



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 55 OF 2020

FIRST ASSURANCE CO. LTD.....APPELLANT

VERSUS

OSIENALA (FRIENDS OF LAKE VICTORIA)....1ST RESPONDENT

SBM BANK (K) LTD..... 2ND RESPONDENT

[Being an appeal arising from the Ruling of the Hon. R. K. Ondieki (SPM) delivered in Kisumu CMCC No. 609 of 2012 on 10th August 2020]

RULING

The 1st Respondent, **OSIENALA (FRIENDS OF LAKE VICTORIA)** have raised a Preliminary Objection to the appeal herein.

1. It asserted that the jurisdiction of the court was not properly invoked before the appeal was filed, since the appeal does not lie as of right under **Section 75** of the **Civil Procedure Act** and under **Order 43 Rule 1 (1)** of the **Civil Procedure Rules**, as no leave was sought and obtained under **Section 75 (1)** of the **Civil Procedure Act** or under the **Order 43 Rule 1 (3)** of the **Civil Procedure Rules**.

2. In this case, the Appellant had filed a Preliminary Objection, seeking to strike out the suit for being time-barred, and also because the verifying affidavit had been filed by a person who did not have authority.

3. On 10th August 2020 the trial court dismissed the Preliminary Objection dated 2nd July 2020. That Preliminary Objection was founded upon the following provisions of the law;

i. **Order 4 Rule 1 (4) of the Civil Procedure Rules;**

ii. **Limitation of Actions Act, Cap. 22;**

iii. **Sections 10 (3) (a) and (d) of the Non- Governmental Organization and Co-ordination Act No. 19 of 1990.**

4. As the Respondent correctly stated, **Section 75 (1)** of the **Civil Procedure Act** expressly cites the Orders from which appeals shall lie as of right. The said section reads as follows;

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with leave of the court making such order or of the court to which an appeal would lie if leave were grant –

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.*”

5. A comparison of the provisions of **Section 75** with the provisions upon which the Preliminary Objection dated 2nd July 2020 shows that the Ruling in respect to which the appeal before me arises does not literally fall within the scope of matters from which an appeal lies as of right.

6. But the Appellant holds the view that the provisions of **Order 43 Rule 1 (b)** and **Rule 1 (j)** of the **Civil Procedure Rules** serve to bring the impugned Ruling within the scope of orders from which an appeal shall lie as of right.

7. **Order 43 Rule 1** provides thus;

“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.
- d.
- e.
- f.
- g.
- h.
- i.
- j. **Order 19 (affidavits)**
- k.
- l.”

8. It was the Appellant’s contention that because the Defence had asserted that the court did not have jurisdiction, and that the suit was time-barred, the Preliminary Objection canvassed before the trial court fell within the category of pleadings, generally. If that be the case, the Appellant submitted that therefore an appeal arising from a Ruling dealing with “*pleadings generally*” was appealable as of right.

9. And as regards **Order 43 Rule 1 (j)** the Appellant submitted that it did not require leave to appeal, because the Ruling in contention arose from the attack which the 1st Respondent had mounted against the Verifying Affidavit.

10. The Appellant’s further submission was that if I should come to the conclusion that leave to appeal was required, I should nonetheless invoke the **Oxygen Rule**, by rejecting the invitation to strike out the case on a technicality.

11. The Appellant submitted that the court ought to give effect to the Overriding Objective, which requires the court to act justly, and as far as practicable, to act fairly.

12. On the one hand, it is correct to state that the **Limitation of Actions Act**; **the Non-Governmental Organization and Co-ordination Act**; and **Order 4 Rule 1 (4)** of the **Civil Procedure Rules** are not expressly cited at **Order 43 Rule 1** of the **Civil Procedure Rules**.

13. In a literal sense therefore, that would imply that leave would be required to appeal in respect to a Ruling based on those provisions of the law.

14. However, the **Oxygen Principle** requires the court to apply the **Overriding Objective Principle** in both substantive and procedural matters.

15. In **DHARMAGMA PATEL & ANOTHER Vs T.A. (a minor suing through the mother and next friend H.H.) HIGH COURT CIVIL APPEAL NO. 40 OF 2009**, the Court held as follows;

“The upshot of the foregoing is that, despite the appeal having been filed without the leave of the court, as required under Order 43 (2) above, for the purposes of the just determination of the proceedings, I shall consider the appeal on its merits.”

16. In arriving at that conclusion, the learned Judge invoked the powers donated to the Court by **Section 3A of the Civil Procedure Act**, and declared;

“..... the procedural defect herein is incapable of overriding the objective and duty of this court under Section 1A and 1B of the Civil Procedure Act.”

17. I do appreciate the fact that learned Judge was influenced by the fact that the Respondent had taken too long before raising the objection: indeed, in that case, the matter was raised when the appeal was called for hearing.

18. The facts before me are distinguishable from that case, as the objection has been raised early in the life of the appeal.

19. In the case of **KENYA COMMERCIAL BANK LIMITED Vs KENYA PLANTERS CO-OPERATIVE UNION & 2 OTHERS, CIVIL APPLICATION NO. 199 OF 2010**, the Court of Appeal noted that the Applicant had no automatic right of appeal from the decision of the learned Judge of the High Court, through which a preliminary objection had been dismissed.

20. The learned Judges of Appeal refrained from commenting on the merits of the intended appeal, but they granted leave to appeal.

21. In my considered opinion, if the Appellant is obliged to seek leave to appeal, there is still the opportunity for it to take that step. As to whether or not the Appellant will take that step; or if the said step would be successful if taken, is a matter about which I express no opinion at this stage.

22. But I hold the view that a purposive interpretation of the provisions of **Order 43 Rule 1 (b)** and **1 (j)** brings the appeal herein within the range of Orders which are appealable as of right. My said finding is based on the fact that the substantive issues upon which the trial court rejected the preliminary objection were;

a. the pleadings; in which jurisdiction was doubted by the 1st defendant; and

b. the verifying affidavit which was said to have been sworn without the authority of the plaintiff.

23. Accordingly, the Preliminary Objection is dismissed, with costs to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE