



**Equity Bank Limited v Wafukho & another (Civil Appeal E284 of 2022)
[2024] KEHC 11927 (KLR) (Civ) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11927 (KLR)

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

CIVIL

CIVIL APPEAL E284 OF 2022

TW OUYA, J

SEPTEMBER 24, 2024

BETWEEN

EQUITY BANK LIMITED APPELLANT

AND

LILIAN NABWIRE WAFUKHO 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal against the ruling and order of Honourable M. Murage,
SRM delivered on 7.04.2022 in Milimani CMCC No. 8228 of 2016)*

JUDGMENT

Background

1. This appeal emanates from the ruling delivered on 7.04.2022 in Milimani CMCC No. 8228 of 2016 (the suit). The background facts leading up to the said ruling are that Lilian Nabwire Wafukho (hereafter the 1st Respondent) filed the suit in the lower court against Equity Bank Limited (hereafter the Appellant) and The Hon. Attorney General by way of the plaint dated 30.11.2016 seeking general, exemplary and special damages arising from a claim in the nature of malicious prosecution and defamation.
2. The Appellant upon entering appearance, filed a statement of defence on 18.01.2017 denying the key averments in the plaint and liability. Thereafter, the Appellant proceeded to file its witness statement coupled with its list and bundle of documents on 26.04.2021. However, the aforementioned documents were expunged from the lower court record by the learned trial magistrate on 15.06.2021, for having been filed out of time and without leave of the court.



3. The above turn of events prompted the Appellant to file the Notice of Motion dated 5.10.2021 (the application) seeking various orders; namely an order for review and/or setting aside of the abovementioned order made on 15.06.2021, an order extending the timelines to enable the Appellant file its requisite documents, and an alternative order deeming the requisite documents to be properly on record as filed. The application was opposed by the 1st Respondent.

The Appeal

4. Upon hearing the parties thereon, the trial court dismissed the said application with costs, vide the ruling delivered on 7.04.2022, thus provoking the instant appeal which was brought through the memorandum of appeal dated 5.05.2022 based on the following grounds:
 - i. That the Honourable Learned Magistrate erred in law by failing to consider the provisions of Article 159 of *the Constitution* of Kenya by placing emphasis on procedural technicalities instead of substantive justice by declining to give a chance to the Appellant to be heard on their defence leading to a miscarriage of justice by expunging the Appellant's filed witness statement.
 - ii. That Honourable Learned Magistrate erred in law and in fact by dismissing the Appellant's application seeking to set aside order expunging the witness statements filed by the Appellant despite the fundamental constitutional right to a fair hearing.
 - iii. That Honourable Learned Magistrate erred in law and in fact in dismissing the Appellant's application seeking to set aside order expunging the witness statements filed by the Appellant when the Second Respondent acknowledged being served and did not oppose the Appellant's application before the subordinate court.
 - iv. That the Honourable Learned Magistrate erred in law and in fact by dismissing the Appellant's application seeking to set aside order expunging the witness statements despite the fact that the first respondent had been duly served with the witness statements before hearing of the suit.
 - v. That the Honourable Learned Magistrate erred in law and in fact by dismissing the Appellant's application seeking to set aside order expunging the witness statements filed by the Appellant by failing to consider the Appellant's averments in the supporting affidavit and submissions.
 - vi. That the Honourable Learned Magistrate erred in law and in fact by dismissing the application despite the Appellant's uncontroverted evidence as per the Appellant's filed witness statements and list of documents imputing blame on the Plaintiff.
 - vii. That the Learned Trial Magistrate erred in law and in fact in her ruling by failing to totally appreciate the gravity of the issue raised by the Appellant and the submissions filed by the Appellant.
 - viii. That the decision of the Learned Trial Magistrate is against settled principles of the law.
5. The Appellant consequently seeks the following orders:
 - i. That the appeal be allowed.
 - ii. That this Honourable Court be pleased to set aside the Ruling of the subordinate court and order dismissing the application seeking to set aside order expunging the witness statements filed by the Appellant.
 - iii. That this Honourable Court be pleased to set aside the Ruling of the subordinate court and order expunging the Appellant's witness statements.



- iv. That alternatively to prayer II above, this Honourable Court be pleased to review the order expunging the Appellant's filed witness statements as proper on record.
- v. That the 1st Respondent do pay the costs of the appeal and the costs of the subordinate court.
- vi. That such further relief as may appear just to this Honourable Court.

Submissions on the Appeal

6. Directions were given for the appeal to be canvassed by way of written submissions. The Appellant's counsel anchored his submissions on the decision in *Martha Wangari Karua v IEBC Nyeri Civil Appeal No 1 of 2017* where the Court of Appeal held as follows:

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”

7. Counsel further cites the decisions in *Shailesh Patel t/a Energy Company of Africa v Kessels Engineering Works Pvt. Limited & 2 others* [2014] KEHC 3551 (KLR) and *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission, Ismael Hashimi, Mathew Kipeme Lempurkel* [2013] KECA 282 (KLR) on the right to a fair hearing. Counsel proceeded to argue that in the present instance, the trial court failed to consider the impact of expunging the Appellant's witness statements and documents; namely, that its right to a fair hearing stands to be impeded coupled with the fact that the 1st Respondent's case would stand uncontroverted. Counsel equally faulted the trial court for not taking into account the views of the 2nd Respondent, specifically its non-objection to the orders sought in the application. That in addition, the trial court did not consider the reasons given for the delay in filing the requisite documents within the stipulated timelines. On those grounds, counsel for the Appellant urged the court to allow the appeal and upon doing so, to set aside the impugned ruling accordingly.
- ix. The 1st Respondent on her part naturally defended the decision by the trial court. Her counsel first and foremost challenged this court's jurisdiction to entertain the present appeal, by dint of Section 75 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya (CPA) as read with Order 43(2) of the Civil Procedure Rules, 2010 (CPR) which sets out instances in which an appeal lies as of right. That the instant appeal does not lie as of right and hence the Appellant was obligated to first seek and obtain leave of the High Court before lodging it, but did not.
- x. Regarding the merits of the appeal, counsel for the 1st Respondent referenced Order 7, Rule 5 of the CPR which expresses thus:

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- a. an affidavit under Order 4 rule 1(2) where there is a counterclaim;
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses except expert witnesses; and
- (d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.



8. It is counsel's contention that the trial court acted correctly by expunging the Appellant's witness statements and documents, since no leave had been sought and/or granted to enable their filing out of time. That such documents were therefore improperly on record. It is equally the contention by the 1st Respondent's counsel that in any event, the principle on extension of time to enable the performance of any legal act does not constitute an automatic right; rather, it lies purely with the discretion of the court, which discretion ought to be exercised judiciously. Reference was made to the case of Mombasa County Government v Kenya Ferry Services & 2 others [2019] KESC 50 (KLR) where the Supreme Court reiterated the above principle. Lastly, counsel rebuts the claims that the Appellant's right to a fair hearing were violated by way of the impugned ruling, whilst maintaining that no leave was sought and/or granted by the Appellant, prior to filing its relevant documents. It is on the premise of the above reasons that this court was urged to dismiss the appeal with costs to the 1st Respondent.
9. The 2nd Respondent notably did not participate in the appeal. At the time of writing this decision, no submissions had been availed on its behalf, for this court's consideration.
10. Be that as it may, I have perused and considered the original record, the record of appeal and considered the material canvassed in respect of the appeal. Before delving into the merits thereof, however, I observed that the 1st Respondent raised a pertinent issue in her submissions regarding competency of the appeal and this court's jurisdiction to entertain it. I therefore deem it necessary to first address this preliminary issue.
11. As earlier mentioned, the 1st Respondent has taken the view that this court lacks jurisdiction to hear and determine the appeal for want of leave and/or the automatic right of appeal, by dint of Section 75 of the CPA as read together with Order 43 of the CPR.
10. The legal principle is that jurisdiction is everything and 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.”

12. 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.”

13. It therefore follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of Section 75 (supra) and Order 43 (supra), in order to seek and obtain leave to appeal.



14. Section 75(1) (supra) sets out the various instances under which a party can lodge an appeal as of right, which are the following:

“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.”

15. Order 43 (supra) echoes the above proviso, by setting out the following:

“1.

- (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 applications 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.”

16. Upon my perusal of the material on record, it is not in dispute that the ruling which is the subject of the present appeal concerns itself with the decision by the trial court declining to set aside its earlier order where it expunged the Appellant’s witness statements and list/bundle of documents for having been filed out of time and without leave, by dint of Order 11 of the CPR which provides for case



management and pre-trial conferences, as well as pre-trial directions previously given by the trial court. Upon consideration of the above-cited provisions of law collectively, it is apparent that the nature of the present appeal does not fall within the category of matters from which an appeal lies as of right; consequently, the Appellant was required by law to first seek and obtain leave prior to filing the instant appeal.

17. From a study of the record, there is nothing to indicate that the Appellant first sought and obtained leave of the court prior to filing its appeal, or at all. In view of all the foregoing circumstances, especially the fact that the said appeal does not lie as of right, I am inclined to find it incompetent before this court. I therefore down my tools and will therefore not proceed with the merits thereof.

Determination

18. The upshot therefore is that the Appellant's memorandum of appeal dated May 5, 2022 is hereby struck out for being incompetent and for want of jurisdiction, with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF SEPTEMBER, 2024

HON. T. W. Ouya

JUDGE

For Appellant Daniel Mugun

For 1st Respondent Gitau

Court Assistant Martin Korir

