



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. E242 OF 2021**

**MOFFAT NYAGA KAGAU.....1<sup>ST</sup> APPELLANT**

**MARGARET MBOGO.....2<sup>ND</sup> APPELLANT**

**WALTER NYAMU KARIUKI.....3<sup>RD</sup> APPELLANT**

**TERESIA GATURI NJOKA.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**PATRICK OPUNDO OWITI T/A**

**COUSIN MOTOR WORKS.....1<sup>ST</sup> RESPONDENT**

**NEW EMBU UHURU GARAGE LIMITED.....2<sup>ND</sup> RESPONDENT**

**AHAMED ALI GEDI.....3<sup>RD</sup> RESPONDENT/APPLICANT**

**RULING**

1. The 3<sup>rd</sup> respondent raised a preliminary objection (P.O) vide the Notice dated 4<sup>th</sup> June 2021, citing the following points of law:
  - i) *That the Appellant's appeal as filed herein has been filed without the requisite leave.*
  - ii) *That this court lacks jurisdiction to entertain and/or determine the appeal herein.*
  - iii) *That the entire appeal is otherwise bad in law and incurably defective*
2. The P.O was argued orally.
3. Mr. Ataka for the 3<sup>rd</sup> respondent submitted that a party can only appeal against orders of the lower court in two instances namely:
  - i) *automatic right of appeal under Order 43 Rule 1 (i) of the Civil Procedure Rules.*
  - ii) *where a party has obtained leave*
4. He argues that the application in issue was one to render a sale by auction absolute under Order 22 Rule 77 of the Civil Procedure Rules, which is not mentioned under Order 43 Rule 1 of the Civil Procedure Rules. That the applicants needed to seek leave which was not done. He therefore urged the court to strike out the entire appeal and application as it lacks jurisdiction to deal.
5. Mr. Mwang'ombe for the 1<sup>st</sup> respondent supported the P.O which he said was raised on a point of law, based on uncontested facts. He submitted that it was clear from the record that no leave was sought.
6. In response Mr. Nyangoro for the appellant submitted that the P.O was opposed as no leave needed to be sought. Further that the operative Order is 042 Rule 6 of the Civil Procedure Rules. He argued that it was clear from the ruling that no sale took place. That what the

respondents were relying on was a technicality which the court should ignore. He prayed for the dismissal of the P.O.

7. In a rejoinder Mr. Mwang'ombe submitted that Order 42 Rule 6 of the Civil Procedure Rules was misplaced since the said Order deals with stay pending appeal. Mr. Ataka added that no application had been made under the said Order 42 Rule 6 of the Civil Procedure Rules. He submitted that Jurisdiction is not a technicality as claimed.

### **Determination**

8. Having considered the submissions, I find the issue falling for determination to be whether or not the appellants were required to obtain leave before filing this appeal. If so, whether or not failure to obtain it is fatal.

9. The impugned ruling delivered on 30<sup>th</sup> April 2021, comprised of three applications. These were as follows:

i) The 1<sup>st</sup> dated 21<sup>st</sup> November 2019 seeking to set aside the ex parte Judgement entered against the 2<sup>nd</sup> respondent on 22<sup>nd</sup> January 2019.

ii) The 2<sup>nd</sup> is by the purchaser dated 4<sup>th</sup> December 2020 which sought restraining orders against the appellants in respect of several parcels of land.

iii) The 3<sup>rd</sup> is dated 17<sup>th</sup> December 2020 by the appellants seeking to stay the proceedings pending the determination of their appeal and application for review in Nairobi HCCA No. 005/2020 between the appellant and respondents.

10. The trial court found the application dated **21<sup>st</sup> November 2019** to be without merit and dismissed it. It is not indicated but the 1<sup>st</sup> application must have been brought under Order 10 Rule 11 of the Civil Procedure Rules.

11. The appellants then raised a preliminary objection dated 8<sup>th</sup> February 2021 against the purchaser's application dated 4<sup>th</sup> December 2020 which was found to lack merit and was dismissed.

The application dated 4<sup>th</sup> December 2020 was founded on Order 22 Rule 77 of the Civil Procedure Rules among others. The same was found to be merited and was allowed.

12. As for the 3<sup>rd</sup> application dated 17<sup>th</sup> December 2020 the trial court found it to have been overtaken by events as the High Court had already made a finding vide HCCA No. 005 of 2020.

13. Order 43 Rule (1) of the Civil Procedure Rules which is titled "APEALS FROM ORDERS" sets out the Orders from which an appeal shall lie as of right.

Order 10 Rule 11 of the Civil Procedure Rules under which the application dated 21<sup>st</sup> November, 2019 was brought is one of the Orders cited under Order 43 of the Civil Procedure Rules and which qualifies a party to appeal as of right.

14. However, Order 22 Rule 77 of the Civil Procedure Rules under which the 2<sup>nd</sup> application was filed is not among the listed Orders under Order 43 (1) of the Civil Procedure Rules. The order being challenged, is in respect of the application filed under Order 22 Rule 77 of the Civil Procedure Rules. So what happens?

15. Order 43 Rules (2), (3) and (4) of the Civil Procedure Rules provide as follows:

*"(2) An appeal shall lie with the leave of the court from any other order made under these Rules.*

*(3) 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.*

*(4) Save where otherwise expressly provided in this rule, "order" includes both an order granting the relief applied for and an order refusing such relief."*

16. The appellants ought to have first sought leave before filing this appeal. The appellants have not denied not having sought leave. Counsel argues that no leave was required which is not correct. Order 43 Rule 1 (R) of the Civil Procedure Rules only provides for Order 22 Rules 35,57,61 (3) and 73 as the ones from which one has an automatic right of appeal. This is irrespective of whether the relief sought is granted or not. It is only where such leave is granted that this court's jurisdiction is invoked.

17. I have also noted with a lot of concern that the appellants herein appear to select where to file their appeals when it suits them. There is HCCA No. 005 of 2020 in the Commercial and Tax division where they appealed against orders in Nairobi CMCC No. 8372 of 2018 the subject file in this matter. I have read the Ruling by Lady Justice Okwany in HCCA No. 005 of 2020 dated 1<sup>st</sup> October 2020 and 23<sup>rd</sup> October 2020 (Annexures AAG) which deal with the issue being raised here.

18. There are findings which have been made vide the said Rulings. It is only prudent that any appeal to be filed in respect of the Nairobi CMCC No. 8372 of 2018, should be in the Commercial and Tax Division which is already handling HCCA No. 005 OF 2020. This is for

purposes of uniformity and proper flow of the issues.

**19.** Finally, on the preliminary objection it is clear that the appellants ought to have sought leave to file this appeal which was not done. It is not a technicality and there is no room for discretion on this. The operative word in Order 43 Rule (1) (2) and (3) of the Civil Procedure Rules is, “**SHALL**”.

**20.** I therefore find merit in the preliminary objection dated 4<sup>th</sup> June 2021 which I hereby allow. The entire appeal and notice of motion are struck out with costs.

**Delivered online, signed and dated this 8<sup>th</sup> day of July, 2021 in open court at Nairobi.**

**H. I. ONG’UDI**

**JUDGE**