



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 41 OF 2019

STEVEN OUKO OROKA.....APPELLANT/APPLICANT

VERSUS

STANLEY SHIUNDU AMUKATA.....RESPONDENT

RULING

Pursuant to the Preliminary Objection dated 1st November 2019, the Respondent sought for the striking out of this appeal alleging that it is outrightly defective for being in violation of Section 75(1)(h) of the Civil Procedure Act as read with Order 43 Rule 1(1),(2)(3) of the Civil Procedure Rules. The respondent's main contention was that no leave was sought and/or granted the appeal having emanated from ruling of the subordinate court made pursuant to sections 1A,1B & 3A of the Civil Procedure Act.

A perusal of the record indicates that parties herein entered a consent on settlement of the claim in the subordinate court dated 28th June 2019 in the following terms; -

1. The appellant to pay the Plaintiff the sum of Kshs 1,450,000/= in exchange for land parcel Kisumu/Manyatta "A"/2704 as follows
 - a. Kshs. 1,300,000/= to be paid on or before expiry of 90 days from today
 - b. The balance of Kshs 150,000/= to be paid on or before expiry of 90 days from today
2. In default of payment in one (1) above an order for eviction of the appellant from the Plaintiff's land parcel Kisumu/Manyatta "A"/2704 be executed by the O.C.S Kondele Police Station.

For one reason or the other the Appellant failed to abide by the terms of the consent and the Respondent moved to evict him from the suit property.

The Appellant however alleged that the consent was entered by his Advocate without his authority and knowledge and sought to have the same varied and or set aside vide an application dated 6/9/2019, which application was dismissed.

Aggrieved by the subordinate court's decision the Appellant lodged the appeal herein and thereafter filed an application dated 25/11/2019 seeking leave to appeal. This court vide a ruling delivered on 6th January 2020 dismissed the application citing inordinate delay on the part of the Applicant in filing the same. On the back of this dismissal counsel for the Respondent sought and was granted directions to canvass the Preliminary Objection herein on the 24th of March 2021.

In the submissions filed on 18th November 2019 counsel for the Respondent contended that a ruling made pursuant to section 1A & 1B of the Civil Procedure Act was only appealable after grant of leave as provided by Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.

Counsel further argued that this court lacked jurisdiction and where a court lacks jurisdiction then it should down its tools. He relied on the case of **Motor Vessel M.V. Lillians vs Caltex Oil (Kenya) Limited (1989) LLR 1653.**

To further buttress the importance of grant of leave counsel cited the case of **Edith Wairimu Njoroge vs Brooks Holdings Co. Ltd** where the court while referring to the Court of Appeal case of **Peter Nyaga Murake vs Joseph Mutunga** stated that:-

"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 43 of the Civil Procedure Rules, the procurement of leave to appeal is 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 the intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water”.

On the strength of the abovementioned authorities counsel contended that the appeal herein was incompetent and implored this court to allow the Preliminary Objection and strike out the appeal. The Appellant on his part did not file submissions in opposition to the Preliminary Objection. From the onset it is important to note that the Appellant/Applicant was denied leave to file this appeal vide the ruling delivered on 6th January 2020. The question that then arises is whether this appeal may still subsist in the absence of leave. Counsel for the respondent argued that without leave this court lacked jurisdiction and went ahead to quote the case of **Edith Wairimu Njoroge vs Brooks Holdings Co. Ltd.**

It is trite law that a court must have jurisdiction before it proceeds with any matter as was rightfully held in the M.V Lillian case. It is also trite law that the absence of leave where leave is required renders an appeal incompetent. This was the holding of the Court of Appeal in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR** where the court had this to say on a similar issue.

“The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie”.

As per the ruling delivered on 6th January 2020 it is clear that the Appellant/Applicant failed to show convince the court that he was worthy of leave.

The court having denied the appellant leave to appeal, then its hands are tied and it clearly has no jurisdiction to handle this appeal. To buttress this point the holding in the case of **Civil Appeal No. (Nairobi) 86 of 2015 Peter Nyaga Murake vs. Joseph Mutunga**, as highlighted in the case of **Edith Wairimu Njoroge vs Brooks Holdings Co. Ltd.** Would suffice.

The court stated as follows:

“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”.

In view of the foregoing, the Preliminary Objection is upheld and the appeal is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE