



**Emirates Sky Cargo v Paragon Electronics Limited (Miscellaneous Civil Application E596 of 2022) [2024] KEHC 12901 (KLR) (Civ) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12901 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E596 OF 2022**

**JN NJAGI, J**

**OCTOBER 23, 2024**

**BETWEEN**

**EMIRATES SKY CARGO ..... APPLICANT**

**AND**

**PARAGON ELECTRONICS LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant approached this court vide a Notice of Motion Application dated October 4, 2022 seeking leave to appeal the ruling of Hon. Ms. W. Murage delivered on 4<sup>th</sup> February 2022 in Nairobi CMCC No. 995 of 2011. The applicant was also seeking for stay of execution and stay of proceedings pending the hearing and determination of the intended appeal.
2. The Respondent responded to the application by filing a Notice of Preliminary Objection dated 17<sup>th</sup> November 2022 which is based on the ground that this court does not have jurisdiction to determine the application for it is filed way out of time and that leave to appeal the ruling ought to have been made at the first instance before the court that delivered the ruling.
3. The application dated 4<sup>th</sup> October 2022 was premised on grounds on the face thereof and supported by the affidavit of the advocate for the applicant, Mohamed Munir Chaudhri wherein counsel deposed that on the day the ruling was delivered on 4<sup>th</sup> February 2022 they were unable to access the online court platform due to technical hiccups. That thereafter they have been trying to get a copy of the ruling without success. That the applicant became aware of the text of the ruling when they were served with a court order dated 11/5/2022 and a decree dated 7/5/2022 which documents were served on their advocates on 1/9/2022 via email but were not received until 26/9/2022 as the advocate's email had lagged. That that is the time the applicant became aware of the reasons behind the ruling and filed the instant application.



4. The Preliminary Objection was disposed of by way of written submissions of counsels appearing for the parties.

#### **Respondent's Submissions on the P.O.**

5. The respondent submitted that the applicant did not have an automatic right of appeal against the order of 4/2/2022 as it is not an order under the provisions of Order 43(1) in respect of which appeals would lie as a matter of right but was an order under the provisions of Order 43 rule (2) that requires an application for leave to appeal be made to the court that made the order. That leave to appeal has not been obtained from the trial court. Therefore, that this court does not have the jurisdiction to grant the orders sought as it is the court that made the order that has jurisdiction to do so.
6. In support of the above proposition, the respondent relied on the case of Serephen Nyasani Menge v Rispah Onsase (2018) eKLR where Mutungi J. held that:
  11. In the instant matter the Notice of Motion dated 18<sup>th</sup> December 2015 pursuant to which the learned magistrate granted the orders of the same date sought to be appealed by the applicant did not fall under any of the Orders set out under Order 43 Rule (1) in respect of which an appeal lies as of right. The application was expressed to be brought under Section 14 of the Landlord (Shops, hotels and Catering Establishments) Act, Cap 301 Laws of Kenya and Sections 1A, 1B and 3A of the *Civil Procedure Act*. Thus the applicant did not have an automatic right of appeal against the order made on 18<sup>th</sup> December 2015 and therefore required to obtain the leave of the court as envisaged under Section 75(1) of the *Civil Procedure Act* and Order 43 subrule (3) of the Civil Procedure Rules. Under Order 43 subrule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order. I find that is the situation in the present matter. The application before this court is for extension of time to bring an appeal out of time and is not one for leave to appeal. Such an application under the rules could only be made before the court that made the order.
7. The respondent also cited the case of Nyutu Agrovet Ltd v Airtel Networks Ltd (2015) eKLR where the Court of Appeal held that where there was no automatic right of appeal as stipulated under section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, then the Appellate Court has no jurisdiction to hear and determine an appeal unless leave of the court from which the order was made is sought and obtained.
8. On the right of appeal versus the provisions of Article 159 of *the Constitution* that implores courts not to put undue weight on procedural technicalities, the respondent cited the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others (2013) eKLR where the Court of Appeal observed that:

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.
9. The respondent further submitted that the provisions of Order 43(3) are mandatory that leave has to be sought from the court that made the order either at the time the order was made by way of an oral



application or within 14 days from the date the order was made. Therefore, that failure to obtain leave as in this case is fatal and consequently no competent appeal can be lodged against such an order.

10. It was submitted that the applicant has not sought for an extension of time within which to appeal the orders of 4/2/2022 and no reason has been shown why no application was filed within 9 months period from the date the ruling was delivered.
11. The respondent further submitted that the application herein is time barred and should be struck out with costs. That this is not a procedural issue curable under Article 159 (2) (d) of *the Constitution*. That this court has no jurisdiction to entertain the matter. The respondent cited the case of Mbaraka Suleiman Mbwana v Nasoro Bakari Nguta & another (2021) eKLR where it was held that:

In the present application, the applicants seek leave of this Court to lodge a memorandum of appeal out of time against the ruling that was delivered on 5<sup>th</sup> November, 2020 by the Senior Resident Magistrate Hon. S. A. Ogot in CMCC No. 37 of 2020 at Msambweni Law Courts. It is noteworthy that the present application is not one for leave to appeal which in any event should have been made before the Court that made the order which the applicants seek to appeal against. There is also no evidence of whether the applicants obtained the requisite leave to appeal as provided under Order 43 Rule 1 sub-rules 2 and 3 of the Civil Procedure Rules and under Section 75 of the *Civil Procedure Act*.

12. The respondent submitted that the Preliminary Objection herein meets the requirement of a Preliminary Objection as stated in Mukisa Biscuits case as it raises a pure point of law touching on the jurisdiction of the court. The Respondent urged the court to uphold the Preliminary Objection.

### **Applicant's Submissions**

13. The applicant submitted that Section 79G of the *Civil Procedure Act* allows the court to admit an appeal where the applicant satisfies the court that he has good and sufficient cause for not filing the appeal in time. Further that Order 50 Rule 6 grants the court power to enlarge time where a limited time is fixed for doing any act or taking any proceedings. That the applicant has shown why the appeal was not filed in time.
14. The applicant submitted that the issue before the court relates to a pure technicality regarding compliance with form of the appeal due to the applicant's omission in seeking leave to appeal from the lower court. That Section 1B of the *Civil Procedure Act* imposes a duty on the court to further the overriding objective in its handling of disputes. That the applicant herein has acted in compliance with the overriding objective. That in order to give meaning to the overriding principle the court can in the interests of justice invoke its jurisdiction under Section 3A of the *Civil Procedure Act*. The respondent in this respect cited the case of Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates, Civil Appeal No. 161 of 1999.

### **Analysis and Determination**

15. I have considered the grounds in support of the Preliminary Objection and the submissions by counsels for the parties. The issue for determination is whether the applicant ought to have sought leave to appeal before the Trial Court.



16. The Court of Appeal in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA pronounced itself on what constitutes a preliminary objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...”

17. The respondent argues that this court has no jurisdiction to entertain the application herein as the order made by the trial court did not attract an automatic right of appeal under order and in the premises the applicant ought to have obtained leave from the trial court to file an appeal against the order of the trial court. That in the absence of leave of the trial court the application is incompetent and improperly before this court.

18. Section 75(1) of the *Civil Procedure Act*, 2010 provides for the orders against which an appeal would lie as of right and/or with the leave of the court. Order 43 rule 1 of the Civil Procedure Rules provides as follows:

Appeals from Orders [Order 43, rule 1]

- i. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1) (h) of the Act-
- ii. (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions)
- iii. (x) Order 45, rule 3 (application for review)
- iv. (y) Order 50 rule 6 (enlargement of time)

19. Under rule 2 of the Order, it is provided that an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under the said order 43 rule (1), leave to appeal must be obtained before such an appeal can be preferred.

20. It is noted that the procedure for obtaining leave is provided under order 43 rule (3) which states that 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.

21. The Court of Appeal in *Nyutu Agrovet Ltd v Airtel Networks Ltd* (2015) eKLR was categorical that where there was no automatic right of appeal as stipulated under section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, then the Appellate Court has no jurisdiction to hear and determine an appeal unless leave of the court from which the order was made is sought and obtained.

22. The same Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, stressed that appellate jurisdiction can only be conferred by the law and stated that:

“An appeal is granted in specific terms by *the Constitution* or a statute. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A court of law cannot assume appellate jurisdiction where none has been specifically granted by *the Constitution* or statute.”



23. I have looked at the intended memorandum of appeal. The applicant intends to appeal against an order of the trial court where the court reviewed its own orders under order 45 of the Civil Procedure Rules. An appeal from an order for review is one of those orders that may be appealed against as a matter of right under order 43 Rule (1) (x). There was thereby no need to obtain leave of the trial court so as to file an appeal. The argument by the respondent to that end is misconceived.
24. The upshot is that the Preliminary Objection has no merit. The application dated October 4, 2022 is properly before this court. The Preliminary Objection is in the premises dismissed with costs to the Applicant.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER 2024.**

**J. N. NJAGI**

**JUDGE**

In the presence of;

No appearance for Applicant

Mr Atake for Respondent

Court Assistant – Amina

30 days Right of Appeal.

