



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO. 3 OF 2017

EDITH WAIRIMU NJOROGE.....APPELLANT

VERSUS

BROOKS HOLDINGS CO. LIMITED.....1ST RESPONDENT

REV. MOSES H.M. NDEGWA.....2ND RESPONDENT

RULING

[1] The Appellant herein, **Edith Wairimu Njoroge**, had sued the two Respondents, **Brooks Holdings Company Limited** and **Rev. Moses H.M. Ndegwa** before the Nairobi (**Milimani**) **Chief Magistrates Court in Civil Case No. 7935 of 2015** in connection with a Joint Venture Agreement made between the parties sometime in the year **2007**. In the course of the trial before the lower presided over by the Senior Principal Magistrate, **Hon. Grace Mmasi (Mrs.)**, an objection was taken by the Defence Counsel, **Mr. Kihingo**, to the production of the Joint Venture Agreement, a copy of which was exhibited herein and marked **Annexure "EWN 1"**. The objection was upheld by the Court pursuant to **Section 19(2)** of the **Stamp Duty Act, Chapter 480** of the **Laws of Kenya**, on the grounds that the Joint Venture Agreement had neither been dated nor stamped as required.

[2] Being aggrieved by the aforementioned decision, the Appellant filed this interlocutory appeal seeking, *inter alia*, that the Ruling delivered by the Senior Principal Magistrate on **28 April 2017** be set aside and that an order be issued directing that the lower court matter be proceeded with before any other Magistrate than **Hon. G. Mmasi**. Thereafter on the **20 June 2017**, the Appellant filed an application under Certificate of Urgency pursuant to **Section 75(1)(h)** of the **Civil Procedure Act** and **Order 42 Rule 6(6)** and **Order 43 Rule 1(1)(f)** of the **Civil Procedure Rules, 2010** for the following orders:

[a] Spent

[b] Spent

[c] That pending the hearing and determination of the Appeal filed herein, there be a stay of the proceedings in **Civil Case No. 7935 of 2010** at the Chief Magistrate's Court at Nairobi Milimani Commercial Courts;

[d] The Costs of the application be in the cause.

[3] The Respondents opposed the Application and intimated their posturing by filing the Grounds of Opposition dated **17 July 2017**. Their contention was that:

[a] The Appellant's Notice of Motion dated **20 June 2017** is premature and speculative for the reason that it is brought on a wrong assumption that the Appellant's case before the lower court had naturally collapsed and cannot proceed for full hearing and determination on its merit;

[b] The hearing and determination of the Notice of Motion dated **20 June 2017** would technically amount to a final determination of the Appellant's case before the lower court and thus amounting to an abuse of the court process;

[c] The Respondents have the right to equal protection of the law as enshrined under **Article 27(1)** of the Constitution of Kenya and therefore that the application for stay of proceedings ought to be disallowed.

[4] In addition to the Grounds of Opposition, the Respondents filed a Notice of Preliminary Objection on **9 October 2017** raising the pertinent argument that the Court has no jurisdiction to hear and determine either the pending application or the appeal itself. The Preliminary Objection was argued on **5 February 2018**; and **Mr. Maina** for the Respondents relied on **Section 75 of the Civil Procedure Act** to support his argument that since no leave was obtained prior to the lodgment of the instant appeal, the jurisdiction of the Court to hear either the application or the appeal itself, was not properly invoked. He relied on the cases of **The Owners of the Motor Vessel Lilian "S" vs. Caltex Kenya Limited [1989] KLR** and **Josephat Muchiri Muiruri & Another vs. Yusuf Abdi Adan: Nairobi High Court Civil Appeal No. 715 of 2006 [2015] eKLR**.

[5] On behalf of the Appellant, **Mr. Kipkorir** opposed the Preliminary Objection, contending that it has been taken in abuse of the process of the Court; and that the arguments advanced by Learned Counsel for the Respondents amount to a complete departure from what was conveyed in the Notice itself. He further submitted that the objection before the Learned Trial Magistrate was in connection with a document that was to be produced under **Order 3** of the **Civil Procedure Rules**; and that orders made thereunder are appealable as of right. Hence, it was the contention of the Respondents that the so called Preliminary Objection is not valid and does not meet the requirements of the law with regard to preliminary objections; which require that the ground for the preliminary objection be self-evident. Counsel relied on the following authorities to support this argument:

[a] **Janet Syokau Kaswii vs. Kathonzweni Financial Service Association [2014] eKLR** wherein **Marete, J.** dismissed a preliminary objection on the grounds that it did not, state in clear terms, the limitation of law in support;

[b] **Garissa Mattresses Limited vs. Margaret Walegwa Wamwandu & 6 Others [2016] eKLR**, whose facts I find inapplicable as it concerned substantive motions for joinder of a Defendant, stay and review/setting aside of a Consent Judgment; and

[c] **Mursal Guleid & 2 Others vs. Daniel Kioko Musau [2016] eKLR** for the proposition that a right of appeal should not be defeated for non-reliance, in an application, on the correct rule of procedure for which appeal as of right is prescribed by the rules.

[6] Thus, **Mr. Kipkorir** urged the Court to dismiss the Preliminary Objection, and urged that the application and the Appeal itself be heard and determined on merit, in compliance with the dictates of the Constitution, especially **Article 159(2)(d)** of the Constitution, that justice be administered without undue regard to procedural technicalities as mandated.

[7] In reply to the submissions of **Mr. Kipkorir**, **Mr. Maina** submitted that a Preliminary Objection can be raised at any time during the proceedings; and that such objections can also be taken up by the Court *suo motu*. He reiterated that the instant Preliminary Objection, unlike the Preliminary Objection that was raised before the Magistrate, is confined to the requirement for leave to appeal; and is therefore based on the provisions of **Order 14** of the **Civil Procedure Rules** and not **Order 3** as contended by the Appellant's Counsel. He added that **Article 159(2)(d)** of the **Constitution** is not a panacea for all procedural defects; and therefore that it cannot be relied upon as a cure for jurisdictional deficiency.

[8] As was appositely stated in the **Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1**, it would be inconsequential for a Court of law to hear and determine a matter if it lacks the jurisdiction to do so. The Court of Appeal expressed itself thus in this connection:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[9] And there is no gainsaying that the question of jurisdiction is one that must be taken *in limine*. In **the MV Lilian S Case**, the Court (per **Nyarangi, JA**) held that:

"...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it..."

[10] Accordingly, it is imperative for the Court to satisfy itself that it does have the requisite jurisdiction to entertain, not only the instant application, but also the appeal itself; and the work, the **Major Law Lexicon, Volume 4**, aptly defines jurisdiction thus:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[11] Thus, while there is no gainsaying that the High Court has unlimited original jurisdiction in civil matters by dint of **Article 165(3)** of the Constitution, it appellate jurisdiction is circumscribed by dint of **Part VIII** of the **Civil Procedure Act**. This appeal, as has been pointed out hereinabove, is an interlocutory appeal from an order of the lower court, and therefore the point of reference is **Section 75** of the Civil Procedure Act as read with **Order 43** of the **Civil Procedure Rules**; and **Section 75(1)(h)** of the Civil Procedure Act, pursuant to which the Notice of Motion dated **20 June 2017** was filed, stipulates that:

"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--

(h) any order made under rules from which an appeal is expressly allowed."

[12] The appeal is from the Ruling of **Hon. G. Mmasi, SPM** dated **28 April 2017**. A copy thereof was exhibited herein as **Annexure EW 2** to the Supporting Affidavit sworn by the Appellant on **20 June 2017**. Clearly, the objection was not a preliminary objection on a point of law on the competence of the suit or any such ground upon which the entire suit could be finally disposed of, but was an objection on the admissibility of an Agreement between the parties. The Ruling aforementioned shows that the position taken by Counsel for the Defendant was that the Agreement was not sealed or stamped as required by **Section 19** of the **Stamp Duty Act** and therefore was not admissible in evidence.

[13] Having heard the respective submissions proffered by Learned Counsel for the parties, the Learned Magistrate ruled thus:

"I have considered the objection and the reply by the Plaintiff's Counsel. I have also perused the said JOINT VENTURE AGREEMENT. The same is not dated. The question that remains lingering in the mind of the Court is, on which date was this Agreement entered into. It is not enough to say all through the defendants were aware of this agreement. The Agreement has to be valid and an Agreement properly so called. Secondly, there is no Stamp on the Agreement. Section 19(2) of the Stamp duty Act Cap 480 Laws of Kenya provides inter alia that:

"No instrument chargeable with Stamp Duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped..."

The said Agreement is signed, but there is no stamp and or seal on the same. It is not enough and or convincing for the Plaintiff's Counsel to maintain that the value of the Agreement is not diminished. This is not a fact but a point of law which has to be complied with. I find that the Objection raised by the defendant's Counsel is viable. Same is allowed and sustained. The Court declines to admit the said Agreement in the suit. The Court so orders..."

[14] The Lower Court then proceeded to fix the suit for further hearing on **22 June 2017**. The record plainly shows that, since the Ruling was delivered in the absence of the Defendant, no application for leave to appeal was made or granted. Accordingly, the pertinent question for determination is whether leave was required, for the lodgment of the instant appeal.

[15] Having given this issue careful consideration, and looked at the provisions of **Order 3** and **Order 14** of the Civil Procedure Rules, I am unable to agree with the submissions of **Mr. Kipkorir** that the objection before the Lower Court was made pursuant to any of the provisions under those Orders. **Order 3** has to do with the frame and institution of suits; and whereas **Order 3 Rule 2** makes provision that suits be lodged along with the documents set out thereunder, such as Verifying Affidavits, Lists and Statements of Witness to be called and copies of documents to be relied on at the trial, the objection had nothing to do with any of the provisions under **Order 3**. The Agreement was not objected to for non-compliance with the provisions of **Order 3**, but for failure to comply with **Section 19(2)** of the **Stamp Duty Act**.

[16] **Order 14** of the **Civil Procedure Rules**, on the other hand provides for the production, impounding and return of documents, and in effect, makes prescription as to how documents are to be treated upon production in Court, as well as their subsequent return, upon rejection or after hearing. **Rule 6** thereof makes provision for certain applications for orders calling for records from other courts or from the Court's own records. The Rule provides that, whereas the Court can act *suo motu*, an application in that connection must be supported by an affidavit. What was before the Trial Magistrate was no such application. In any event, **Order 14** is not one of the provisions listed under **Order 43 Rule (1)** of the **Civil Procedure Rules** as the Orders in respect of which an appeal an appeal may lie as of right.

[17] In **Mandavia vs. Rattan Singh[1965] EA 118**, the then Court of Appeal for East Africa had occasion to consider a case with more or less similar facts. The Appellant had pleaded that the suit against him was *res judicata*. The issue was taken as a preliminary issue and the Trial Judge ruled that *res judicata* had not been made out. The Appellant, without obtaining leave to appeal, lodged an appeal against the decision; and at the hearing, a preliminary objection was taken that the decision did not amount to a decree or preliminary decree as it did not conclusively determine the rights of the parties with regard to any of the matters in controversy between them. Alternatively, it was argued that, if the Judge's decision was an "order" then it was not appealable as of right, and as leave to appeal had not been obtained, the appeal was incompetent. The Court of Appeal held, inter alia, that, where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or *res judicata* fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.

[18] In the premises, the conclusion that I come to, on the basis of the foregoing, is that leave of the lower court was a prerequisite to the assumption of jurisdiction by this Court on appeal. Indeed in **Kenya Commercial Bank Limited vs. Esipeya [2015] eKLR**, the Court of Appeal held that:

"...having chosen to raise the limitation point by way of a preliminary objection under no particular Order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the Superior Court which was neither sought nor obtained.

[19] Similarly, in **Civil Appeal No. (Nairobi) 86 of 2015 Peter Nyaga Murake vs. Joseph Mutunga**, while making reference to failure to seek leave to appeal from an order, the Court expressed the viewpoint that:

"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 qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid 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”.

[20] As to whether **Article 159(2)(d) of the Constitution** can cure the deficiency herein, I find instructive the observations of the Court of Appeal in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] e KLR** that:

“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) (d) of the Constitution. We do not consider Article 159 (2)(d) of the Constitution to be a panacea, nay , a general white wash, that cures and mends all ills, misdeeds and defaults of litigation”.

[21] The same position was taken in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** by the Court of Appeal thus:

“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 1 B of the Civil Procedure Act Cap 221 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.

[22] In the result, I would uphold the Respondent's Preliminary Objection and find that this appeal and the Notice of Motion date **20 February 2018** are incompetent for want of leave; and that the Court therefore lacks the requisite jurisdiction to hear and determine the same. The Appeal is accordingly struck out with costs, and that includes the Notice of Motion filed herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI IN OPEN COURT THIS 20TH APRIL, 2018

OLGA SEWE

JUDGE