



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 87 OF 2014**

**BETWEEN**

**CHINA WU YI CONSTRUCTION CO., LTD ..... APPELLANT**

**AND**

**GEORGE ARUNGA SINO T/A**

**MAYWOOD AUCTIONEERS ..... RESPONDENT**

**AND**

**JOTHAM MWANGI WERE ..... INTERESTED PARTY**

*(Being an appeal from the Ruling and Order of*

*Hon. D. Chepkwony, SPM dated 2<sup>nd</sup> July 2014 at the*

*Senior Principal Magistrates Court at Nyando in Civil Case No. 118 of 2006)*

**RULING**

1. The appellant moved this court by a Memorandum of Appeal dated 7<sup>th</sup> August 2014 and amended on 27<sup>th</sup> February 2017 seeking to set aside the ruling of the subordinate court delivered on 2<sup>nd</sup> July 2014 ordering the appellant to pay the auctioneers costs incurred following what the appellant considered to be irregular attachment of its property. The appellant prayed that the lower court's order be substituted with an order that the appellant is not liable for the auctioneer's costs and if any costs are payable then they should be paid by the respondent.

2. When the appeal came up for hearing on 14<sup>th</sup> March 2017, I asked the parties to address me on whether leave was obtained prior to filing this appeal and if not, the consequence thereof. Mr Yogo, counsel for the appellant, conceded that the court did not expressly grant leave to appeal but submitted that the grant of leave could be implied from the fact that the court granted an order of stay of execution pending appeal on 2<sup>nd</sup> July 2014 after delivering the ruling now appealed from. Counsel contended that the issue of leave should have been determined at the time of admission of the appeal and not at the hearing.

3. Mr Madialo, counsel for the interested party, submitted that leave to appeal was a necessary requirement for this appeal to be heard and since it was neither sought nor granted, the court lacked jurisdiction to entertain the appeal.

4. From the onset, it must be appreciated that this Court has the jurisdiction to hear and determine appeals from tribunals and subordinate courts as prescribed by the Constitution and other Acts of Parliament. Although speaking of the jurisdiction of its in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others*** **NRB CA Civil Appeal No. 154 of 2013 [2013] eKLR**, the Court of Appeal reiterated the general principle no less applicable to the High Court that:

*It is trite that no right of appeal exists absent an express donation by the Constitution, or by statute or by other law ..... The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie.*

5. This appeal arises from an order of payment of auctioneer's costs following an application made under **Order 22 rule 22, Order 12 rule 7 and Order 21 rule 8(2)** of the **Civil Procedure Rules** and **sections 1A, B and 3A** of the **Civil Procedure Act**. **Section 75** of the **Civil Procedure Act** specifies the orders from which parties have a right of appeal without leave which implies that in all other cases a party would require leave to mount a competent appeal. **Order 43 Rule 1** of the **Civil Procedure Rules** sets out the orders from which appeals lie as of right while **Rule 2** thereof dictates that, "*an appeal shall lie with leave of the Court from any other order made under these rules*". The order on payment of auctioneer's costs is not listed under **Section 75** of the **Civil Procedure Act** nor is it exempted by **Order 43 Rule 1** of the **Civil Procedure Rules** hence the grant of leave is necessary. I would also add that the fact that the application cited or invoked some provisions that are appealable as of right, for example **Order 12 rule 7** of the **Civil Procedure Rules**, does not save the appellant as the order made and specifically appealed from is not one for which an appeal is provided as of right.

6. The right of appeal and the conditions upon which it is granted must be express and not implied. Leave must be sought and obtained before an appeal can be said to be competent. Further, admission of an appeal under **Order 43 rule 13** of the **Civil Procedure Rules** is a procedural and formal process to ensure that the full record is before the court. Admission of an appeal cannot amount to an implied grant of leave or a waiver of jurisdiction.

7. The issue of leave to appeal is not a mere technicality but one that goes to jurisdiction. As was held in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others*** (**Supra**)

*The question of a 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.*

8. Failure by the appellant to obtain leave is fatal to this appeal. It must now be formally put to death. The appeal is struck out the appeal with costs to the respondent and interested party. I assess costs for each party at Kshs. 12,000/-.

**DATED and DELIVERED at KISUMU this 21<sup>st</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Yogo instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Respondent in person.

Mr Madialo instructed by S. O. Madialo and Company Advocates for the respondent.