



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 111 of 2009

SIMPHOROSE ODONGO LANGO.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

The applicant in the instant application was committed to civil jail in execution of a warrant of arrest and immediately filed the appeal herein simultaneously with this application. The application seeks stay of execution by way of committal of the applicant to civil jail and her release from civil jail on account of poor health. That application was granted *ex parte*. The respondent has filed a replying affidavit and a document headed “**GROUND OF OPPOSITION AND PRELIMINARY OBJECTION**”

At the *inter partes* hearing, counsel for the respondent confined his arguments to the preliminary objection to the appeal herein. The “**GROUND OF OPPOSITION AND PRELIMINARY OBJECTION**” raises six grounds but on a closer look, it raises only one point, namely, that the appeal was filed without leave of the court. Learned counsel contended that an appeal against committal to civil jail under Order XXI rule 35 does not lie

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automatically and leave ought to have been obtained before the filing of the appeal herein.

In response, learned counsel for the applicant maintained that leave was indeed obtained from Mr. Onyiego, a magistrate who, until recently served in this court. But counsel for the respondent argued that if leave was obtained, the appeal ought to have been headed to indicate that it was filed pursuant to leave of the court. Moreover, he submitted, leave ought to have been obtained from the court (read magistrate) who made the orders, namely Mr. King’ori.

I have considered the rival arguments set out above. The objection raised is certainly on a point of law as it is, if successfully argued, capable of disposing the appeal. **Mukisa Biscuits Manufacturing Company Ltd. V. West End Distributors Ltd.** (1969) E.A.696. The sole question in the objection is whether the appeal was filed without leave, granted that an appeal from a decision on Order XXI Rule 35 of the Civil Procedure Rules does not lie automatically. Where, like in the matter before me an appeal does not lie as of right under XLII rule 1 of the Civil Procedure Rule, leave ought to be obtained in terms of Rule 2. Rule 3 aforesaid provides that:

“3. Applications for leave to appeal under section 75 of the Act shall in the first instance be made to

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the court making the order sought to be appealed from either informally at the time when the order of made or within 14 days from date of such order” (Emphasis supplied)

It follows therefore that the person aggrieved by an order not covered under Order XLII rule 1 has a choice of either seeking leave informally after the order is issued or if he/she does not do so at that time must do so within 14 days from the date of the order. I have looked at the original record in C.M.C.C.No.1630/1995 and there is no dispute that the order in question was made by Mr. Kingori, Senior Principal Magistrate. It was made on 10th June, 2009. It is also not controverted that the leave to file this appeal was granted by Mr. Onyiego on 15th June, 2009. Of course it is clear from the original record that it is Mr. Onyiego who had issued the warrant of arrest but not the order in question.

There is no indication at all in the proceedings before Mr. Onyiego why the matter of leave could not be raised before the magistrate who had made the order in question. Whether or not to grant leave is a matter of judicial discretion and it is only natural that two judicial officers may consider an application for leave differently.

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From this analysis, the issues can further be narrowed to two i.e. whether Mr. Onyiego had the jurisdiction to grant leave and whether an application for leave could be made informally. Order XLII rules 3 is clear that only Mr. Kingori could deal with the application for leave to appeal, and since no explanation has been offered as to why the application was not presented to him, I find that it was irregular for Mr. Onyiego to have entertained the application. From the original record it is clear that no formal application was made. Once more, rule 3 above is emphatic that after the order is made the aggrieved party has fourteen (14) days to seek leave. It is true as submitted by counsel for the applicant that rule 3 above does not specify whether the application to be brought within fourteen (14) days is a formal or informal application. I have no hesitation in holding that any application beyond the time immediately following the making of the order, must be formal. This would appear to be the position found in Order XLI rule 4(1) and (5) of the Civil Procedure Rules where an application for stay may be made immediately the judgment is delivered but a formal one must follow.

In the result I find merit in the objection which I hereby sustain and find that the appeal is incompetent having been brought without leave. The appeal is hereby struck out with costs to the respondent. All the subsequent orders stand discharged.

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Orders accordingly.

Dated & Delivered at Nakuru this 25th day September, 2009.

W. OUKO

JUDGE