



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**MISC. CIVIL APPLICATION NO. 19 OF 2019**

**(CORAM: HON. R.E. ABURILI - J)**

**NICHOLAS AYORO.....APPLICANT**

**VERSUS**

**KEVIN OCHIENG JABEDO.....RESPONDENT**

**RULING**

1. This ruling determines the applicant's Notice of Motion dated **17/9/2019** filed under Certificate of Urgency on 18<sup>th</sup> September, 2019. The application seeks orders that this court do grant the Applicant Nicholas Ayoro leave to file an appeal out of time against the ruling and order of the subordinate court dated and delivered on 27/7/2019 in *Bondo PMCC No. 25 of 2018*. Secondly, that the grant of such leave do operate as stay of execution of the ruling and order in *Bondo PMCC No. 25 of 2018* pending the hearing and determination of the said appeal. Third, that costs be in the appeal.

2. The application is supported by grounds on the face of it, key among them is that the Applicant did not get a letter informing him of the outcome of his case in time to enable him instruct his advocate to appeal in time and that the delay is not inordinate; and that it would be in the interest of justice to grant the orders sought.

3. The said Application is further supported by the affidavit sworn by the applicant **Nicholas Ayoro** on 17/9/2019 annexing a draft Memorandum of Appeal and reiterating the grounds in support thereof.

4. The application was argued orally on 22/10/2019 with Miss Ojwang counsel for the applicant reiterating the prayers sought for enlargement of time for filing an appeal, emphasising that to date, court proceedings in the lower court have not been supplied despite a written request and deposit of fees paid.

5. She submitted that the application had been made without delay, the appeal as intended is arguable and has high chances of success.

6. Counsel submitted that the suit was erroneously struck out on account that there was an arbitration clause in the contract. However, apart from the draft Memorandum of Appeal, no pleadings or order or ruling from the lower court was annexed to the affidavit and therefore this court cannot tell with certainty the nature of the dispute between the parties in the lower court.

7. The Respondent's counsel, Mr. Ochanyo holding brief for Mr. Omollo was granted leave to respond to the application orally after they failed to file a replying affidavit within the time frames granted by the court. Counsel argued in contention that there is inordinate delay in filing the application for extension of time. Further, that there is no explanation for the delay and or as to who was to write a letter to the client.

8. That as no proceedings have been supplied, it is not clear what record they will file if leave is granted. Counsel urged the court to dismiss the application with costs.

9. In a brief rejoinder, Miss Ojwang reiterated her earlier submissions and added that despite paying for proceedings the same had not been supplied.

**DETERMINATION**

10. I have considered the application for extension of time for filing of appeal from the ruling allegedly delivered in 25/7/2019 at Bondo in *Bondo PMCC No. 25/2018* by Hon. E. Wasike, SRM. I note that no ruling, Order or pleading is annexed hence I am only guided by the

affidavit sworn by the applicant that his suit was struck out on account that there was a clause for arbitration in the contract subject of the suit in the lower court. I do not have the benefit of that contract and therefore it is not possible to decipher what kind of contract it was and for what purpose it was entered into.

11. The parties did not refer this court to any authority. However, the relevant provisions for extension of time for filing of an appeal under the **Civil Procedure Rules is Section 79G of the Civil Procedure Act**. The application is also expressly brought under **Section 1, 1A, 1B, 3A, 63(e) and Order 51 Rule 6 of the Civil Procedure Act and Rules** respectively.

12. Apart from **Section 79G of the Civil Procedure Rules** - the proviso thereof which stipulate for enlargement of time for filing of appeal where such stipulated period has lapsed, **Section 95 of the Civil Procedure Act (CPA)** also provide that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

13. In addition, **Section 75(1) of the Civil Procedure Act (CPA)** provides for Orders against which an appeal would lie as of right and or with the leave of the court. The section provides:

***“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—***

***(1) (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.***

14. The implementing procedural law to the above section is **Order 43 Rule 1 of the Civil Procedure Rules** which sets out orders and rules in which appeals would lie as of right. The Order provides:

***“43. 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).

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

(3) An applications 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.

(4) Save where otherwise expressly provided in this rule, "order" includes both an order granting the relief applied for and an order refusing such relief.

2. The rules of Order 42 shall apply, so far as may be, to appeals from orders.

3. Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

15. The above provision clearly stipulate that in all other cases, the party wishing to appeal must first seek leave of court to appeal. What this means is that unless the order sought to be appealed against falls under the express orders which are appealable as of right under **Order 43(1) of the Civil procedure Rules**, leave to appeal must first be obtained before such an appeal can be preferred, or enlargement of time for filing of an appeal can be sought and obtained.

16. In addition, Under **Order 43 Rule 3 of the Civil Procedure Rules**, 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.

17. The question is whether the order / Ruling that is sought to be appealed against is one of the Orders falling under **Order 43 Rule (1) of the Civil Procedure Rules** in which an appeal lies as of right. If the answer is in the affirmative, I shall proceed to determine the application on the basis of jurisdiction since jurisdiction is everything. It is granted by the Constitution and statutes not by parties. I hasten to add that a jurisdictional issue is not a procedural technicality curable by application or invocation of the inherent jurisdiction of the court or Article 159 of the Constitution that obliges courts to determine disputes without undue regard to [procedural technicalities but to consider the substance.

18. In *Nova Chemicals Ltd vs Alcon International Ltd HC MISC Appl No 1124 of 2004*, echoed in *Nyutu Agrovet v Airtel Networks Ltd [2015] eKLR*, the Court of Appeal held that **leave to appeal does not constitute the right to appeal. The right must precede leave.** In the *Nova Chemicals (supra)* case, the court held:

**“...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.”**

19. In the *Nyutu Agrovet (supra)* case, the Court of Appeal emphasised 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 rights 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 Motor Vessel “Lilian ‘S’ v Caltex Oil (K) Ltd [1989]KLR 1.”**

20. Applying the above established legal principles to the instant application which is not backed by any pleading or order from the lower court, and having carefully examined the provision of **Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules**, I am unable to find any provision that allows a party to exercise their right of appeal from orders striking out suit for want of jurisdiction. In other words, I find no provision that confers upon the present applicant the right of appeal against an Order striking out the Suit.

21. It follows that the applicant should first have sought leave of the lower court to appeal, at the pronouncement of the ruling striking out his suit or by way of a formal application, before seeking to invoke the jurisdiction of this court. This court is therefore devoid of jurisdiction to entertain an application for leave to enlarge time to appeal against an order which is not appealable as a matter of right.

22. A similar situation arose in *Peter Nyaga Murake Vs. Joseph Mutunga CA 86/2015* at Nairobi where the Court of Appeal stated: -

**“Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the procurement of leave to appeal is sine quo non to the lodging of the Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave, which has not been sought and obtained, is dead in the water.”**

23. As to whether I can invoke **Article 159(2)(c) of the Constitution** to salvage this application, the answer lies in *Kakuta Maimai Hamisi Vs. Peris Pesi Tobiko & 2 Others [2013] eKLR* where the Court of Appeal stated and I concur: -

**“The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2)(c) of the Constitution. We do not consider Article 159(2)(c) of the Constitution to be a panacea, nay, a general white wash that cures and amends all ills, misdeeds and defaults of litigation.”**

24. The above pronouncement was echoed in *Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012* where it was stated succinctly: -

**“In our view, it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the Civil Procedure Act Cap 21 and Sections 3A and 3B of the Appellate Jurisdiction Act Cap 9). Procedure is also a handmaiden of first determination of cases.”**

25. In view of the above, it is not about the applicant having delayed to file an appeal and therefore seeking for enlargement of time, but that the appellant had no automatic right of appeal and therefore he should first have sought and obtained leave to appeal and once that leave was granted, he could then invoke the jurisdiction of this court on all matters including enlargement of the time. He did not do that. Accordingly, this application must fail. The same is declined and dismissed.

26. The Applicant is however not disentitled of any opportunity to ventilate his grievances. His counsel can widely and carefully consult the relevant law and procedure and still get justice in the same court which struck out his suit as the suit was merely struck out and not dismissed. As the reasons for dismissing this application were not advanced by the Respondent but by the court's exploration of the law and practice, I decline to award the Respondent any costs and order that each party shall bear their own costs of the application. **File is closed.**

27. Orders accordingly.

**Dated, signed and Delivered in open court at Siaya, this 28<sup>th</sup> October 2019.**

**R.E. ABURILI**

**JUDGE**

In the presence of:

Mr Ochanyo h/b for Mr Ken Omollo for the Respondent

N/A for the Applicant.