



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 8 OF 2020

CIRCUIT BUSINESS SYSTEMS LIMITED.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF SIAYA.....RESPONDENT

(Appeal from the Ruling of Hon J.O. Ongondo, Principal Magistrate in Siaya PM Civil Suit No 19 of 2019 delivered on 30th April 2020)

RULING ON REVIEW

Introduction

1. This ruling determines the application dated 1st October 2020 in which the appellant seeks orders reviewing, setting aside or varying the orders issued by this court 23rd September 2020.
2. The appellant herein filed an application before the Principal Magistrate's Court at Siaya in Civil Suit No. 19 of 2019 seeking to have the defence filed by the respondent therein struck out and that judgement be entered in its favour on the grounds that the statement of defence did not disclose a reasonable defence in law.
3. The trial magistrate Hon. Ong'ondo upon finding that both parties had withheld material facts ruled that in order to determine the matter fully it was necessary to have the matter proceed to full trial and thus dismissed the appellant's application for striking out of the defence.
4. Dissatisfied by the trial court's ruling, the appellant filed its Memorandum of Appeal dated 18th September 2020. When the matter came up on the 23rd September 2020 for hearing, the court observed that the appeal was filed without leave of court under section 75 of the Civil Procedure Act. Mr. Mungau who was on record for the appellant prayed to be allowed to withdraw the appeal with no orders as to costs. On the other hand, Mr. Okanda for the respondent indicated that they were going to file a preliminary objection on the same issue and thus prayed for costs for the inconvenience caused to their client. This court ordered that the appeal was filed without leave and was thus fatally incompetent and further wholly withdrew the appeal with costs to the respondent. The appellant subsequently filed the application dated 1st October 2020 which is subject of this ruling.
5. The application was canvassed by way of written submissions.

Appellant's Submission

6. The appellant/applicant submitted that decrees, orders or rulings made on an application under Order 2 as in the instant case were appealable as a matter of right as provided under order 43 Rule 1(b) of the Civil Procedure Rules. The appellant further submitted that it had the right of appeal and no leave was required in the circumstances. Reliance was placed on the case of **Joseph Otondo V Gedeon Kivisi & 3 Others; Patrick Lihanda & 4 Others (Interested Parties) [2020] eKLR** where the court held that *orders made under Order 1 are appealable as a matter of right*.
7. It was further submitted that the court should review its orders dismissing the appeal and substitute the same with orders reinstating the appeal for hearing and determination on account of an error apparent on the face of the record. Reliance was placed in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** where it was stated that *"a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established"*. Further, the appellant relied on the case of **Attorney General & O'rs v Boniface Byanyima HCMA No. 1789 of 2000**.

8. The appellant submitted that he had brought the instant application within reasonable time, promptly and without delay.

9. The appellant submitted that the substantive orders made by the court on 23rd September 2020 ought not to have been made. That the same occasioned miscarriage of justice which the court ought to reject through this review. Reliance was placed on the case of **Rahab Wanjiku v Esso Kenya Limited [1995-1998] EA 332** where the court stated inter alia that “*the learned judge had no business determining on the date, the substantive issues in the matter.*”

10. The appellant further submitted that he be awarded the costs of the application.

Respondent’s Submissions

11. The respondent submitted opposing the application subject of this ruling on the ground that the court was now *functus officio* having dismissed the appeal on the basis of law.

12. It was further submitted that misconstruing of law could not be a ground for review but may be a ground for appeal. Reliance was placed on the case of **Francis Njoroge v Stephen Maina Kamore (2018) eKLR** where the court citing the case of **Abasi Belinda v Fredrick Kangwamu & Another [1963] E.A.** held similarly.

Analysis & Determination

13. The main question, from the above facts is whether the Order made on 30th April 2020 is appealable as a matter of right or leave to appeal should have first been obtained from the Court that made the Order.

14. The impugned Ruling directed the parties to approach the registry and take a hearing date on priority to have the dispute finally determined. The appellant had sought to have the defence struck out as provided for under Order 2 Rule 15 (1) of the Civil Procedure Rules.

15. 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 serious judicial consideration.

16. 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.

17. 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.”

19. 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.

20. The above position was espoused by the Court of Appeal in **Nyutu Agrovet Ltd v Airtel Networks Limited (2015) e KLR**. The court in the above decision also held that leave to appeal does not constitute the right to appeal. The right must precede leave. The Court of Appeal in the above Nyutu Agrovet Ltd case (supra) cited with approval the decision by Ringera J (as he then was) in **Nova Chemicals Ltd vs Alcon International Ltd HC MISC APPL 1124/2002** where the learned judge held that:

“the point of departure must be the recognition that the right of appeal, with or without leave, must be conferred by statute and the same is never to be implied”.

21. The Court of Appeal further stated that:

“.....and even Section 75 of the Civil Procedure Act, giving this court jurisdiction to hear appeals from the High court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law then that court has no business to entertain the matter. (see owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1.”

22. 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.

23. 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):”**

24. 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 appellant’s counsel too erroneously withdrew the appeal on the basis that it was filed without leave of court.

25. For the above reason, iam 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.

26. Orders accordingly.

Dated, signed and delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE