



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 30 OF 2016

KITHUNGURURU FARMERS'

CO-OPERATIVE SOCIETY LTD.....APPLICANT/APPELLANT

VERSUS

HARRISON K NJAGE

T/A H.K ENTERPRISES (K).....RESPONDENT

RULING

A. Introduction

1. This application dated 18th October, 2019 seeks for leave to appeal out of time against the judgment of this court delivered on 17/10/2019. The applicant further prayed for costs of the application.

2. The grounds upon which the application was based were that the applicant felt strongly aggrieved by the impugned judgment and that Section 75 of the Civil Procedure Act requires leave to be obtained before an appeal can be lodged against the said judgment. The applicant states that he is aware that the right of appeal is a constitutional right and that the judge failed to consider key and fundamental issues in the said judgment which aggrieved he applicant. He therefore wishes to seek the Court of Appeal's intervention in the relevant issues. The application was further supported by the affidavit of one Joseph Gitonga Ireri the treasurer of the applicant who reiterated the grounds in the application as summarized herein.

3. The respondent opposed the application through his his replying affidavit wherein he deposed that the application was misplaced and aimed at delaying the course of justice and that the applicant was desirous of frustrating him from pursuing his suit against him and which delay was occasioning him injustice as the lower court suit Embu CMCC No. 184 of 2014 has never been set down for hearing. It was further stated that the applicant had not demonstrated what he wished to appeal against or the injustice he will suffer if the orders sought were denied. Further that the court cannot infer applicant's feelings and neither can the court be moved by emotions of the applicants. As such, he prayed the application be dismissed.

4. The application was disposed of by way of written submissions and wherein each party filed its submissions in support of its position in the pleadings herein.

B. Issues for determination

5. I have considered the application herein, the reply by the Respondent and the rival submissions filed herein and it is my opinion that the main issue for determination is whether the application is merited.

C. Applicable law and determination of the issues

6. The applicant substantively seeks for orders for leave to appeal from the judgment delivered by this court on 17/10/2019. The application was brought primarily under Section 75(1) of the Civil Procedures Act. The section requires that leave be sought to appeal to the Court of Appeal against some orders.

7. However, as the Court of Appeal P.N Waki JA held in **Wangu Njagi v James Mwai [2006] eKLR**, Section 75 of the Civil Procedure Act applies only to appeals from the decision of the High Court in exercise of its original jurisdiction but not where it is exercising appellate jurisdiction. The court had this to say: -

“In my view, Section 66 and 75 of the Civil Procedure Act provide for appeals to the Court of Appeal from decrees and orders of the High Court in its original jurisdiction and are not relevant for purposes of this application, since the order intended to be challenged was issued by the Court in its appellate jurisdiction. The relevant Section would be Section 72(1) of the Civil Procedure Act which provides: -

“72. (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits”

8. I am guided by this authority that the only time leave is required to appeal to the Court of Appeal is where the order being appealed from is made by the court in exercise of its original jurisdiction. When a litigant wish to appeal from a decision of the High Court in exercise of its appellate jurisdiction, the relevant provisions are Section 72 of the Act. Under that section, the requirements one ought to satisfy is that the appeal must be on the ground either that: -

the decision was contrary to law or to some usage having the force of law; the decision failed to determine some material issue of law or usage having the force of law; or there was a substantial error or defect in the procedure provided by the Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

9. This section does not require leave to appeal to the Court of Appeal from the decision of the High Court in exercise of appellate jurisdiction. In my opinion, the applicant herein had an automatic right to approach the Court of Appeal on points of law only within the period provided by the law.

10. As such, it is my considered opinion that the instant application is misconceived and that it lacks merit.

11. The application is accordingly dismissed with costs.

12. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF SEPTEMBER, 2020.

F. MUCHEMI

JUDGE

Ruling delivered through Video Link in the presence of: -

Mr. Muriuki Gitonga for Applicant/Appellant

Mr. Andande for Respoondent