



Mucheri (Civil Appeal 11 of 2018) [2024] KEHC 3222 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 11 OF 2018
CW GITHUA, J
APRIL 3, 2024**

**IN THE MATTER OF
MICHAEL NJUGUNA MUCHERI APPELLANT**

(Being an appeal against the ruling and orders of Hon. M. Wachira (C.M) delivered on the 15th of February, 2018, at the Chief Magistrate's Court in Murang'a, Civil Suit No.28 of 2014)

JUDGMENT

1. The appellant, Michael Njuguna Mucheri, filed an appeal to this court through a Memorandum of Appeal dated 13th March 2018 seeking to set aside the ruling delivered by the lower court on 15th February 2018 dismissing his application dated 2nd February 2017 and all consequential orders.
2. In his Memorandum of Appeal, the appellant raised three grounds in which faulted the learned trial magistrate for not appreciating that the issue which was before her was not whether costs were payable but rather the amount payable. He also blamed the learned trial magistrate for failing to establish the issues raised by the appellant about the costs in question and his submissions in support of the application.
3. The appeal was prosecuted by way of written submissions following directions given by the court on 20th July 2022. The appellant's submissions were filed on 15th March 2023 by Ms. R.M Kimani & Co. Advocates while those of the respondent were filed on 20th of March, 2023 by the firm of Kirubi, Mwangi Ben & Co. Advocates.
4. In the submissions filed on his behalf, the appellant contended that the learned trial magistrate erred by not considering the prayers in his application dated 2nd February 2017 which sought stay of the notice to show cause issued against him and setting aside of the certificate of costs dated 9th August 2016.
5. The appellant submitted that the learned trial magistrate failed to appreciate that there was no judgement that was capable of being executed as the judgement that had been entered against the respondent earlier had been set aside and the appellant thereafter withdrew the suit filed against the respondent.



6. It was the appellant's further submissions that the certificate of costs was irregularly issued to the respondent on the basis of just a letter and that the respondent purported to execute the certificate of costs before first having a judgement entered on the impugned certificate of costs.
7. On his part, the respondent in his submissions gave a detailed background of the proceedings before the trial court which culminated into filing of the present appeal. Besides supporting the trial court's decision, the respondent submitted that the appeal was misconceived and lacked merit in that it challenged the ruling and orders issued by the trial court in an application filed under Order 22 of the *Civil Procedure Rules* (CPR) from which there was no automatic right of appeal. He averred that no leave was sought or granted by the trial court before the appeal was filed and the appeal was therefore incompetent.
8. I have carefully considered the memorandum of appeal together with the parties rival written submissions as well as the record of appeal. Before addressing the merits or otherwise of the appeal, I wish to first deal with the preliminary point raised by the respondent concerning competence of the appeal since it goes to the jurisdiction of this court and if it was successful, it would determine the appeal without having to consider its merits or otherwise.
9. My perusal of the court record reveals that the respondent initially raised this issue in his replying affidavit filed in response to the appellants Notice of Motion dated 8th May 2018 though the same was never canvassed as the application was compromised by the parties. The appellant though obviously aware of this contention by the respondent having been served with the replying affidavit did not address it in the submissions subsequently filed in prosecution of the appeal nor did he seek leave to file supplementary submissions to respond to the issue after it was raised for the second time in the respondents written submissions.
10. That said, I have looked at the Notice of Motion dated 2nd February 2017 which gave rise to the orders impugned in this appeal. I confirm that indeed the application was filed under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Section 51 of the *Advocates Act* and Orders 22 Rule 22(1) and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.
11. Section 75 (1) of the *Civil Procedure Act* as read together with Order 43 Rule (1) of the *Civil Procedure Rules* expressly provides for the orders from which appeals lie as a matter of right and those from which appeals would lie only with leave of the court making the order sought to be challenged on appeal or the court to which the appeal would lie if leave was granted.
12. A careful scrutiny of the above provisions of the law leaves no doubt that the orders subject matter of the instant appeal were not among the orders listed either under Section 75 (1) of the *Civil Procedure Act* or Order 43 Rule (1) of the *Civil Procedure Rules* from which appeals automatically lie to the High Court as of right. It follows therefore that the appellant was required to seek and obtain leave from the trial court or this court before filing the appeal.
13. I have gone through the entire court record and I have not come across any evidence to show that the appellant ever sought and obtained leave to appeal before filing the appeal. I therefore agree with the respondent that the appeal was irregularly filed without leave of the court.
14. Having found as I have above, the question that now begs an answer is this: What is the consequence of filing an appeal against orders from which appeals do not lie as of right without leave of the court ?



15. To answer this question, I will do no more than to rely entirely on the decision of the Court of Appeal in *Peter Nyaga Muvake v Joseph Mutunga* (2015) eKLR where the court expressed itself as follows;

“As to whether the appeal is competent, there is no contest that the appeal arises from the decision of Mabeya J made under Order 42 Rule 6 of the Civil Procedure Rules. Section 75 of the *Civil Procedure Act*, Cap 21, stipulates the thematic orders from which appeals lie as of right. Appeals from other orders lie only with the leave of the court. An order made under Order 42 Rule 6 is not exempt from the requirement of leave. It does not lie as of right. In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 42 of the *Civil Procedure Rules*, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.”

16. In view of the foregoing, it is clear that filing an appeal without first obtaining leave to appeal when such leave was required made the appeal incompetent as it meant that the appellate court’s jurisdiction to entertain the appeal was not properly invoked. But having said that, can it be argued that the requirement to obtain leave was a procedural technicality which could be cured under Article 159 of *the Constitution* ?

17. As stated earlier, the right to appeal was not a procedural issue as it went to the appellate court’s jurisdiction and cannot be equated to a procedural technicality. This position was emphasized by the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR when it stated thus:

“The question of a right to appeal goes to jurisdiction and is so fundamental 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) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.Having already found that jurisdiction stands on a higher, firmer and more preemptory position than procedural rules, we can only re-iterate that it goes to the very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance - procedure dichotomy of Article 159 of *the Constitution*.

18. Given that the appellant did not seek or obtain leave to appeal before filing the present appeal, I find that the appeal is incompetent and this court lacks jurisdiction to determine the same. In the premises, the appeal is hereby struck out with costs to the respondent.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 3RD DAY OF APRIL 2024



In the presence of :

Ms. Kimani for the Appellant

Mr. Mwangi Ben for the respondent

Ms. Susan Waiganjo, Court Assistant

