outside the issues in which appeals lie as of right and therefore the applicant ought to have sought leave of this court in order to pursue an appeal.*

20. *The applicant ought to have sought the subject leave orally at the time the court delivered its ruling or within 14 days thereafter. The applicants contend that the failure by the Advocate who was holding their brief to orally seek leave to appeal was out of inadvertence and belief that the Respondent said application had failed, and further that their failure to act within 14 days and seek leave was as a result of the closure of the court on 17th March, 2020 by the Chief Justice due to the Covid 19 Pandemic.*

21. The general rule above is that every decree may be appealed from unless barred by some law. However, an appeal does not automatically lie against every order. Indeed, where time for filing of an appeal as stipulated in law or the rules has expired, the court is empowered to grant extension of such period. This power to extend the time for filing an appeal out of time is discretionary.

22. It is also trite that leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. This is because Section 79 G of the Civil Procedure Act allows an appeal to be considered out of the period stipulated for filing of the same.

CONCLUSION

23. I have carefully considered the instant application, parties’ submissions, the authorities cited to me and the relevant legal provisions as well as the circumstances of this case and I find that the present application cannot stand. The Applicant has failed to provide sufficient reason to warrant the grant of leave to appeal out of time. The Applicant was well aware of the options available to them and they failed to act timeously.

24. The said Orders were issued on 10th March, 2020; the applicants have brought the instant application after two months that is on 20th May, 2020 citing the closure of the Courts pursuant to Covid 19 restrictions. However, I wish to note that despite the said restriction there were procedures in place to file suits and had the applicants been serious they would have managed to put in their application during that time. However, be as it may, there is no prima facie ground and this court finds no merit in the instant application as there is no sufficient ground to allow the same.

25. The upshot is that the application dated 20th May, 2020 lacks merit and thus the court makes the following orders:-

(i) The application is dismissed.

(ii) The costs in the main cause.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 22ND DAY OF JULY, 2020.

.....

C. KARIUKI

JUDGE