



**Ndung'u v Karanja & another (Civil Appeal 75 of 2023)  
[2024] KEHC 11824 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11824 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 75 OF 2023  
TW OUYA, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**LAWRENCE KARONG'E NDUNG'U ..... APPELLANT**

**AND**

**JUSTIN NG'ANG'A KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**SIMON NJOROGE NGUGI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. At the onset, Lawrence Karong'e Ndung'u (hereafter the Appellant) filed the memorandum of appeal in the present appeal on 7<sup>th</sup> March, 2022 against the ruling and order made by Hon. R. Otieno on 8<sup>th</sup> February, 2022 in Thika CMCC No. 178 of 2021, wherein the learned trial magistrate dismissed the Appellant's ex parte Originating Summons dated 5<sup>th</sup> May, 2021 (the Originating Summons) which sought leave to file a suit in the nature of a material damage claim, out of time.
2. It is apparent from the record that Justin Ng'ang'a Karanja and Simon Njoroge Ngugi (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) did not participate in the suit or the appeal hence the appeal was intended to proceed ex parte. It is equally apparent from the record that when the Appellant's counsel, Miss Simiyu, initially appeared before this court on 6<sup>th</sup> June, 2024 she confirmed that the Appellant's submissions had been filed and that she would be relying entirely on them. The matter was slated for judgment. Nonetheless, when the matter came up before this court on 11<sup>th</sup> July, 2024 it was noted that no formal application for leave to appeal out of time had been filed. Later on 16<sup>th</sup> July, 2024 Miss Simiyu made mention that she had not filed a formal application seeking leave to file the appeal out of time. The record shows that when the abovementioned advocate subsequently appeared before this court on 29<sup>th</sup> July, 2024 she stated that she had filed written submissions on the appeal.
3. I have considered the material on record. It is apparent therefrom that written submissions have since been filed in the appeal, with the appeal awaiting judgment. However, before I delve into the merits of



the appeal, it is equally apparent that during the course of the appeal proceedings, this court became aware of the absence of any formal application seeking an order for leave to file the appeal, as confirmed by the Appellant's counsel. There is likewise nothing on the record to indicate that leave was granted to the Appellant, for filing of the appeal.

4. The above position therefore raises a pertinent issue being whether the present appeal is properly before this court, which would answer the question whether this court has jurisdiction to entertain the Appellant's appeal.
5. 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.”

...

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.”

6. In the present instance, while it may be apparent that the appeal was filed within the statutory timelines for lodging appeals against the decisions of subordinate courts, the question remains whether the appeal lies as of right or whether leave ought to have been sought and granted prior to filing thereof.
7. 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.”

8. It therefore follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of Section 75 of the *Civil Procedure Act* (CPA) and Order 43 of the Civil Procedure Rules (CPR), in order to seek and obtain leave to appeal.

9. Section 75(1) of the CPA 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.”

10. Order 43 of the CPR 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 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.”

11. Upon my study and consideration of the material on record, it is not in dispute; as earlier mentioned; that the ruling which is the subject of the present appeal arose from the lower court’s decision to dismiss the Originating Summons which sought leave of the trial court, to file a material damage claim out of time.



12. Upon consideration of the above-cited provisions of law, 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 formally seek and obtain leave prior to filing his appeal.
13. From a study of the record, no such application has so far been filed by or on behalf of the Appellant, for this court's consideration. Moreover, the Appellant has not availed any credible material before this court, to demonstrate that he sought and obtained leave of the court prior to filing the present appeal. 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 and improperly before this court.
14. Accordingly, the Appellant's memorandum of appeal filed on 7<sup>th</sup> March, 2022 is hereby struck out, with no order on costs.

ROA 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>rd</sup> DAY OF SEPTEMBER, 2024**

**HON. T. W. OUYA**

**JUDGE**

For Appellant Miss Simiyu

For Respondent No Appearance

Court Assistant Martin Korir

