



Kakamega Caltex Service Station Limited & another v Family Bank Limited (Civil Appeal E021 of 2022) [2023] KEHC 693 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E021 OF 2022
PJO OTIENO, J
FEBRUARY 10, 2023**

BETWEEN

KAKAMEGA CALTEX SERVICE STATION LIMITED 1ST APPELLANT

WILLIAM SHIMANYULA 2ND APPELLANT

AND

FAMILY BANK LIMITED RESPONDENT

(Being an appeal from the Ruling of Hon. D. Alego (SPM) dated 14th March, 2022 in Kakamega CMC MCL & E No. 64 of 2017)

JUDGMENT

1. The appellant initiated a suit against the respondent in Kakamega CMC MCL & E No 64 of 2017 and pleaded, according to the documents in the court file, the dispute to relate to a loan facility advanced by the respondent to the appellants and secured by a charge registered over property known as LR No Kakamega/Municipality/block/x/2019 (“the property”).
2. Due to non-performance of the loan facility, the property stood the risk of being auctioned and the suit at the lower court was filed in an attempt to stop the sale.
3. The suit was inactive for a period of three years prompting the respondent to file an application for dismissal of the suit for want of prosecution which application was allowed in a ruling delivered on March 14, 2022.



The Appeal

4. It is that ruling that provoked this appeal wherein the appellants are seeking that the same be upset and set aside on the seven grounds that:-
- a) That the learned trial magistrate erred in law and fact in disregarding the fact that the appellant has always been keen to have his claim against the respondent prosecuted to its logical and meritorious conclusion.
 - b) That the learned trial magistrate erred in law and fact in failing to find that indeed, the original case file was re-allocated new case numbers and moved to different courts without any notice to the appellant.
 - c) That the learned trial magistrate erred in law and fact in dismissing the appellant's claim against the respondent when the respondent had not complied with orders issued against it requiring it to furnish the returns of the auction sale of LR No Kakamega/Municipality/Block/1/xxx.
 - d) That the learned trial magistrate erred in law and facts in failing to appreciate that the appellant had a very valid and genuine claim against the respondent that can only be canvassed by hearing the parties on merit.
 - e) That the learned trial magistrate erred in law and fact by failing to consider the fact that the appellant would suffer double jeopardy having already lost LR No Kakamega/Municipality/Block/1/xxx *vide* an unlawful action.
 - f) That the learned trial magistrate erred in law and fact in disregarding the sacrosanct principles of natural justice.
 - g) The learned trial magistrate erred in law and fact in totally ignoring the appellant's submissions."

The Preliminary Objection

5. Before this court could determine the merits of the appeal, the respondent filed a preliminary objection dated July 27, 2022 premised on two grounds that the court lacks jurisdiction to entertain the appeal on the twin issues that the suit before the subordinate court was the Environment and Land Court and on account of appellant's failure to seek and obtain leave to appeal against the ruling delivered by the subordinate court on the 14th day of March, 2022.
6. The appeal and the preliminary objection were collapsed to be heard together and by way of written submissions. On the basis that the preliminary objection challenges the jurisdiction of the court and the competence of the appeal, the merits of the appeal will only be availed for determination after the preliminary points have been determined to lack merits.

Appellants' Submissions

7. It is the submission by the appellants that the principles of natural justice dictate that this appeal be heard and determined by this court and cite the authorities in *Ridge v Baldwin* (1963)2 ALL ER 66 of 81, *Board of Education v Rice* (1911) AC 179, *Onyango Oloo v The Attorney General* (1986-1989) EA 456, *Egal Mohamed Osman v Inspector General of Police & 3 other* (2015) and *Chief Constable Pietermaritz Burg V Shim* 1908 NLR 338 in that regard. They however do not submit on the preliminary objection at all.



Respondent's Submissions

8. The respondent's submissions identify four issues for determination as; whether the court has the requisite jurisdiction to entertain the appeal; whether the appeal is properly before this court on account of the appellant's failure to seek leave to appeal; whether the appeal is incompetent and ought to be struck out; and whether the appellants have established a threshold for the grant of the orders sought in the memorandum of appeal. The second and third issue is actually one put twice differently.
9. On whether this court has the requisite jurisdiction to entertain the appeal, the respondent argues that the subject matter of the subordinate court's suit having been LR No Kakamega/Shikulu/xxxx, and in line with article 162(2) of the Constitution of Kenya 2010 and section 13(1) of the Environment and Land Court Act, the environment and land court is the competent appellate court in the instant appeal as it is vested with authority to determine questions of land. They cite the case of Philip Kitoto & another v Simon Kuria & another (2011) eKLR for that proposition of the law.
10. On whether this appeal is properly before the court on account of the appellant's failure to seek leave to appeal, and whether it should be struck out, the respondent submits that failure by the appellants to seek leave prior to lodging this appeal is incurably defective and that this appeal ought to be struck out. They place reliance on the decisions in Simon Kalachu v Yuasa International Ltd & another (2018) eKLR and Augustine Mulo Onyango v Migotiyu Plantations Limited & another (2022) eKLR.
11. On whether the appellants have established a threshold for the grant of the orders sought, the respondent argues that the appellants have failed to challenge the exercise of the discretion by the subordinate court in respect of the application for dismissal for want of prosecution.

Issues, Analysis and Determination

12. This court has considered the preliminary objection, the appeal and submissions offered by the parties and identifies three issues for determination to be; whether the court has the jurisdiction to hear and determine the appeal; whether the appeal is properly before this court; and, only if the two be answered in the affirmative, whether this appeal is merited.

Jurisdiction of the court

13. The Jurisdiction of a court is its legal power, mandate and authority given by law, whether by the constitution or statute, to determine specific genre of disputes. Jurisdiction is everything and without it, a court of law has no mandate to move an extra step and ought to down its tools.
14. This court draws its jurisdiction from article 165(3) of the Constitution of Kenya 2010 which vests upon it unlimited original jurisdiction in criminal and civil matters only subject to the disputes reserved for the court of equal status as ordained by article 165 (5).
15. Article 165 (5) divests the High court of jurisdiction in all matters reserved for the exclusive jurisdiction of the Supreme Court the courts contemplated in article 162 (2). The matters reserved for the exclusive jurisdiction of the Environment and Land Court as a court of equal status are enshrined to be disputes concerning the Environment and the use and occupation of, and title to, land.
16. From the documents on record of appeal, the dispute at the subordinate court was the determination whether the lending contract documented in an instrument of charge executed between the parties had been breached by the respondent as defendant before the trial court. In the estimation and discernment by the court, a charge is never a transfer, confers no title in the land to the chargee nor does it vest upon the chargee the right to occupy or use land. A charge is thus a security for the realization of the



covenants by the parties, especially the chargor, to pay the sum advanced and thereby secured. It is an instrument documenting a commercial transaction and thus asks no question on the environment and the use and occupation of, and title to, land. A dispute over the rights and obligation under a charge are not disputes about land use, occupation or title to land. That position was finally reinstated by the Court of Appeal in *Cooperative Bank Limited vs Patrick Kangethe* when the court said: -

“A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.”

17. As pleaded, the dispute was one over a commercial agreement and not over the land. It thus inevitably follows that the Environment and Land Court would have no jurisdiction in the matter but the High court is properly seized of the same. The court thus hold that the appeal is rightfully before it and that the preliminary objection as presented and argued was itself misconceived.

Competence or Propriety Of The Appeal

18. The respondent argues this issue in two folds; first, whether the appeal is incompetent for lack of leave to appeal from a ruling from which there lies no right of appeal, and, secondly whether failure by the appellants to compile and file a complete record of appeal renders the appeal fatally defective.
19. The court proposes to start with the mundane question of whether an incomplete record of appeal makes an appeal amenable to being struck out. The straight answer to that challenge is simply that there is no statutory obligation on an appellant to compile and file a bundle called the record of appeal. Rather, the obligation under order 42 rule 13 is upon the court to avail the records of the court appealed from. More remote is the alleged obligation to have a complete record or suffer the grave consequence of striking out. In *CMA CGM Kenya Limited v Diamond Gate General Trading Llc & 4 others* [2019] eKLR the court when face with similar objection resolve the issue in the following words:-

“On the second limb alleging shoddy compilation of the record, that equally has no legal foundation because no law provides how a record of appeal before this court must be compiled. What we now routinely call a record of appeal before the high court is a rule of convenience developed out of practice and largely copying from the Court of Appeal Rules but with no legal underpinning. I say no legal underpinning because order 42 rule 13(4) merely obligates the court, and not the appellant, to ensure that the enumerated documents are in the court file. That must be seen to demand that the record at trial be availed and thus contrasts with rule 87, *Court of Appeal Rules*, which obligates the appellant to prepare and serve the record and defines what must be contained therein.”

20. On the first limb, the respondent argues that this appeal is not properly before this court and the argument is anchored on the provisions of order 43 of the *Civil Procedure Rules* and section 75 (1)



of the Civil Procedure Act. It is indubitable that an application for dismissal for want of prosecution under Order 17 affords no automatic right of appeal by dint of section 75 or order 43 of the Act. One aggrieved by such an order must first seek and obtain leave of the court before his appeal can be tenable. Here the appellant has not obtained such leave even after being confronted with the stark letter of the law. In fact, he gave the challenge a very wide berth. Maybe it was a concession that the challenge was unassailable.

21. The court upholds the objection that the appeal is incompetent for want of leave to appeal, it is thus unfit to be examined for merits and is therefore it is struck out with costs.
22. With the appeal struck out, questions as to merit become moot and an endeavour to no avail.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF FEBRUARY, 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Onyonje for Appellant

Mr. Ativa for the respondents

Court Assistant: Polycap

