



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 53 of 2011

DUNCAN NYAMWAYA OGENDO.....APPELLANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

RULING

A preliminary objection on a point of law dated 27th January 2012 by the respondent states:-

- 1) The appeal is incompetent and invalid and should not be allowed to remain on record as the appellant failed to obtain leave of court to appeal under Order 43 (2) of the Civil Procedure Rules.**
- 2) This court lacks jurisdiction to hear this appeal .**

The basis of this appeal is the Ruling delivered by the lower court pursuant to the appellants Notice of Motion dated 18th March 2011. The appellant had come under the provisions of Order 22 Rule 22 and Order 51 Rule 1 and 15 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The counsel for the respondent argued that the appellant after having the said application dismissed ought to have sought the leave of the court before filing this appeal. She anchored her argument on the provisions of Order 43 (2) which clearly stipulates the Orders which one can appeal as of right and when to seek leave.

Mr. Odeny for the appellant argued that although the notice of motion had quoted Order 22 Rule 22 the prayers therein and in particular prayer 4 and 5 sought setting aside of the interlocutory judgment and leave to defend the suit which provisions does not require the leave of the court to appeal.

I have perused the lower court proceedings and nowhere does the appellant sought the leave of the court to appeal. The last remark was for the applicant to file a formal application for stay.

I am inclined to allow the preliminary objection. The provision of Order 43 of the Civil Procedure Rules does not provide for Orders emanating from Order 22 Rule 22 of the Civil Procedure Rules to be circumvented. A formal application ought to be made to the lower court for leave to appeal to the high court.

Order 43 (1) (k) provides that only Order 22 Rules 25, 57, 61 (3) and (73) one can appeal as of right.

The respondent implored this court to apply the provisions of Article 159 of the current Constitution as well as the “O”₂ Rules . The same in my opinion does not apply in such a case. The provisions of the Law are very clear. Leave ought to be obtained. This court cannot infer and presumed that the appellant had quoted a wrong provision of the law. Parties are held by their own pleadings.

I allow the preliminary objection and struck out the appeal with costs to the respondent.

Dated, signed and delivered at Kisumu this 14th day of November 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

P. J. Otieno for Odeny Advocate for the Plaintiff

Ouko Advocate for the defendant

HKC/aao