



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 715 OF 2006

JOSEPHAT MUCHIRI MUIRURI.....1ST APPELLANT

MARKET POWER INTERNATIONAL LIMITED.....2ND APPELLANT

VERSUS

YUSUF ABDI ADANRESPONDENT

RULING

1. Before me for determination is the application dated 6th November 2011 by the respondent in the main appeal Yusuf Abdi Adan brought under the provisions of Sections 1A,1B and 3A of the Civil Procedure Act Order 43 Rule 2 of the Civil Procedure Rules s and Order 42 Rule 35 (2) of the Civil Procedure Rules.
2. The application seeks the following orders:-
 - a. That this appeal be dismissed and or struck out.
 - b. That the respondent does have costs of this appeal.
 - c. That the respondent have costs of this application.
 - d. That this appeal is against dismissal of a preliminary objection lodged without leave to appeal having been obtained from the court below.
 - e. This appeal, lodged on 22nd May 2007 has not set down for hearing as yet.
3. The appellants filed grounds of opposition to the application which was not supported by any affidavit. They instead filed submissions on 15th November 2011 and a declaration of non-appearance on the hearing of the application, seeking only to rely on their filed submissions. The respondent/applicant also filed written submissions on 2nd November 2011.
4. On 2nd February 2012 Honourable Onyancha J had directed that the parties urge the application orally but when they appeared before me on 16th June 2015 through their advocates on record, they agreed to rely on their filed written submissions and this court is now tasked to decide on the merits of the application.
5. In his written submissions the applicant contends that since this appeal is an offshoot of a ruling based on a preliminary objection, not by way of chamber summons or Notice of Motion, leave of court to appeal was mandatorily required but that instead, the appellants filed the appeal herein without such leave. He relied on **Civil appeal No. 105/1998 Kenya Commercial Bank Ltd v Esipeya** where the Court of Appeal held that leave to appeal is necessary. The applicant also relied on **Vasamani and Company Ltd v Lab Construction Company Ltd CA**

- 224/1996 where the Court of Appeal held that a ruling resulting from a preliminary objection is only appealable with leave under Section 75 of the Civil Procedure Act. Counsel for the applicant maintained that the record of appeal does not show that any leave to appeal was sought or obtained after the ruling and before filing of the appeal hence the appeal should be struck out with costs. The applicant made no submissions on dismissal of the appeal for want of prosecution under Order 42 Rule 35(2) of the Civil Procedure Rules.
6. The appellant's submissions dated 14th November 2011 relies on the grounds of opposition filed on 30th August 2011. They maintain that the applicant had not demonstrated that any leave was required before the filing of this appeal. In their view, Order 43 Rule 2 of the Civil Procedure Rules provides that “ ***an appeal shall lie with the leave of the court from any other order made under these Rules***”. In their view, the preliminary objection was not based on any provisions of the Civil Procedure Rules and the ruling thereof was therefore not “ ***an order made under these Rules***”. In the appellant's view, the preliminary objection was clearly based on Section 4(2) of Cap 22 which is the Limitation of Actions Act and therefore the application to strike out the appeal was misconceived as no such leave to appeal was required. They also maintained that their appeal was arguable and that the application was based on procedural technicalities to defeat an otherwise arguable appeal, which application, in their view, has no place in the present Article 159(2) of the Constitution.
 7. In the view of the appellant, the question of whether leave was or was not required is a question of procedure and a technicality which ought not to be entertained in view of the constitutional provisions.
 8. On the issue of dismissal of the appeal for want of prosecution, the appellants submitted that only the Registrar could invoke such provisions of Order 42 Rule 35 (2) of the Civil procedure Rules hence the application was misconceived and that the applicant could only invoke Order 42 Rule 35(1). They also submitted that they had compiled and filed and served a record of appeal and that no hearing date could be fixed before directions are given.
 9. The appellants urged this court to dismiss the application by the respondent on both limbs.
 10. I have carefully considered the application, grounds of opposition and submissions by both parties. The only issue for determination is whether the application has any merit on both limbs.
 11. The applicant maintains that the appeal is incompetent as it was filed without leave of court and that no steps have been taken to have the appeal disposed of.
 12. On the other hand, the appellants/respondents contend that no leave of court to appeal was required as the preliminary objection was not based on any provisions of the Civil Procedure Rules hence the ruling by the trial magistrate was not “***an order made under these Rules***” as per Order 43 Rule 2 of the Civil Procedure Rules. In addition, that directions had not been given hence the appeal cannot be dismissed for want of prosecution in accordance with Order 42 Rule 35 (2) of the Civil Procedure Rule (which they consider erroneously cited).
 13. Examining the record, vide a plaint dated 10th March 2005 and filed in court on 11th March 2005, the respondent herein Yusuf Abdi Adan sued the appellants Josephat Muchiri Muiruri and Market Power International Ltd claiming for special damages arising from alleged negligence by the appellants as a result of which their motor vehicle KAK 229N collided with his motor vehicle registration No. KAN 245R thereby damaging it. He therefore claimed for costs of repair, assessors charges, towing charges and loss of user. The cause of action allegedly arose on 29th December 2001.
 14. In their defence dated 30th June 2005, the appellants herein denied the respondent/ applicant's claim and in paragraph 6 pleaded that the suit based on tort was statute barred by virtue of Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya. They reserved the right to raise a preliminary point of law for determination and or apply to have the suit struck out.
 15. On 30th June 2006 the appellants filed Notice of Preliminary Objection seeking to have the suit struck out for being statute barred and in a ruling delivered on 19th September 2006 K.L.Kandet (Mr) Resident Magistrate, he dismissed the preliminary objection. The thrust of that ruling was that the appellants had through their insurance company-Heritage Insurance Company Limited undertaken, during out of court negotiations not to plead limitation should the negotiations fail and that the insurance company's undertaking bound the appellants insured and that the suit need not have been filed against the insurance company which was privy to the

- negotiations and made an undertaking on behalf of the owners of motor vehicle. The trial magistrate found that the appellants were estopped from pleading limitation in the suit in view of their insurers undertaking not to plead limitation and dismissed the preliminary objection.
16. It is that ruling by the learned trial magistrate that provoked this appeal filed on 18th October 2006 and amended on 11th May 2007.
17. With the above background in mind, the question for determination in the present application by the respondent is was the leave of court requisite for filing of this appeal?
18. The appellants have in my view, raised a novel point of law that the order dismissing the preliminary objection was not made under the Rules made under Civil Procedure Act, but based on Section 4(2) of the Limitation of Actions Act. That necessitates some deep examination of that provision of Order 43 Rule 2 of the Civil Procedure Rules that “ **An appeal shall lie with the leave of the court from any other order made under these Rules**”.
19. According to the appellants, the preliminary objection in the court below was not made based on any provisions of the Civil Procedure Rules or Act and that in any case, this application seeks to strike out the appeal based on procedural technicalities abhorred by Article 159(2) (d) of the Constitution.
20. First, it must be appreciated that 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 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 Limitation of Actions Act and I find no provision that confers upon the appellant the “ right of appeal” under that Act, where proceedings before the court emanate from that Act as was in this case. On the other hand, I find that the proceedings before the subordinate court, subject matter of this appeal, were and are civil proceedings governed by the Civil Procedure Act and Rules made there under. The court, in hearing the matter before court, was exercising its civil jurisdiction in determining a dispute of a civil nature and the order made on the preliminary objection was a formal expression of the decision of the court (see Section 2 of 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 appeal arises from the preliminary objection ruling made by Kandet Mr (RM). It is also not disputed 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 dismissing the preliminary objection raised by the appellants is not listed as one which is appealable as a matter of right. That being the case, leave was necessary as it is not exempt from the requirement of leave under Order 43 Rule 6 of the Civil Procedure Rules. It is my humble view that that Order was an order made under the Civil Procedure Rules and without leave, then this court is deprived of jurisdiction to hear and determine the appeal as filed. In my view, it is that leave which confers 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 do no one more thing than down its tools. **(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**, referring 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”.

27. The court further agrees with the Court of Appeal decision in the case of **Kenya Commercial Bank Ltd v Tony Manaseh Esipiya CA 105/98** whose facts are in parimateria with the instant case. In that appeal, which arose from the decision of the High Court on a preliminary objection at the trial that the plaintiff’s claim was statute barred as was pleaded in paragraph 12 of the defence, the learned Judge dismissed the preliminary objection and it is against that decision that the defendant appealed to the Court of Appeal without first seeking leave of court to appeal and arguing differently that they believed the learned Judge’s ruling gave rise to a preliminary decree from which an appeal lies to the Court of Appeal as of right. The respondent argued that without leave being sought and obtained, no right of appeal accrued to the appellant. The Learned Judges of Appeal per **Gicheru, Kwach and Shah, JAA** (as they were then) unanimously struck out the appeal holding that:

“.....the point taken in paragraph 12 of the defence was that the claim was time barred, a clear limitation point, which could have been made the subject of an application under Order 6 Rule 13 of the Civil Procedure Rules (now Order 2 Rule 15 of the Civil Procedure Rules) An order on an application under Order 6 Rule 13 is appealable as of right under Order 42 Rule 1 (now Order 43 of the Civil Procedure Rule). But 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”.

28. The Court of Appeal in the above case also cited with approval the decision of **G.R. Mandaria V Rattan Singh(1965) EA 118** where it was held inter alia:

“ where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or

resjudicata 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”.

Law JA at page 124 stated:

“ The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal will lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue, and finally disposed of at first instance, a preliminary decree arises from which an appeal lies; but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal”.

29. I have no reason whatsoever to differ with the holdings of the Learned Judges of the Superior Court of Appeal in the above cases as cited. The limitation point taken by the appellant herein as a preliminary issue failed. It matters not that the point of law was based on the Limitation of Actions Act, for that is, indeed the law that limits the period within which civil suits should be instituted with exceptions set out in the schedule and other provisions of the Act. That Act (Limitation of Actions Act Cap 22 Laws of Kenya) does not confer any right of appeal to the appellant. The appellants as the unsuccessful parties had no right to appeal except with leave. Only leave when obtained would confer jurisdiction to this court to hear and determine the merits of this appeal. No leave was either sought or granted. The appeal is therefore a non starter in limine.
30. Albeit Article 159(2) (d) of the Constitution has been invoked by the appellant 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 221 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 possesses and determination and certainly does not run a foul the substantive procedure, dichotomy of Article 159 of the Constitution.

33. I echo Nyarangi JA in the case of **Owners of Motor Vessel “ Lilian S” v Caltex Oil (K0 Ltd (1989) KLR 1** and declare that ideed-

“.....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. In this case, and in view of the foregoing, the contention by the respondent/appellant that the application was not supported by an affidavit cannot be bought by this court as the application was soundly grounded on purely points of law and did not require factual evidential depositions. Consequently, I allow the respondent's application and find the appeal herein as filed incompetent. The same is struck out and dismissed with costs to the respondent/applicant.

Dated, signed and delivered in open court at Nairobi this 23rd day of September 2015.

R.E. ABURILI

JUDGE

23/9/2015

Coram Honourable R.E. Aburili J

C.A. Adline

Mr Okao holding brief for Pramod Patel for the respondent.

Mr Wambua for appellant.

Court- Ruling read and delivered in open court as scheduled.

Ruling to be typed.

R.E. ABURILI

JUDGE

23.9.2015