



Kenyan Alliance Insurance Co Limited v Invesco Assurance Co Limited & another (Civil Appeal E1031 of 2023) [2024] KEHC 12326 (KLR) (Civ) (9 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12326 (KLR)

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

CIVIL

CIVIL APPEAL E1031 OF 2023

CW MEOLI, J

OCTOBER 9, 2024

BETWEEN

KENYAN ALLIANCE INSURANCE CO LIMITED APPELLANT

AND

INVESCO ASSURANCE CO LIMITED 1ST RESPONDENT

SAMUEL KANGETHE KAGAMBO 2ND RESPONDENT

RULING

1. The Kenyan Alliance Insurance Co. Limited (hereafter the Appellant) instituted the present appeal via the memorandum of appeal dated 3.10.2023 against the ruling of Cheloti (PM) delivered on 25.09.2023 in Milimani CMCC No. E529 of 2021.
2. Soon thereafter, Samuel Kangethe Kagambo (hereafter the 2nd Respondent) filed the Notice of Motion dated 16.10.2023 (the Motion) seeking that the appeal be struck out for having been filed without leave of the court. The Motion stands supported by the grounds set out on its body and the depositions in the affidavit of the 2nd Respondent's advocate, Nelson Kaburu Felix. Therein, he stated that the appeal seeks to challenge the decision by the trial court dismissing an application by the Appellant seeking inter alia, an order for the change of advocates; an order quashing the warrants of attachment and sale issued against it; and a declaration that it had fully settled the decretal sum in the matter, in compliance with its statutory obligations. The advocate further stated that an appeal of such nature does not lie as of right, but with leave of the court. That in the present instance, no prior leave was sought and granted, the omission rendering the appeal incompetent. That consequently, this court does not have jurisdiction to hear and determine the said appeal.
3. The Appellant resisted the Motion by way of the replying affidavit sworn by its Legal Officer, Mercy Maweu on 15.02.2024 terming the Motion as misconceived and devoid of merit. The deponent averred



that an appeal lies as of right from the impugned decision and the Appellant did not require prior leave of the court. Further asserting that if the order sought in the Motion is granted, the Appellant will suffer grave prejudice since it had already settled half the decretal sum in the matter.

4. Directions were given for canvassing of the Motion by way of written submissions. In supporting the Motion, counsel for the 2nd Respondent anchored his submissions on Section 75 of the [Civil Procedure Act](#) (CPA) and Order 43 of the [Civil Procedure Rules](#) (CPR) which set out the various orders from which appeals lie as of right and those requiring leave of the court prior to filing of an appeal. Counsel submitted that the orders sought in the application which resulted in the impugned ruling that is the subject of the present appeal, are not among orders envisioned by Section 75 (*supra*) and Order 43 (*supra*), hence prior leave of the court was required. That in the absence of such leave being sought and obtained, the appeal is incompetent ab initio and consequently ought to be struck out with costs. Reliance was placed on the decision in [Peter Nyaga Muvake v Joseph Mutunga](#) [2015] KECA 475 (KLR) where an application seeking to stay execution pending appeal was struck out on similar grounds as those raised in the instant Motion.
5. On his part, counsel for the Appellant anchored his written submissions on the decision in [Stephen Omondi Juma v Sprocer Awuor Rabote](#) [2022] eKLR, and made reference to the decision in [Nyutu Agrovet Ltd as Airtel Networks Ltd](#) [2015] eKLR regarding instances where an appeal lies as of right versus instances where prior leave was required. Counsel proceeded to submit that the prayers before the trial court included stay of execution and quashing of warrants of attachment and sale, and that orders made under Order 22, Rule 25 of the [CPR](#) were included in Order 43 (*supra*) as among those from which an appeal would lie as of right. Counsel submitted that the appeal is therefore properly before this court. Furthermore, counsel urged this court to consider the overriding objective of the [CPA](#) as well as Article 159 of the [Constitution](#) of Kenya, in dispensing justice, citing the case of [Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions, Attorney General, Elijah Kipng'eno Arap Bii & International Centre For Policy And Conflict](#) [2015] KECA 690 (KLR). On this premise, counsel urged this court to dismiss the Motion.
6. Invesco Assurance Co. Limited (hereafter the 1st Respondent) did not participate in the motion.
7. The court has considered the grounds and rival affidavit material together with the submissions on record.
8. The 2nd Respondent's Motion raises an issue pertinent to the jurisdiction of this court to entertain the Appellant's appeal. On the premise that the appeal herein does not lie as of right but with leave in absence of which the appeal herein is incompetent. On its part, the Appellant asserted the contrary.
9. 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.”



10. 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.”

11. It therefore follows that where a right of appeal does not lie automatically, a party ought to invoke the provisions of Section 75 of the [Civil Procedure Act](#) (CPA) and Order 43 of the [Civil Procedure Rules](#) (CPR), to obtain leave to appeal.

12. Section 75(1) of the [CPA](#) sets out the various instances where 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.”

13. Order 43 of the [CPR](#) taking cue from Section 75(1) (h) [CPA](#) above provides as follows:

“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.”

14. None of the parties thought it prudent to proffer a copy of the impugned ruling for the court’s perusal and consideration. However, annexed to the 2nd Respondent’s supporting affidavit is a copy of the application filed before the trial court and which resulted in the impugned ruling. The application dated 22.03.2023 was filed by the Appellant under Sections 1A, 1B and 3A of the CPA; Order 45, Rule 1 and Order 51, Rule 1 of the CPR; and Article 159 of the Constitution of Kenya, 2010, seeking the following orders:
- a. That the application be certified urgent and service thereof be dispensed with in the first instance.
 - b. That the firm of G & G Advocates LLP be granted leave to come on record for the 1st Defendant/Applicant (the Appellant herein).
 - c. That the court be pleased to issue an order staying execution of the Judgment/Decree issued on 3.09.2021 against the 1st Defendant/Applicant (the Appellant herein) pending the hearing and determination of the application.
 - d. That the court be pleased to issue an order quashing the warrant of sale of the 1st Defendant’s/ Applicant’s (the Appellant herein) property dated 14.03.2023.
 - e. That the court be pleased to issue a declaration that the 1st Defendant/Applicant (the Appellant herein) has fully paid part of their judgment sum and therefore has fully complied with its statutory obligation.
 - f. That the costs of the application be provided for.
15. Prayers b), d) and e) constitute the substantive orders sought. In the absence of a copy of the ruling, the court is unable to ascertain the details of the decision by the lower court. Nonetheless, it is apparent that the lower court dismissed the application, which decision precipitated the present appeal arose.
16. Be that as it may, upon consideration of the above-cited provisions of law which formed the basis of the application before the lower court and more particularly the substantive orders sought, the court is of the view that the present appeal does not fall within the category of matters in respect of which an appeal lies as of right. As a result, the Appellant was required to obtain leave in the lower court prior to filing the appeal.
17. Judging from the position adopted by the Appellant regarding the present Motion, no such leave of the lower court was obtained prior to filing the appeal. Hence the appeal is incompetent, and the court has no jurisdiction to entertain it. It is trite that the question whether an appeal lies as of right or by leave goes to the jurisdiction of the appellate court to entertain an appeal before it. I associate myself with the sentiments of Sewe J, in Edith Wairimu Njoroge v Brooks Holdings Co. Ltd [2018] e KLR that where an appeal does not lie as of right from an order but only with leave, such leave “was a prerequisite to the assumption of jurisdiction by this court on appeal.” In Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 Others [2013] e KLR the Court of Appeal held that the right of appeal goes to the appellate court’s jurisdiction, is a fundamental matter and that a question regarding the absence of statutory conferment of such right is not a mere technicality.



18. The same court held in *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR, Civil Appeal No. (Nairobi) 86 of 2015 that:

“Without leave of the High Court, the Appellant 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 an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

19. Consequently, the Notice of Motion dated 16.10.2023 has merit and is hereby allowed. The appeal is hereby struck out, with costs to the 2nd Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2024.

C. MEOLI

JUDGE

In the presence of:

For the Appellant/Respondent: Mr. Mutinda

For the 2nd Respondent/Applicant: N/A

C/A: Erick

