



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 25 OF 2020

PAUL MAINA NJEGE.....APPELLANT

-VERSUS-

CAREPRIME GENERAL MERCHANTS.....1ST APPELLANT

RHODA NYARUAI NDERI.....2ND APPELLANT

RULING

1. Before the court for determination is the motion by **Careprime General Merchants** and **Rhoda Nyaruai Nderi** (the 1st and 2nd Respondents, respectively) dated 15th June, 2020 seeking inter alia that the appeal filed on 17th January, 2020 be struck out for want of jurisdiction. The motion is expressed to be brought under section 1A, 1B, 3A & 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, on grounds inter alia the Appellant did not seek leave to appeal and/or did not have an automatic right of appeal against the impugned decision of the trial court.

2. The affidavit in support of the motion is sworn by the 2nd Appellant who deposes that on 19th December 2019 a ruling was delivered in Nairobi Milimani CMCC 10491 of 2018 in her favour and being aggrieved by the said ruling the Appellant herein on 17th January, 2020 lodged an appeal as against the ruling. The Respondent deposes that the Appellant did not seek leave to appeal or having automatic right of appeal from the impugned ruling and thus the appeal itself is fatally incompetent and ought to be struck out.

3. The motion was opposed by way of a replying affidavit dated 7th January 2021 sworn by **Paul Maina Njege** (hereafter the Appellant). To the effect that that Respondents earlier successfully moved the lower court on an application seeking to set aside judgment in default; that judgment was set aside on conditions which the Respondents failed to comply with as a result of which the Appellant proceeded with execution, prompting a second application dated 22nd August 2019 which was heard and determined through the ruling delivered on 19th December 2019 ; that aggrieved by the said ruling the Appellant filed the instant appeal as of right before the same court which was also allowed; that the Appellant was aggrieved by the ruling on the second application and his counsel duly sought leave in the court below to appeal the second ruling. He asserted that the instant motion was pre-mature, premised on speculation and lacks merit and ought to be dismissed with costs. Attached to the affidavit are copies of the two motions in the lower court.

4. On 3rd March, 2021 parties took directions to canvass the motion by way of written submissions and oral highlighting. The parties duly complied with filing of submissions however elected not to highlight them. For the Respondents, counsel submitted that pursuant to the provisions of Order 43 Rule 1 of the Civil Procedure Rules, an appeal does not lie as of right from the ruling sought to be challenged herein as the motion giving rises to the ruling was founded on Orders 22 Rule 22, 40 Rule 1 and 2 and 51 Rule 1 of the Civil Procedure Rules. Hence leave to appeal therefrom was mandatory. He placed reliance on **Serephen Nyasani Menge v Rispah Onsase [2018] eKLR**. Citing decisions in **Nyutu Agrovat v Airtel Network [2015] eKLR** and **Francis Ndahebwa Twala v Ben Nganyi [2018] eKLR**, counsel further submitted that the Appellant's notion that the court has jurisdiction to entertain the appeal is misconceived.

5. Counsel for the Appellant for his part submitted that the appeal before the court was in respect of a decision made by the lower court pursuant to powers vested on it under Order 10 Rule 11 of the Civil Procedure Rules. Further, it was submitted that section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules govern matters relating to the right of appeal. He contended that the decision to set aside default judgment and admit a defence filed out of time was based on Order 10 Rule 11 of the Civil Procedure Rules and that an appeal lies therefrom as of right by virtue of the provisions of Order 43 Rule (1)(g). The Court was urged to dismiss the motion.

6. The court has considered the application in light of the parties' respective affidavit material and submissions. It is not in dispute is that the present appeal stems from a ruling delivered on the 19th of December 2019. What must be determined is whether the present appeal is competently before the Court. To determine that issue, it is necessary to look at the depositions and annexures in affidavits sworn by the

parties as well as the memorandum of appeal. The latter requires no deep analysis. The appeal filed on 17th January 2020 relates to the ruling delivered on 19th December 2019.

7. Contrary to the erroneous submissions of the Appellant's advocate which also contradict the Appellant's replying affidavit, the said Ruling was in respect of the motion dated 22nd August 2019 (see annexure **PMN4** to the replying affidavit). And not the motion of first instance dated 19th March 2019 (see annexure **PMN 1** to the replying to affidavit), inter alia to seeking to set aside the default judgment in the lower court suit, which was allowed by the ruling delivered on 14th June 2019. (The Appellant's counsel unfortunately appears not to have updated himself appropriately on the chronology of events in the lower court). Therefore, the ruling which is the subject of the appeal herein is in respect of the motion dated 22nd August 2019 as correctly pointed out by the Respondents' counsel.

8. Under Section 75 (1) (h) of the Civil Procedure Act an appeal lies as of right from any order made under rules from which an appeal is expressly allowed by rules. Order 43 of the Civil Procedure Rules amplifies this provision. 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 Pesi Tobiko & 2 Others [2013] e KLR** the Court of Appeal held that the right of appeal goes to the appellate court's jurisdiction, it is a fundamental matter and that a question regarding the absence of statutory conferment of such right is not a mere technicality.

9. 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."

10. The Respondent's second motion in the lower court dated 22nd August 2019 was brought under Orders 22 Rule 22, 40 Rules 1 and 2 and 51 Rule 1 of the Civil Procedure Rules. It was a mixed-grill motion. The key prayers sought that:

"3. ... pending the inter partes hearing and determination of the main suit, the Plaintiff/Appellant herein, either in person or through his agents namely Dancy Auctioneers, their agents, servants and or employees be restrained in any howsoever from attaching and/or selling any of the manner Defendant/Appellants' property either by way of public auction and /or through private treaty.

4. ...

5. ... the Honorable Court be pleased to set aside the judgment in the instant suit and be pleased to set the matter for Hearing." (sic)

11. Whereas no appeal would lie as of right if only Order 22 Rule 22 had been invoked therein, the invocation of Order 40 Rules 1 and 2 of the Civil Procedure Rules and the nature of the main prayers in the motion bring it within the ambit of Order 43 Rule 1 subrules (g) and (u) of the Civil Procedure Rules. Thus, an appeal lay as of right from the ruling thereon delivered on 19th December 2019. Given the foregoing, the Court is at a loss regarding the submissions made by the Respondents to the contrary, and which appear to ignore the provisions under which their own motion dated 22nd August 2019 was founded as well as the provisions of Order 43 Rule 1 of the Civil Procedure Rules. By the same token, the authorities cited by the Respondents are of no relevance to the instant matter.

12. The motion dated 15th June 2020 is without any merit and borders on abuse of the process of the Court given the undisputed background and the applicable and clear provisions of the law which require no elaboration. The motion constitutes a waste of precious judicial time and resources, and it is difficult to fathom the motivation behind it. This Court must register its displeasure at such wanton dissipation of the Court's scarce resources by dismissing the misconceived motion dated 15th June 2020 with costs to the Appellant in any event. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 15TH DAY OF JULY 2021.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms Wahito h/b for Mr Nderitu

For the Respondents: N/A

C/A: Carol