



West Kenya Sugar Company Limited v Nyongesa & another (Civil Appeal E126 of 2023) [2024] KEHC 12191 (KLR) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E126 OF 2023
S MBUNGI, J
OCTOBER 7, 2024**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPELLANT

AND

JOSEPH NYONGESA 1ST RESPONDENT

ISAAC ESHIKUMO 2ND RESPONDENT

(Being an appeal against the ruling of Hon. Z.J Nyakundi Senior Principal Magistrate Kakamega in CMCC Cause No. 337 of 2013 dated and delivered on 14th August 2023)

JUDGMENT

1. What is before this Court is an appeal against the decision of the trial Court in CMCC Cause No. 337 of 2013. The main issue for contemplation in the trial court was whether the 1st respondent's case should be opened for cross examination. The appellant sought the court's leave to recall PW4, Dr. Moses Okumu for further cross-examination and the same was dismissed with no orders as to costs.
2. The appellant being dissatisfied with the decision filed the present appeal vide a memorandum of appeal dated 28th August 2023 on the following grounds: -
 - a. The learned magistrate erred in law in finding and holding that the appellant's reason to recall PW4 Dr. Moses Okumu for further cross-examination was not a compelling reason to re-open the plaintiff's case.
 - b. That the learned magistrate erred in law and in fact in disregarding the evidence tendered by the appellant and/or failing to consider the said evidence in its totality.



- c. That the learned magistrate erred in law and in fact in failing to appreciate the significance of the documentary evidence tendered in support of the appellant's application dated 27th July 2022.
 - d. That the learned magistrate erred in law and in fact in failing to consider the applicant's submissions which were duly filed.
 - e. Other grounds and reasons to be adduced at the hearing hereof.
3. The appellant sought the following prayers: -
- i. That this appeal be allowed.
 - ii. The ruling of the Hon. Z.J Nyakundi dated and delivered on 14th August 2023 in CMCC Cause No. 337 of 2013 – Joseph Nyongesa v West Kenya Sugar Company Limited and Isaac Eshikumo be set aside.
 - iii. The costs of this appeal be awarded to the appellant.
 - iv. Such further or other reliefs as this Honorable Court may deem just and fit to grant in the circumstances of this appeal.
4. As per the directions of this court, the appeal was canvassed by way of written submissions.

Appellant's Case

5. The appellant submitted that that the grounds for recalling the plaintiff's witness PW4 for further cross examination are compelling enough to re-open the plaintiff's case in light of the new evidence that had been discovered and obtained post the initial cross-examination.
6. The appellant submitted that there was need to bring back the witness, and gave a short brief of what happened as follows: -
- a. On 7th March 2022 the 1st Respondent called Moses Okumu as PW4, an expert witness to tender medical evidence to show the injuries that the 1st respondent sustained.
 - b. The PW4 testified that he worked as locum tenens at the Aga Khan University Hospital in Kisumu (the Hospital) from the year 2012 to the year 25th March 2018.
 - c. PW4, failed to adduce any evidence when asked during his cross-examination whether, he had any evidence to demonstrate before the Honorable Court that he was engaged with the Hospital and/or had the authority to testify on behalf of the Hospital.
 - d. As the Court record may show, the PW4 further affirmatively testified that "he was the locum doctor" who signed the Discharge Summary adduced by the 1st Respondent as evidence which was dated 18th December 2012 and signed under the name 'Costa'.
 - e. PW4's national identity card showed he was called Moses Okumu, the name 'Costa' was not in the national identity card.
7. The appellant submitted that vide a letter dated 24th June 2022, the appellant's counsel wrote to the hospital in Kisumu requesting to confirm whether indeed PW4 worked at the hospital as locum tenens to which the hospital responded vide an email dated 27th June 2022 confirming the counsel's suspicion that PW4 had never worked with the hospital.



Respondent's Case.

8. The respondent submitted that the appeal is non meritorious and an abuse of the court process and ought to be dismissed since the appeal emanated from an order dismissing an application under Section 3a, Section 146 of the *Evidence Act*, order 18 Rule 10 and Order 51 hence the appellant should have sought leave of the court before launching the appeal.
9. The respondent further submitted that order 18 Rule 10 of the Civil Procedure rules empowers the court to recall any witness who has been examined, at the discretion of the court and not a mandatory provision.
10. The respondent submitted that Section 146(a) of the *Evidence Act* was not meant to correct mistakes that a witness had committed in the course of the trial, urging the court to disallow the appeal and uphold the ruling of the trial court.

Analysis and Determination

11. This court has the duty as the first appellate court to analyse and re-evaluate the evidence before the trial court and arrive at its own conclusion, while bearing in mind that it neither saw nor heard the witnesses testify. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

“...This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”
12. I have looked at the application and the submissions by the counsels. To me, the only issue for determination is whether the appellant had to seek leave of the court to lodge this appeal and if the appeal is properly before the court, was there any basis for the trial magistrate to decline the application to recall PW4 for further cross-examination.

Determination

13. On the issue of leave, order 43(1) states 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

14. The power to recall a witness is donated by section 146 of the *Evidence Act* states that :-

- i. Witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.
- ii. Subject to the following provisions of this Act, the examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief.
- iii. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
- iv. The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.



15. Order 18 rule 10 of the Civil Procedure Rules states that: -

“The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”

16. Order 18 rule 10 of the civil procedure rules is not one of the orders listed under Order 43(1) of the Civil Procedure Rules. Meaning that this appeal should have been brought under section 43(2) of the Civil Procedure Rules, where leave of the court should have been sought.

17. I have perused the record, no such leave was sought. Meaning that the appeal before me is incompetent. For this court has no jurisdiction to deal with the appeal for no leave was sought to invoke its jurisdiction.

18. There are many decisions of the superior courts and this, like in the case of [*Directline Insurance Co. Ltd v Onyango \(Civil Appeal E345 of 2022\)*](#) [2022], while faced with a similar application as the instant application had this to say;

“...It is then clear that under order 43(2) 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 order 43(1) leave to appeal must be obtained before such an appeal can be preferred. (See Mutungi J in *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR). Order 42 rule 6 under which applications for stay of execution fall is not one of the orders mentioned in order 43(1) where the appeal lies as of right. The appellants ought to have sought leave before filing this appeal. In *Stephen Omondi Juma v Sprocer Awuor Rabote* [2022] eKLR, Aburili J was faced with a similar issue as the issue before me. She cited a Court of Appeal decision and stated that:

“As was emphatically stated in *Nyutu Agrovet Ltd vs Airtel Networks Ltd* [2015] eKLR, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. Further, that the right of appeal is conferred by statute and cannot be inferred. It 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*](#) and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”

Leave to appeal in the instant case did not lie as a matter of right.”

The court further stated: -

“...There is no automatic right of appeal of the order sought to be appealed from by the Applicant in the instant matter. There can therefore be no competent Appeal that would clothe this court with jurisdiction to entertain an application for stay of execution or for stay of proceedings pending Appeal. In essence, this court has no jurisdiction to hear the intended appeal unless leave of the court from which the order was made is sought and obtained. The belated filing of the application dated 13/09/2023 cannot regularize the anomaly...”



19. Even article 159 of *the Constitution* cannot come to aid of an appeal filed without seeking leave where leave is required to be sought. In *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR, the Court of Appeal had this to say of the matter: -

“...It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of *the Constitution*. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition.”

20. In view of the above, it is clear that this court has no jurisdiction to entertain the appeal as filed. And thus the court cannot interrogate the merits of the appeal for want of jurisdiction. In the case of *Owners of the Motor Vessel “Lillians” –vs- Caltex Oil (Kenya) Ltd* [1989]KLR 1, Nyarangi, JA. Noted that: -“...Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

21. The upshot of this is that I do strike out the appeal for reasons stated herein above, costs to the respondents.

22. Right of appeal 30 days explained to the appellant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE.

In the presence of: Ms. Rauto holding brief for Ms. Muleshe for the respondents present.

Mr. Otieno holding brief for Mr.Waweru for the appellant present online.

Appellant – absent

Respondents - absent

Court Assistant : Elizabeth Angong’a

