



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 304 OF 2014

HENRY KIPKIRONG 1ST APPELLANT

PYRAMID CONSTRUCTION LTD. 2ND APPELLANT

VERSUS

ROBERT CHESANG.RESPONDENT

R U L I N G

This is a ruling to a Preliminary Objection dated 22nd July, 2015. The Objection has been raised by the Respondent and the same is premised on the fact that the Memorandum of Appeal filed herein on the 17th July, 2014 is incompetent a nullity and not allowed by law and should be struck off.

The Appellants in this matter filed a Memorandum of Appeal on the 17th day of July, 2014 wherein they have listed ten (10) grounds of Appeal.

The Appeal was prompted by the ruling/order of the learned magistrate Mr. Charles Obulutsa (Ag. Chief Magistrate) in Nairobi, Chief Magistrate's Court in Civil Case Number 7984 of 2013 at Milimani.

The Respondent herein filed a plaint in the Chief Magistrate's court on the 18th day of December, 2013 against the Appellants claiming a sum of Ksh.810,000/- interest at 12% on the principal sum from the 21st July, 2010 until payment in full, plus the costs of the case.

The brief facts as pleaded in the plaint were that sometimes in February 2010 the first Appellant who is a director and shareholder of the 2nd Appellant requested the Respondent to advance him money to complete some construction works which the 2nd Appellant was undertaking in West Pokot and Eldoret.

The Respondent did not have all the money that the Appellant was requesting but the Respondent in turn approached Anjemwa general Supplies to advance the Appellant the money and in turn guaranteed the payment of the said funds.

The Appellants were advanced a total of Ksh.810,000/- which was guaranteed by the Respondent. The 1st Appellant agreed to repay back the money and drew a cheque of Ksh.810,000/- from an account of the 2nd Appellant which was payable on the 21st July, 2010 but which the 1st Appellant requested Anjemwa General Supplies not to bank.

The Appellants did not pay the said amount and since the Respondent had guaranteed to pay the money to Anjemwa General Supplies, the Respondent was forced to honour the guarantee and pay off the said amount of Ksh.810,000/- to the said Anjemwa General Supplies. The Respondent filed the present case claiming the aforesaid sum of Ksh.810,000/- plus interest.

The Appellants filed a joint defence in the lower court wherein they acknowledged having borrowed a sum of Ksh.200,000/- from the Respondent but denied that the Respondent guaranteed the Appellants any monies advanced to them by Anjemwa General Supplies if at all.

The Appellants further averred that the cheque of Ksh.810,000/- in the name of Anjemwa Supplies was never banked as the Appellants did not have any written agreement between themselves and Anjemwa Supplies. The Appellants denies that the Respondent paid a sum of Ksh.810,000/- on their behalf to Anjemwa Supplies on 30th day of April, 2014.

By a Notice of Motion dated the 13th May, 2014, the Respondent sought to strike out the Appellant's joint statement a defence dated the 28th April, 2014 and filed in court on the 30th April 2014. The Respondent also sought that he be allowed to proceed with execution of the decree in the matter before the lower court.

The Application was premised on the grounds that the defence is scandalous, frivolous or vexatious, the defence is calculated to delay the execution of the decree and that it is an abuse of the court process.

The application is supported by the Affidavit of the Respondent Robert Cheseng sworn on the 13th May, 2014 and was opposed by the Appellants vide the statement of grounds of opposition filed in court on the 6th June, 2014.

The learned magistrate heard the Application and a ruling was delivered on the 10th day of July. He granted the Application and entered judgment for the sum of Ksh.810,000/- plus costs and interest.

The Appellants were not satisfied with the ruling and have appealed to this court and have cited ten (10) Grounds of Appeal as per the Memorandum of Appeal filed in court on the 17th day of July, 2014 but as the appeal was still pending before the court, the Respondent filed a Preliminary Objection on a point of law on the 22nd July, 2014.

The basis of the objection is that the Memorandum of Appeal, herein is incompetent, a nullity and not allowed by the law and should be struck out and the Appellants condemned to pay costs of the Appeal.

On the 24th day of September, 2015, the matter came before me and parties agreed to canvass the Preliminary Objection by way of written submissions which both the parties filed on different dates.

On his part, the Respondent submitted that the Appeal herein is against an order arising out of an interlocutory proceeding in the Lower Court. The said Application was brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010. He submitted that the right of Appeal is a strong right enshrined in the Constitution as a fundamental right available to any aggrieved party. However, the Right of Appeal in Kenya is guided by statute and in particular, Civil Appeals are governed by the Civil Procedure Act and the Civil Procedure Rules. Section 65 and 75 of the Civil Procedure Act as read with Order 42 and 43 of the Civil Procedure Rules provides that a civil appeal may be taken to the High Court from a lower court either as a matter of right or by leave of the court.

The Respondent further submitted that Order 43(1) (1) states that: -

“An Appeal shall lie as of right from the following orders and rules under the provisions of Section 75(1) (b) of the Act – the Order sets out the details of the Orders from which the Appeal lies of right.”

On the other hand Order 43 Rule 2 provides that: -

“An Appeal shall lie with leave of the court from any other order made under these rules. Order 43 lists the orders which one can appeal as of right and also states that any other order not listed will require leave of the court before one files an Appeal.”

In support of his intention, the Respondent relied on the case of **Andrew Kimani Ngumba & another Vs Zakaria Muigai Gakibe**, Court of Appeal in Nairobi Civil Case number 1999/1996 where the court held that an appeal can only lie from an order in the circumstances set out in Section 75 and 76 of the Civil Procedure Act.

The Respondent also relied on the case of **Hogan Vs Adrianwalla (1965) E.A 594** where the court in deciding a Preliminary point of law struck out an appeal as not being properly or legally before the court because leave to appeal was not obtained as required by the law. The court in striking the appeal ruled that it had no jurisdiction to entertain the Appeal.

The Respondent also relied on the case of **Kenya Commercial Bank Limited Vs Tony Monase Esipeya, Civil Appeal No. 105/1988** where the issue before the court was absence or lack of leave to appeal. The Court of Appeal held that where the unsuccessful party had not right of an Appeal except with the leave, and leave was not obtained the consequence was that the Appeal was incompetent and had to be struck out.

He concluded by submitting that Section 1A, 1B, 3A are not among the orders listed under Order 43(1). One would require leave of the court to file an Appeal from a ruling arising from these orders. On the issue of the jurisdiction of the court, in the circumstances, he relied on the case of Owners of **Motor Vehicles “Lillian S” Vs Caltex Oil (Kenya) Limited 1989 (KLR)** and that of owners and masters of the **Motor Vessel “Joey” Vs Owners and Masters Tugs: “Barbara” and Steve (2008) B** and that of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others (2012) eKLR**. In the case of **Owners and Masters of the Motor Vessel (supra)** the court had this to say about jurisdiction.

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 obligated to decide the issue in the right way on the material before it. Jurisdiction is everything and 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. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done the court should hear and dispose of that issue without further ado.”

He urged the court to allow the Application and dismiss the Appeal. The Appellants on their part submitted that, they did not require leave to appeal against the ruling of the learned magistrate and the reason for this submission was that in the ruling the magistrate states ***“An Appeal is a right”*** and by virtue of that statement, they did not need to seek leave.

They further submitted that the Appeal herein was not pursuant to an interlocutory order but to a final decree and therefore, the appeal lies as a right. They relied on the case of **Kuria Ngware Vs Martha Njeri Wanjoike & 2 Others, High Court Civil Appeal No. 39 of 2012 Nakuru**, where the court expressed itself in the following terms.

“In our view, the judgment produced by Judge Maraga (as he then was) was not an interlocutory judgment. There was nothing that was left to be decided by the court latter and was, for all intents and purposes, a final decision of the court for which an appeal could proceed and has proceeded as of right.”

In reply to the submissions by the counsel for the Appellants, the Respondent distinguishes the facts in the case of **Peter Macharia Mwangi & Others Vs Martha Njeri Wanyoike & Others** with the facts,

in this case, in that in the case of **Peter Macharia** the Appeal was against a judgment and a decree of the High Court while the present case is an Appeal against a ruling by a magistrate. He cited the cases of **Gohil Vs Wamai (1983) eKLR**, **Songo Bay Estates Ltd Vs Dresder Bank Ag (1971) E.A 17**, **Harnan Singh and Company Vs Jadra Karsan (1953) 20 EACA** among others.

I have carefully considered the Preliminary Objection, and the submissions made by the learned counsels. The issue that the court has to determine is whether the Appellants needed to seek leave of the court to file the Appeal herein.

First, it must be appreciated that this court has jurisdiction to hear and determine appeals from tribunals, subordinate courts or other bodies as prescribed in Article 165 of the Constitution and other Acts of Parliament. However, a party filing an Appeal must demonstrate under what law the Appeal is filed and whether he has a right to file the same and if not, he has to demonstrate that leave has been sought and granted before the Appeal can be lodged.

The above position was espoused by the Court of Appeal in the case of **Nyutu Agrovet Ltd Vs Airtel Networks Limited (2015) eKLR** where the court held; leave to Appeal does not constitute a right to Appeal. The right must precede the leave. The Court of Appeal in the case of **Nyutu Agrovet** cited with approval the case of **Nova Chemicals Ltd Vs Alcon International Ltd HCC Misc. Application No. 1124 of 2002** where the learned Judge stated: -

“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.”

I fully agree with the counsel for the Respondent that the Right of Appeal goes to the jurisdiction as was held in the case of **Kakuta Maimai Hamisi Vs Peris Pesu Tobiko & 2 Others (2013) eKLR** that: -

“The right of Appeal goes to the jurisdiction and is so fundamental that we are unprepared to hold that in 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) of the Constitution. We do not consider Article 159(2) (d) of the Constitution to be a panacea, a general white ash, that cures and mends all ills, misdeeds and defaults of litigation.”

The Application have been brought under Sections 1A, 1B and 3A of the Civil Procedure Act, the Appellants herein required the leave of the Court to Appeal against the ruling of the learned magistrate. I am not persuaded by the argument advanced by the Counsel for the Appellant that the appeal herein is filed pursuant to a final decree.

In the premises, I allow the Preliminary Objection and dismiss the Appeal herein as the same is incompetent.

Dated, signed and delivered at Nairobi this 28th day of January, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***For The Appellant***

..... ***For The Respondent.***