



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gikonyo & another v Wanjiru (Miscellaneous Civil Application  
E018 of 2023) [2024] KEHC 2829 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2829 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
MISCELLANEOUS CIVIL APPLICATION E018 OF 2023**

**TM MATHEKA, J**

**MARCH 11, 2024**

**BETWEEN**

**JOHN GITAHI GIKONYO ..... 1<sup>ST</sup> APPELLANT**

**ROY TRANSMOTORS LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARY WAMBUI WANJIRU ..... RESPONDENT**

**RULING**

1. Pending before Makindu Magistrates Court is MCCC 4 of 2019 – previously before Hon. J.D Karani SRM.
2. From the application before me dated 21/02/2023 brought under sections 1A, 1B, 3A *Civil Procedure Act* and Orders 42 Rule 6, 11, 51 Rule 1 *Civil Procedure Rules* there was a hearing in which the defence had for some reason not been heard. The applicant’s advocate filed an application dated 2/3/2022 seeking the re-opening of the plaintiff’s case for cross examination and testimony of the sole defence witness.
3. The application was heard, the ruling was delivered on 15/02/2023 where the application was allowed – only to the extent that the plaintiff’s case was re-opened, for cross examination of the plaintiff.
4. The court however refused the prayer for the defendant’s witness to testify for the reason that the witness’s statement was filed without leave of court and proceeded to expunge it from the record. The order allowing the re-opening of the plaintiff’s case was conditioned on the presence of counsel for the defendant/applicant being present during the reading of the ruling. In default, the application would be deemed as dismissed with costs to the plaintiff and the matter set for judgment.
5. On 15/02/2023 the ruling was delivered, counsel for the defendant/applicant was absent and the consequences took their natural course.



6. The applicant brought his application on the main ground that the date of the ruling was not taken by counsel and no notice was issued by the court. He filed this appeal on the following grounds:
1. That the learned magistrate erred in law and fact by failing to be guided by law and procedure in determining the application and issuing a ruling dated 15<sup>th</sup> February 2023 and thereby arriving at a wrong conclusion.
  2. That the learned magistrate erred in law and fact by showing open bias against the appellant and/or bias in favour of the respondent.
  3. That the learned trial magistrate erred in law and fact in denying the defendants/appellants a chance to tender evidence and defend themselves without undue regard to technicalities.
  4. That learned trial magistrate erred in law and facts by issuing a conditional ruling based on the presence of the appellants' in court during delivery of the same.
  5. That the learned trial magistrate erred in law and fact by failing to appreciate that no sufficient notice of the ruling date was communicated to the appellants' thus resulting to non-attendance to court during delivery of the ruling.
  6. That the learned trial magistrate misdirected herself and erred in law and fact by visiting the advocate's inadvertent mistake upon the appellants'.
  7. That the learned trial magistrate misdirected herself and erred in law and in fact by finding in her ruling that the appellants' application is dismissed as a result of non-attendance by the appellants' counsel during delivery of the ruling.
  8. That the learned trial magistrate erred in law and in fact by expunging the appellants' witness statement without any legal basis to do so.
  9. That the learned magistrate misdirected herself and erred in law and fact by striking out the appellants' witness statement when no such application had been made and/or no such orders had been prayed for and without giving the appellants a chance to be heard.
  10. That the learned magistrate erred in law and fact by finding that the appellants witness statement was filed without leave when no such leave was required to do so in the circumstances.
  11. That the learned magistrate erred in law and fact in finding that failure to file a list of witnesses invalidates a witness statement when there is no law in support of such a finding.
  12. That the learned magistrate erred in law and fact in finding that the appellants witness statement was sneaked into the court's record without any evidence to support the finding and contrary to the evidence on record.
  13. That the learned magistrate erred in law and fact by failing to take into account the principles set out under Article 50(1) of *the Constitution* of Kenya 2010, section 1A, 1B and 3A of the *Civil Procedure Act*, thereby reaching a wrong decision.
  14. That the learned magistrate erred in law and fact by failing to exercise the court's discretion in a fair manner under the circumstances.
  15. That the learned magistrate misdirected herself and erred in law and fact by issuing excessively unfair, harsh and oppressive conditions against the appellants without any basis in law and/or reasonable justification.



7. Counsel for the respondent filed a P.O on 22/06/2023 dated 16/06/2023. That the Notice of Motion and Memorandum of Appeal were fatally and incurably defective. That the court lacks jurisdiction to hear and determine the Notice of Motion and the intended appeal.
8. That the Memo of appeal offends the provision of section 75 of the CPA and Order 43 Rule (1)(1) and (2) of the CPR (2010) .
9. The applicant argues that the court has jurisdiction. That the learned trial court’s conditional ruling – basing the re-opening of plaintiff’s case on the presence of counsel was unsupported by any law. He cites Order 43 Rule 1(1) (b), Articles 48 and 50 (1) of the Constitution, and Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 Others (2013) e KLR where the court states;

“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 ill, misdeeds and defaults of litigation.”

Also on Joseph Otondo –v-Gedeon Kivisi & 3 others; Patrick Libanda & 4 Others (Interested Parties ([020] e KLR that orders made under order 1 are appealable – and Circuit Business System Ltd –vs- County Government of Siaya [2020] e KLR that a defence is a pleading – and where it is struck out an applicant can appeal from that order.

10. The respondent sets down the history of the case that the matter proceeded via formal proof after the defendant failed to enter appearance – that the appellant filed an application to have the proceedings set aside. The applicant did not attend court and a judgment was delivered on 27/07/2020. Another application to set aside was allowed and another hearing set down on 26/01/2022. The appellant did not attend – matter was set for judgment on 25/05/2022 – provoking the application dated 02/02/2022 – the outcome of which is the subject of this appeal.
11. Arguing the P.O, the respondent submits that the appeal is not competent before this court as it does not lie as of right as per section 75(1) (h) of CPA and Order 43 Rule 1 of CPR; that the appeal emanates from Order 18 Rule 10 on the recall and examination of witness, and order 11 on pre-trial guidelines, all of which fall out of section 75 of the CPA and Order 43 Rule 1 of CPR. In the circumstances the appeal could only be filed upon leave of court, which the applicant/appellant did not seek. He relies on Isaac Mbugua Ngirachu –v- Stephen Gichobi Kaara Embu HCCA 80/2019 on the consequences of failure to seek leave: That;

“The consequence of failure to seek leave of the court to file an appeal is explained in the Court of Appeal decision in Nyutu Agrovat –V- Airtel Networks Ltd (2015) e KLR wherein a five (5) Judge bench held that where there was no automatic right to appeal as stipulated under section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained.”

Similarly, Christopher Mbui Gitau –V- Wambui Kamau Kajiado HCCA E067/2021 where court made reference to Kakuta Maimai Hamisi V- Peris Pesi Tobiko & 2 Others [2013] e KLR the Court of Appeal observed,

“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 as 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.”

and in *Stephen Omondi Juma –V- Sprocer Awuor Rabote*, Siaya HCCA No. E007 of 2022 where the court stated as follows;

“Compliance with the pretrial requirements in civil proceedings is governed by the provisions of Order 11 of the *Civil Procedure Rules* on case management and conferences. Order 11 of the *Civil Procedure Rules* replaced the former summons for directions. The Order was and is intended to assist the High Court and the Magistrates Court and the parties to expeditiously have the dispute resolved parties are expected to file and exchange a list of and statements of their intended witnesses as well as a list of and the documents intended to be relied on at the hearing before the suit is certified as ready for trial, during the pre-trial conference ... orders made under Order 11 of the *Civil procedure Rules* are not appealable as of right hence a party aggrieved by an order granting or denying prayers under Order 11 must first seek and obtain leave from the court that made the order sought to be appealed from.”

12. It is submitted that absence of leave to appeal as explained renders not only the application dated 21/03/2022 impotent, but deprives this court the jurisdiction to hear and determine this appeal on its merits. It is trite law that jurisdiction is everything, without which a court of law acts in vain.
13. The respondent argues that the appellant does not have right of appeal from Order 11 directions as he argues that the appeal seeks to have the plaintiff recalled for cross examination under Order 18 Rule 10 and to have their witnesses testify and the statement filed after directions under order 11 – all of which fall outside section 75 of the *CPA* and Order 43 of the *CPR*. That the appellant having failed to seek leave from the trial court thus it has no jurisdiction to deal with the appeal. See *Owners of Motor Vessel Lilian s’ –v Caltex Oil(K) LTD* (1989) KLR.
14. From the foregoing, everything turns on whether this court has the jurisdiction to hear and determine the appeal. The question is whether the appellant has the right of appeal by right. The applicable law is s. 75 of the *CPA* and Order 43 of the *CPR*.
15. Section 75 of the *CPA* provides: -

An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) an order under section 64;



- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.

No appeal shall lie from any order passed in appeal under this section.

Order 43(1), (2) of the [CPR](#) provides

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—
  - (a) Order 1 (parties to suits);
  - (b) Order 2 (pleadings generally);
  - (c) Order 3 (frame and institution of suit);
  - (d) Order 4, rule 9 (return of plaint);
  - (e) Order 7, rule 12 (exclusion of counterclaim);
  - (f) Order 8 (amendment of pleadings);
  - (g) Order 10, rule 11 (setting aside judgment in default of appearance).
  - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
    - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
  - (j) Order 19 (affidavits);
  - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
  - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
  - (m) Order 24, rules 5, 6 and 7 (legal representatives);
  - (n) Order 25, rule 5 (compromise of a suit);
  - (o) Order 26, rules 1 and 5(2) (security for costs);
  - (p) Order 27, rules 3 and 10 (payment into court and tender);
  - (q) Order 28, rule 4 (orders in proceedings against the Government);
  - (r) Order 34 (interpleader);
  - (s) Order 36, rules 5, 7 and 10 (summary procedure);
  - (t) Order 39, rules 2, 4 and 6 (furnishing security);
  - (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
  - (v) Order 41, rules 1 and 4 (receivers);
  - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
  - (x) Order 45, rule 3 (application for review);



- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates); (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules
16. The Notice of Motion dated 02/03/2022 sought two prayers; the re-opening of the plaintiff's case, for recall and cross examination by the defence and; the sole defence witness be allowed to testify. Then there were the orders by the court in its decision – where the court allowed the applicant to recall the plaintiff but not to call the defence witness – question is – was this about pleadings, Order 18 rule 10 or about Order 11?
17. The applicant argues that it is about pleadings – and that Order 43 Rule (1)(1)(b) is applicable and hence the matter is appealable severally that the appellant's application dated 21/02/2023 is based on Order 42 Rule 6 and Order 10 Rule 11, Order 51 Rule 1 hence – no leave was required to file this appeal. However, this is the application before me and not the application that is being appealed from. The issue for determination is the outcome of the application that was before the subordinate court – hence this argument is not tenable.
18. The respondent argues that it is Order 18 Rule 10 of the CPR – on the recall and examination of a witness. However, a reading of that Order and Rule which states Court may recall and examine witness ...The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit. clearly indicates that this is the power donated to the court to recall the witness and to put questions to the witness.If the applicant was relying on this Order, then the issues determined out of it would not be appealable as of right. The appellant would require leave of court.
19. The application by the applicant had nothing to do with pleadings as envisaged by Order 2 CPR. He already had a defence on record but had not complied with the directions under Order 11 CPR to file and exchange witness statements. Again Order 2 is not applicable to the application that was before the subordinate court.
20. The order arising out of non-compliance with Order 11 is also not appealable as of right. Hence the applicant ought to have sought the leave of court.
21. Hence in as far as the refusal by the learned trial court to allow the applicant to testify and the expunging of his statement off the record, those two grounds are not appealable as of right and as a matter of law. I have had counsel of the authorities cited by each side and it is my view that in this one the appellant was required to seek the leave of court to bring the appeal and having failed to do so this court lacks the jurisdiction to hear and determine the appeal with respect to those grounds.
22. In the circumstances the P.O is successful. The appeal is struck out with costs to the respondent.
23. The effect of this is that the interim orders made on 3<sup>rd</sup> July 2023 have lapsed.

**DATED SIGNED AND DELIVERED, THIS 11<sup>TH</sup> DAY OF MARCH 2024,**

**MUMBUA T. MATHEKA**

**JUDGE**

CA Nelima

Musyoki Benson and Associates Advocates for the appellants

Karanja & Partners Advocates for the Respondent

