

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 40 OF 2015

MOHAMMED SALIM BALALA 1ST APPELLANT

ABED OMAR ABED P/A BALALA & ABED ADVOCATES..... 2ND APPELLANT

VERSUS

TOR ALLAN SAFARIS LIMITED RESPONDENT

(An appeal from the decision of Hon. C. Mbogho (CM) delivered in Malindi on 18th August, 2015 in Malindi CMCC No. 83 of 2012 (Formerly HCCC No. 86 of 2012))

RULING

On 18.8.2015, Hon. Mbogo CM, gave directions that two applications pending before him be heard together. The applications are a notice of motion dated 18.4.2015 by the dependents seeking to have the amended plaint struck out for having been filed without leave of the court. The second application is a notice of motion dated 3.8.2015 seeking leave of the court to amend the plaint. The trial court felt that both applications could be heard and determined together.

The appellants were not satisfied with that directive and lodged this appeal. Similarly, the appellants filed a notice of motion dated 15.9.2015 seeking to stay the proceedings before the trial court. The respondents raised a preliminary objection based on the ground that the appellants ought to have obtained leave of the court under Order 43 rule (2) before filing the appeal.

Parties agreed to determine the preliminary objection by way of written submissions. In their brief submissions, counsel for the respondent maintain that the appeal is against the order of the court of 18.8.2015 allowing both applications to be heard together. That appellant ought to have obtained the leave of the court by way of an oral application immediately the direction was issued or by filing a formal application within 14 days from the date of the order. Counsels further maintain that since the appeal was filed without leave it should be struck out. This suit was formerly filed as HCCC No. 86 of 2012. It was transferred to the chief magistrate's court on 18.11.2014 for determination and became CMCC No. 83 of 2015. The dispute has not been heard and parties are still dealing with preliminaries.

The appellants maintain that they are entitled to lodge an appeal. Order 43 rule 1 gives the various situations when appeals from orders can be made. The situation not covered under Order 43 rule (1) require leave of the court under Order 43 (2). The applications before the trial court involve the amendment of pleadings. Order 43 (f) provide for amendment of pleadings as one order which does not require leave of the court.. Although the appeal is based on the order directive that two applications be heard together, the two application relate to the pleadings themselves. Even if leave is necessary, it is not prudent to strike out the appeal but direct the appellant to file a formal application and seek leave of the court. Still the court can grant leave and allow a party to appeal.

My observation is that the parties herein are engaging in quite minor issues. The appellant could have restrained himself and wait for the final ruling of the court on the two applications before lodging the appeal. The trial court felt that it would have saved judicial time if the two applications were to be heard together. On his part, the plaintiff could have opted to wait for the appellant's application for stay of

proceedings to be heard and raise the preliminary objection within the response. Even if the appeal is struck out, the appellant can still retrace his steps and be allowed to file another appeal.

The record of the trial court shows that parties had already filed written submissions and affidavits in respect of the applications. There is a consent of both counsels dated 21.10.2015 whereby parties agreed to stay the chief magistrate's case pending the hearing and determination of the appeal. This presupposes that the parties would like to dispose of the appeal first. It is therefore prudent to have the appeal heard and see its outcome instead of having it struck out.

In the end, I do find that the preliminary objection is not one that can determine the dispute once and for all. It is not merited and is hereby dismissed. Each party to meet their own costs.

Dated and delivered in Malindi this 21st day of April, 2016.

S.J. CHITEMBWE

JUDGE