



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CIVIL APPEAL NO. 110 OF 2010

ROBERT KIPROP KIPSANG.....APPELLANT

VERSUS

RICHARD KOSGEI.....RESPONDENT

RULING

The Preliminary Objection is dated the 2nd November, 2010 and has been brought and raised by Counsel for the Respondents, herein.

A brief summary of the initial suit is as follows:

On the 26th April, 2010 in CMCC NO. 207/2009 the Appellant filed a Notice of Motion under Order XLIV rule 1 and 2, Order XXI rule 10, Order III rule 9 and Order L of the Old Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law.

The application was before Honourable Nathan Shiundu and on the 14th June, 2010 the same was disallowed.

The Appellant being aggrieved with the decision of the trial court filed the appeal herein on the 22nd June, 2010 challenging the entire decision.

The Preliminary Objection is to the effect that this appellate court has no jurisdiction to entertain the appeal as no leave was sought or granted by the trial court as required under Order 42 rule (1) and (2) of the old Civil Procedure Rules (now Order 43 rule (1) and (2) of the new Civil Procedure Rules.) Nor was leave granted pursuant to Section 75 of the Civil Procedure Act (Cap 21).

Learned Counsel for the Respondent's prayer was that the appeal be struck out with costs to the Respondent.

I have perused the Notice of Motion dated the 26th April, 2010 which was brought under Order XLIV Rule 1 & 2 Order XXI Rule 10, Order III rule 9 and Order L and Section 3 and 3A of the Civil Procedure Rules and Civil Procedure Act, respectively, and all enabling provisions of the law.

I have also heard the submissions and arguments of both Counsels for the Appellant and Respondent.

I am inclined to agree with Counsel for the Respondent and I state that the said Notice of Motion can only

be described as “ECLECTIC” as it embraces many orders. Nevertheless none of the said orders fall under the ambit of Order 43(1) & (2) previously order 42(1)(2) of the old Civil Procedure Rules. Therefore leave of the trial court is a pre-requisite before any appeal can be lodged.

The Preliminary Objection raises a clear point of law on jurisdiction. The Notice of Motions heading is clear and speaks for itself.

The Preliminary Objection is therefore upheld and I find that this Honourable court has no jurisdiction to entertain the appeal.

The appeal is hereby struck out as being incompetent. Costs to the Respondent.

Dated and Delivered on this 30Th day of January 2012.

A. MSHILA
JUDGE