



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 232 of 2006

EURO BANK LIMITED (IN LIQUIDAITON).....PLAINTIFF

VERSUS

SHAH MUNGE & PARTNERS LTD.....DEFENDANT

R U L I N G

1. Before the Court is the Plaintiff's Notice of Motion dated 29 February 2012. It seeks orders of this Court to grant the Plaintiff leave to appeal to the Court of Appeal against the decision of Mr. Justice Kimondo of 17<sup>th</sup> February 2012 for dismissal of this suit. The Application is brought under the provisions of **Order 43 (2)** of the *Civil Procedure Rules 2010* as well as **Section 3A** of the Civil Procedure Act. The Application before Kimondo J arose out of a Notice to Show Cause why the suit should not be dismissed under **Order 17 Rule 2** of the *Civil Procedure Rules 2010*.

2. The Application currently before Court is supported by the Affidavit sworn on 29<sup>th</sup> February 2012 by Chacha Odera a partner in the firm of Oraro & Company, Advocates who are on record as representing the Plaintiff in these proceedings. The deponent detailed that the Applicant was dissatisfied and aggrieved by the decision of Kimondo J and had instructed Oraro & Company to appeal. It was noted that under the Civil Procedure Rules 2010 **Order 43 Rule 2**, an appeal to the Court of Appeal could only be with leave of the Court. Mr. Odera went on to say that in his opinion the proposed appeal raised fundamental issues touching on this Court's power to dismiss a suit for want of prosecution in cases where a hearing date was fixed less than a year prior to the dismissal but where the hearing did not proceed as the case was not confirmed at the monthly call-over. It also touched upon the general exercise of this Court's discretion as regards dismissal of suits for want of prosecution as well as the Court's role in driving litigation under the amended Civil Procedure Rules and the litigant's Constitutional right to be heard.

3. The Application is opposed and the advocates for the Defendant, Kilonzo & Company file Grounds of Opposition on 18 October 2012. Those grounds were as follows:

**“1. The Plaintiff filed a Notice of Appeal dated 20<sup>th</sup> February 2012 and filed on 23<sup>rd</sup> February 2012.**

**2. The Application herein has been filed after the fact.**

**3. The said intention to appeal to the Court of Appeal is out of time.**

**4. There is no prayer for enlargement of time to file the Notice of Appeal or at all.**

**5. The Application dated 29<sup>th</sup> February 2012 is misconceived and bad in law”.**

4. In the Applicant’s submissions filed herein on 6 November 2012, the first point it raised was that the Court should consider whether the intended appeal raises serious issues for determination on appeal. The Court was referred to the case of **Sadmidim Kurji & Another vs. Shalimar Ltd. & Others** *Civil Appeal No. Nai. 197 of 2004*, as well as **Judicial Service Commission of Enquiry into the Goldenberg Affairs & 3 Others vs. Kilach** (2003) KLR 249. The other points noted by the Applicant in response to the Respondent’s Grounds of Opposition were that a notice of appeal is required under the Rules to be filed before the expiry of 14 days from the date of the decision to be appealed from. The notice of appeal herein was filed six days after the decision had been handed down by Court, well within time. Finally, the Applicant concluded its submissions by saying that there was no merit in the grounds of opposition and the facts as contained in the Affidavit in support of the Application were uncontroverted.

5. The Defendant’s submissions in response to the Application were filed herein on 5 November 2012. Having set out the progress of the proceedings since Kimondo J delivered his Ruling on 17 February 2012, the Defendant repeated its Grounds of Opposition to the Application. Thereafter it maintained that a litigant seeking to appeal against an order whose leave of this court is required should first seek such leave then lodge its appeal. The Defendant submitted that the Application before Court was made by the Applicant after having filed the notice of appeal and without having obtained leave from the Court so to do. In this connection, I was referred to the case of **Hunker Trading Co. Ltd. vs. Elf Oil Kenya Ltd.** (2010) eKLR. The Respondent maintained that the Applicant was in contravention of the law and had failed to put itself on the “right” side of the law as contemplated in the **Hunker Trading** authority. The Court was then referred to the case of **Inderjit S. Saimbhi v Mohinder Singh Saimbhi & Another** (2010) eKLR. That was a Ruling delivered by my learned brother Makhandia J. (as he then was) and he detailed as follows:

**“The applicant filed a notice of appeal on 31<sup>st</sup> July 2009 going by the annexures in the affidavit in support of the application. The instant application was filed on 6<sup>th</sup> August, 2009 long after the notice of appeal had been filed and served. It would appear therefore that the applicant has placed the cart before the horse rendering this application superfluous. The Notice of Appeal so filed would therefore appear to be incompetent. The applicant should ideally have sought and obtained leave to file appeal first before he could contemplate filing Notice of Appeal. If I granted leave as sought by the applicant, the applicant will still have to file a fresh notice of appeal. The Notice of Appeal filed being incompetent as aforesaid, the applicant cannot be heard to say that he commenced in the appellate process and on that basis I should exercise my unfettered discretion in this favour.**

**No draft memorandum of appeal was annexed to the application. Accordingly I am not in a position to address the issue of the merits of the intended appeal if at all. See the case *J. P. Machira (supra)*. It is incumbent upon the applicant to place before court sufficient material upon which the court may be able to exercise its discretion. No such material have been placed before me”.**

The Respondent pointed out that the time granted under **Order 43 (3)** of the *Civil Procedure Rules* for the Applicants to file an appeal had long lapsed.

6. **Order 43 (2)** of the *Civil Procedure Rules 2010* provides:

**“(2) An Appeal shall lie with leave of the Court from any other order made under these Rules”.**

In my opinion that Rule would cover an Order made by the Court under Notice to Show Cause why the suit should not be dismissed under **Order 17 Rule 2** of the *Civil Procedure Rules 2010*.

**Order 43 (3)** of the *Civil Procedure Rules 2010* provides:

**“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is**

**made, or within fourteen days from the date of such order”.**

From this Court’s record, no such application for leave was made at the time Kimondo J made the Order on 17 February 2012. However this Application for leave as before Court was made on 29 February 2012 within 14 days of the date of Kimondo J’s Order and within the time prescribed by **Order 43 (3)**. Hence the Defendant’s Grounds of Opposition No. 3 fails and as a consequence No. 4 has no bearing on the matter.

7. As I understand the Defendant’s submissions herein so far as they related to the “O<sub>2</sub> principle” and the **Hunker Trading** case, it took issue with the fact that the Plaintiff had not obtained the leave of this court (or the Court of Appeal) to file a Notice of Appeal (never mind the Memorandum of Appeal itself). In not so doing the Plaintiff had put itself on the “wrong” side of the law. In the Defendant’s view, the Plaintiff’s current Application could not stand as it had taken a step, a wrong step, which this Court should not endorse by even considering the Plaintiff’s said Application. To reinforce the point, the Defendant had referred the Court to the **SAIMBHI V SAIMBHI** case and the Ruling of Makhandia J dated 25 January 2010, as quoted above.

8. Against that Ruling, the Plaintiff has referred the Court to the Court of Appeal’s decisions in **Kurji vs. Shalimar Ltd** and **the Judicial Commission of Inquiry into the Goldenberg Affair** (both supra). To my mind, the finding of the Court at pages 259-260 of the latter Report says it all:

**“But the position must be different where an appeal can only be brought with leave. Rule 74(4) deals exactly with such a situation; that rule states:**

**‘when an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal’**

**This rule clearly deals with two situations, namely:**

- (i) Where leave to appeal is necessary; or**
- (ii) Where a certificate that a point of law of general public importance is involved.**

**In either case, it is not required that before one files a notice of appeal, one must have obtained the leave or the certificate. One can file the notice of appeal and thereafter obtain the leave or the certificate as the case may be. Mr. Nowrojee did not show us any authority from this Court or from anywhere else where it has been decided that the obtaining of leave or a certificate is a condition precedent to the filing of a notice of appeal. We are not ourselves aware of any such authority and we would be surprised if there were to be one for such a decision would be clearly contrary to the plain meaning of the words in rule 74(4) of the rules. But as we shall show in a moment, we do not think that leave to appeal is required in order to appeal from an exparte order granting or refusing leave to apply for any of the prerogative orders set out in Order 53. We are satisfied that the obtaining of leave is not a condition precedent to the filing of a notice of appeal”.**

The decisions of the Court of Appeal are, of course, binding on this Court whereas the decision of Makhandia J in the **Sainbhi vs Saimbhi** case is merely persuasive.

9. The conclusion to all the above is that, I find the Plaintiff’s Application dated 29 February 2012 properly before the Court. Further and in my opinion, I think that the proposed appeal will raise fundamental issues in relation to this Court’s powers to dismiss a suit for want of prosecution for a step not taken, not only in a case where a hearing date was fixed less than a year prior to the dismissal as envisaged under **Order 17 Rule 2** but also generally. Such appeal will also be useful so far as the defining the role of the court in driving the litigation process going forward. For these reasons, I allow the Plaintiff’s Application dated 29 February 2012 and grant leave to appeal as against the Court’s Order of 17 February 2012. I also direct that the costs of this Application shall abide by the outcome of the

intended Appeal.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of December 2012.**

**J. B. HAVELOCK  
JUDGE**