



REPUBLIC OF KENYA



**Nzangi & another v Mwikali (Civil Appeal E178 of 2022)
[2024] KEHC 7048 (KLR) (Civ) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E178 OF 2022

CW MEOLI, J

JUNE 13, 2024

BETWEEN

SIMON NZANGI 1ST APPELLANT

SAMUEL ALEXANDER MUSYOKI MWIKALI 2ND APPELLANT

AND

FELISTUS KIMANZI MWIKALI RESPONDENT

RULING

1. Simon Nzangi and Samuel Alexander Musyoki Mwikali (hereafter the 1st and 2nd Applicants) filed the present appeal on 24.03.2022 from the ruling delivered on 7.03.2022 in Milimani Cmcc No. 2886 of 2019, pursuant to leave purportedly granted by the lower court, for the lodging of the appeal.
2. Subsequently, the Applicants filed the Notice of Motion dated 24.03.2022 (the Motion) seeking inter alia, an order granting them leave to file an appeal against the aforesaid ruling; stay of proceedings before the lower court pending the hearing and determination of the appeal; and an order setting aside the lower court proceedings of 7.03.2022.
3. Soon thereafter, Felistus Kimanzi Mwikali (hereafter the Respondent) filed the notice of preliminary objection dated 1.08.2023 challenging the competency of the appeal before this court, on the grounds that:

The appeal is bad in law and fatally defective having been filed without leave as required by law. (sic)

4. In resisting the preliminary objection, the Appellants put in a replying affidavit sworn by their advocate, Dave Khamala on 29.09.2023 averring that the preliminary objection is misconceived. The advocate also averred that several attempts had been made at extracting the order made by the lower



court on 7.03.2022, to no avail. That when the parties attended court on 19.07.2023, the Respondent's counsel informed the court that upon perusing the lower court record, he discovered that no such order for leave to appeal was ever made by the lower court and that consequently, the parties were directed to file affidavits containing proof of the order granting leave to appeal. That in the circumstances, it would have been more prudent for the Respondent to file an affidavit. For those reasons, the advocate urged the court to dismiss the preliminary objection, with costs.

5. The preliminary objection was heard by way of oral arguments and additional written submissions by the Respondent. Whilst supporting the preliminary objection, counsel for the Respondent, contended that the appeal was filed without leave of the court and yet the Applicants purported that leave was granted. That, consequently, this court lacks jurisdiction to entertain the incompetent appeal. Reliance was placed on the renowned case of *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR where the Court of Appeal held that an appeal which has been filed without leave of the court is incompetent and ought to be struck out on that basis.
6. Counsel further contended that in the present instance, the order sought to be appealed from was made by the trial court at the trial, declining to grant an application for adjournment made by the Applicants' counsel. That consequently, the Applicants required leave of the court prior to lodging the appeal. Counsel therefore urged this court to strike out the present appeal.
7. Counsel for the Respondent also filed written submissions, which were anchored on the decisions in *Stephen Omondi Juma v Sprocer Awuor Rabote* [2022] eKLR and *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara* [2021] eKLR regarding instances where an appeal lies as of right and where a party ought to first seek and obtain leave before filing an appeal. Counsel proceeded to submit that in view of the fact that the Applicants herein failed to obtain prior leave to appeal, the present appeal stands incompetent, and the court therefore lacks jurisdiction to entertain it. On those grounds, the court was urged to dismiss the appeal with costs.
8. Counsel for the Applicants relied on the contents of his sworn replying affidavit to argue that the preliminary objection is not well founded and further arguing that the Respondent has not filed a response to the Motion.
9. The court has considered the notice of preliminary objection, the reply thereto, the written and oral arguments before it as outlined above. The preliminary objection is predicated on the key issue of jurisdiction of this court to entertain the Applicants' appeal.
10. As to what constitutes a preliminary objection, the court in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 analyzed the said definition in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”



12. The legal principle is that jurisdiction is everything and that without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.



We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

13. The record shows that when the parties attended court on 26.05.2022 the Applicants were directed to file a further affidavit containing a certified copy of the order (purportedly) made by the lower court on 7.03.2022, granting them leave to file the appeal. When the parties returned before the court on 20.07.2022 it was noted that the relevant order had not been obtained. Consequently, the court ordered the Executive Officer (E.O.)-Milimani Commercial Courts, to expedite the extraction of the said order. The record shows that the Applicants wrote a letter dated 31.08.2022 addressed to the E.O. to that effect which letter the court directed the Deputy Registrar to follow up on, vide the order made on 18.10.2022. When the parties subsequently attended court on 18.07.2023 counsel for the Respondent insisted that no order for leave to appeal was ever obtained, while the Applicants’ counsel took a contrary position.
14. In the premises, the court directed the parties to file further affidavits on the subject, within 14 days therefrom. It is apparent from the record that no such affidavits were filed by either party. Instead, the Respondent moved the court by way of the preliminary objection which is now the subject of this ruling.
15. Upon perusal of the record, it is apparent that no certified copy of the impugned ruling was availed before the court, to enable it to ascertain the true position whether leave was granted to the Applicants to file an appeal against the impugned ruling. Be that as it may, it is trite law that the right of appeal is conferred by statute. This position was echoed by the Court of Appeal in the oft cited case of *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR when it held thus:

“It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law, then that court has no business to entertain the matter (see *Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd* [1989] KLR 1. This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not constitute the right to appeal. The right must precede leave.”

16. It therefore follows that where a right of appeal does not lie as of right, a party can invoke the provisions of Section 75 of the *Civil Procedure Act (CPA)* and Order 43 of the *Civil Procedure Rules (CPR)*, to seek and obtain leave to appeal. Section 75(1) of the *CPA* spells out the various instances in which a party can lodge an appeal as of right, as follows:

“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.
- (2) No appeal shall lie from any order passed in appeal under this section.”

17. Order 43 of the *CPR* fleshes out the provisions of Section 75(1) (h) above, by stating the following:

- (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.
 - (3) 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.”

18. Reviewing the material on record, it is not in dispute that the ruling which is the subject of the present appeal arose from the lower court’s decision dismissing the Applicants’ advocate’s application for adjournment when the matter was scheduled for defence hearing. Upon consideration of the above-cited provisions of the *CPR*, it is evident that an appeal from an order made under Order 17 of the *CPR* which provides for the prosecution of suits, does not lie as of right. Judging from the Applicants’ material on record, the subject order or ruling of the lower court was given in the circumstances envisaged in Order 17 Rule 4 of the *CPR*, which states that the Court may proceed to decide the suit notwithstanding the failure by any party to produce his evidence. Consequently, the Applicants were required to first obtain leave prior to filing their present appeal.
19. The memorandum of appeal on record purports that it was filed pursuant to leave granted by the lower court on 7.03.2022. However, as earlier observed, the Applicants have despite being given time failed to tender a certified copy of the alleged order of the lower court or the lower court proceedings by which they were granted leave to appeal. Interestingly, one of the prayers in the Motion before this court, seeks leave to file an appeal against the ruling of the lower court. Raising doubt whether any prior leave had been sought and obtained as earlier purported by the Applicants. Moreover, under Order 43 Rule 3 of the *CPR*, where an appeal does not lie as of right, the application for leave ought in the first instance to be made to the court making the order sought to be appealed from.
20. In the circumstances, the appeal before the court is on all accounts incompetent. The notice of preliminary objection dated 1.08.2023 is upheld and consequently, the Applicants’ memorandum of appeal filed on 24.03.2022 is hereby struck out, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Kalair

For the Respondent: Ms. Muthiani



C/A: Erick

