



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

MISC. CIVIL APPLICATION NO. 2 OF 2018

GEORGE ODHIAMBO UMIDHA.....APPLLCANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST RESPONDENT

BERNARD NALO MAKATIANI.....2ND RESPONDENT

RULING

1. By an application dated 26th June, 2018, the Applicant **GEORGE ODHIAMBO UMIDHA** seeks from Court leave to file his appeal out of time challenging orders made on 22.9.2016 by Hon Hazel Wandere and that the annexed Memorandum of Appeal be deemed to be duly filed and served.
2. The Application is supported by grounds on the face of the Application and the Applicant George Odhiambo Umidha Sworn on 26.6.2018.
3. The gist of the Application which is brought under the provision of **Section 79 G and 95 of the Civil Procedure Act, 2010, Order 50 Rule 5 of the Civil Procedure Rules** and all enabling laws is that the 2nd Respondent Bernard Nato Makatiani had made an application for provision of Security in execution of instruction for the attachment in Civil Misc. Applications No. 42/2016.
4. That the Auctioneer proceeded to execute Warrants against the Applicant herein. The Applicant denies having any relationship with the 1st Respondent Co-operative Bank (K) Limited as he was never a Party to the application by the 1st Respondent.
5. That he therefore filed Objection to Execution vide application dated 30.6.2016 in the same Court which had granted provision of security to the 2nd Respondent and the Court did on 13.7.2016 direct that the animals earlier attached be returned to him after consideration of his application which was undefended.
6. That however, the Auctioneer later made a belated application dated 18.7.2016 and had the Court case file placed before a different Magistrate not seized of the matter and without serving the Applicant herein with the papers and that the said Principal Magistrate directed that the said file be taken to the High Court for interpretation of the Orders.
7. That however, the High Court advised that it was better for an appeal to be filed and that albeit a Memorandum of Appeal was drawn, it was not filed in time as the Applicant herein delayed to furnish his Advocate with instructions to file the same.
8. He now seeks Leave to lodge the appeal out of time as the delay in filing the same was not deliberate and that the intended appeal has arguable chances of success. Further that unless the Application is allowed, the Applicant stands to suffer irreparably.
9. The Applicant deposes that he is willing and ready to abide by the conditions that the Court may deem it just.
10. The Applicant's application is vehemently opposed by the 1st Respondent who filed a Replying Affidavit sworn by Rose Ongira, its Advocate.
11. It is deponed that the 2nd Respondent had filed a **Miscellaneous Civil suit No. Siaya Misc. 42/2016 Coop Bank of Kenya Ltd Vs. Ruth Akinyi Wau & 4 Others and Bernard Analo Makatiani, trading as Benwill Auctioneers** seeking for Security as he intended to execute against one Ruth Akinyi Wau who had defaulted in servicing her loans obtained from the 1st Respondent via a Chattels Mortgage and that the said application was allowed.

12. That the said Auctioneers went ahead and attached the animals of Ruth Wau and that is when the Applicant herein filed Objection to attachment in the said file where the Auctioneer had obtained an Order for provision of security in executing the Orders, instead of filing the application in a proper Civil Suit as expected.

13. That despite the above procedural anomaly, the Court went ahead and entertained the application by the Objector and issued Orders directing that 5 bulls and 2 cows attached by the Auctioneer be returned to the Objector and/or their proceeds of sale of the said animals, despite the fact that there was no prayer for refund but for stay of execution and sale of the animals pending hearing and determination of the application and for declaration that the purported execution and attachment levied by the Auctioneers on the Applicant's properties was null and void, illegal, unlawful, irregular, null and void and that the same be lifted with all consequential orders therefrom.

14. That albeit the Applicant filed an affidavit of service claiming that it had served the 1st Respondent with the application, that was not true as the 1st Respondent only came to know of the application when it was served with an order through its Siaya Branch.

15. That the Lower Court allowed the Applicant/Objectors application granting orders that were never prayed for by the Objector/Applicant herein.

16. That the 1st Respondent filed Notice of Appointment and the file was placed before Hon. C. Okore on 29.7.2016 for direction on whether the Objector's application was properly filed in a Civil application file instead of filing of a proper suit given that a 3rd Defendant non-party was enjoined by the Applicant and since the file was only opened for orders on provision of security while executing.

17. That the Court directed parties, to appear on 4.8.2016 for further directions and for the parties to shed light on what was happening in that file.

18. That on 4.8.2018 Hon. Okore declined to handle the matter and directed that the file be placed before Hon. H. Wandere who had the conduct of the matter and the 1st Respondent's Advocates submitted upon which Hon. Wandere reserved the Ruling for 8.9.2016.

19. That in any event the Applicant/Objector's Advocates had been served for 4.8.2016 but that they failed to attend Court.

20. That the ruling was never delivered in the presence of the parties after the Magistrate indicated that the file had been returned to the registry hence she would deliver the ruling on Notice but which Notice was never issued until the 1st Respondent's Counsel stumbled on the ruling in the Registry after writing to the Court and learnt that the same was delivered on 22.9.2016 directing the Objector to file a proper Civil suit but which suit has never been filed.

21. That this application is meritless as no leave to appeal was obtained from the Magistrate's Court hence the application herein is untenable pursuant to order 43 (1)(a) – (aa) hence it should be struck out with Costs to the Respondents.

Submissions

22. The Parties Advocates urged the application by way of Oral submissions made on 1.10.2018 with Mr. Oduor submitting on behalf of the Applicant/Objector reiterating the depositions by his Client whereas Mr. Abira opposed the Application on behalf of the Respondent reiterating depositions in the Replying affidavit.

23. In addition, Mr. Oduor submitted that final Orders had been issued in his clients favour on 13.7.2016 directing the attached animals to be returned to the Applicant/Objector and that under **Order 22 Rule 51 of the CPR** contemplates that Objection to execution ought to be made in the same proceedings where execution took place.

24. It was submitted that in this case, the Respondent placed the file before a different Magistrate who went ahead by directing the Objector/Applicant to file a proper suit.

25. It was submitted that the Applicant was not party to those proceedings hence he could not have sought leave to lodge the appeal within the stipulated period under **Section 79 G of the CP or Order 50 (5) of the CPR** hence he appeared before the P.M. for directions on how to proceed with the matter and was advised to appeal hence this application.

26. Mr. Oduor relied on **Article 159 of the Constitution** and urged the Court to allow the application as there was no way his client could have known that there was a decision against him.

27. It was submitted that even if there was a procedural lapse, the Court should invoke the overriding Objectives of the **Civil Procedure Act and Article 159 of the Constitution** and allow the Application as the intended appeal was arguable and that his client was going to suffer irreparably unless the Orders sought are granted as he has been to Court severally and hired different Advocates.

28. In opposing the appeal and adopting the depositions contained in the Replying affidavit, Mr. Abira submitted that the Applicant's Counsel was served but failed to appear in Court on 4.8.2016 to protect the Objector's interests.

29. Further, that the placing of the file before another Magistrate was an administrative issue as Hon. Okore was not in the station and has not been there for quite some time, to date.

30. That the subject objection proceedings filed by the Applicant did not fall under **Order 22 Rule 51 of the Civil Procedure Rules**.

31. That if the Objector had an interest in the matter, it should have perused the file to discover what orders may have been made therein.
32. It was submitted that the application herein as a whole was improperly before this Court and offends **Order 43 Rule 1 of the CPC** as the Applicant has no automatic right to appeal against that Order without Leave of Court from the Court that made the Order.
33. That this Court should not sacrifice procedure at the expense of satisfying an offending Party.
34. It was also submitted that the issues sought to be ventilated on appeal are different from what the Objector sought in his application for Objection to Execution hence the intended appeal has no chances of appeal hence it should be dismissed as the Objector should have sought to file a different suit.
35. In a rejoinder Mr. Oduor submitted that failure to seek leave in the Lower Court to file an appeal is curable by **Article 159 of the Constitution** as the Applicant relied on Counsel from the subordinate Court and from the High Court and that there are no conflicting issues on appeal as there was an order for return of 5 animals and that, that order has not been renewed hence the orders sought herein should be granted.

DETERMINATION:

36. I have carefully considered the application herein which seeks leave of this Court to appeal against the Order of the P.M's Court made on 22.9.2016 out of time and the issue that is for determination is whether the Applicant/Objector is entitled to the Orders sought?
37. There are serious ancillary questions that the Court will however, answer in determining the above main issue.
38. The first question is whether the application for leave to appeal out of time is tenable in view of the allegation by the Respondent's Counsel that the application offends **Order 43 (1) (a) of the CPR** as there is no automatic right of appeal and that since the Applicant should have first applied for leave to appeal before the Court whose Orders are sought to be challenged herein.
39. The beginning point is to examine the Lower Court record as extracted and filed herein by both parties' Advocates.
40. From the annexures filed in support of the affidavits of both Parties, it is clear that the Applicant herein was an Objector to execution process commenced by the 2nd Respondent Auctioneer as Agent of the 1st Respondent by way of attachment of the movable property allegedly belonging to the Applicant herein in the mistaken belief that the said property to wit, animals, belonged to Ruth Akinyi Wau who had allegedly defaulted in the repayment of a loan advanced to her by the 1st Respondent via Chattels Mortgage.
41. The Objector successfully obtained an Order for the release of the animals. However, on the Respondents learning of what the Court had ordered in favour of the Applicant herein, they approached the Court in protest and the Court did, after considering an application to the effect that the Applicant herein had, instead of filing a fresh suit challenging the process of attachment of the animals it had granted orders in the miscellaneous application proceedings where the 2nd Respondent had merely sought for security to accompany him to attach the property of the person he believed to be the owner thereof and loanee/defaulters, on instructions of the 1st Respondent.
42. The Court made the order on 22.9.2016 but the Applicant claims that it was not made aware of the ruling until much later and that upon seeking advise of the Court, he was advised to appeal against the said ruling in the High Court. However, time for filing an appeal had lapsed and hence this application for extension of time to file an appeal out of time.
43. The main question, from the above facts is whether the Order made on 22.9.2016 is appealable as a matter of right or leave to appeal should have first been obtained from the Court that made the Order.
44. The impugned Ruling was brief and had the effect of closing the file and directing the Registry to open a new file for the Objector.
45. 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. 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.
46. **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.
47. **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.

48. 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.

49. 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.**

b.

c.

20. 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.

21. 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”. 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 in the form of directions. It does appear that there is no clear provision of the law under which the trial court made the order. However, as the order was general and advisory in nature, it could be made under the inherent jurisdiction of the court as stipulated in section 3A of the Civil procedure Act, or under section 3 of the Civil Procedure Act, being the special jurisdiction of the court being invoked to meet the ends of justice

23. The proceedings before the subordinate court, subject matter of this application were and are civil proceedings governed by the Civil Procedure Act and Rules made there under. However, I find no provision that confers upon the appellant the **“right of appeal”** under the inherent or special jurisdiction of the court under the Civil Procedure Act..

23. In addition, Section 5 of the Civil procedure Act on jurisdiction of the courts is clear that any court shall, subject to the provisions herein contained have jurisdiction to try all suits of which its cognizance is either expressly or impliedly barred.”

24. What I gather from the above provisions and the definition of Rules to mean “Rules and Forms made by the Rules Committee to regulate procedure of court” is that any issue arising in the course of proceedings requiring a determination by the court, and where the court does pronounce itself, then that pronouncement is made by the court in the exercise of its civil jurisdiction under the Civil Procedure Act and the Rules made there under.

25. There is no dispute that the intended appeal arises from an order of directions to the registry and parties to open a new file for the ventilation of the grievance raised by the applicant herein. It is not in dispute that Section 75 of the Civil Procedure Act specifies the orders from which parties have a right of appeal, without leave, which implies that in certain other orders a party would require leave of the court to file an appeal. The order for directions as given by the trial court is not listed as one which is appealable as a matter of right. That being the case, leave to appeal from the court that made the said order was necessary as it is not exempt from the requirement of leave under Order 43 of the Civil Procedure Rules.

26. It follows that that Order having been made under the Civil Procedure Rules and without leave of the court that made the order, then this court is deprived of jurisdiction to hear and determine the application and the intended appeal. In my view, it is that leave from the trial court which would confer this court with the jurisdiction to hear the appeal and with respect to the appellant’s counsel’s submissions, jurisdictional issues are not matters that fall in the category of procedural technicalities. They go to the root of the matter, for, without jurisdiction, this court or any other court would be acting in vain.(see **Owners of Motor Vessels “Lilian S”**) (supra).

26. The Court of Appeal in **CA Nairobi 86 of 2015 Peter Nyaga Murake v Joseph Mutunga**, while making reference to failure to seek leave to appeal from an order 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 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”.

30. Albeit Article 159(2) (d) of the Constitution has been invoked by the applicant arguing that the application herein is based on procedural technicalities hence it should be dismissed, I disagree. As earlier stated, jurisdictional issues are not procedural requirements for without jurisdiction, the court acts in vain. As was held 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”.

31. The same Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** (five Judge Bench) stated succinctly thus, concerning the issue of taking umbrage under Article 159(2) (d) of the Constitution.

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

32. In the same breath, having already found that jurisdiction stands on a higher pedestal and in a more peremptory position than procedural rules and that the requirements for leave to appeal as was in this matter is a jurisdictional issue, I can only reiterate that it goes to the very heart of substantive validity of court processes and determination and certainly does not run a foul the substantive procedure, dichotomy of Article 159 of the Constitution.

33. Nyarangi JA in the case of **Owners of Motor Vessel “ Lilian S” v Caltex Oil (K) Ltd (1989) KLR 1** stated:

“.....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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

34. Consequently, I find and hold that the application herein as filed is incompetent. It was filed without leave of the court that made the order which is sought to be challenged, and which order is not appealable as a matter of right. The application dated 2th June, 2018 is dismissed with costs to the respondent.

Dated, signed and delivered in open court at Siaya this 29th day of October, 2018.

R.E.ABURILI

JUDGE

In the presence of:

Mr Oduor h/b for Mr Wakla advocate for the applicant

Mr Okello h/b for Miss Ongira for the Respondents

CA: Brenda and Modestar