



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 153 OF 2019**

**BETWEEN**

**CHASE BANK KENYA LIMITED.....APPELLANT/APPLICANT**

**AND**

**TATA AFRICA HOLDINGS LIMITED.....RESPONDENT**

**RULING**

1. By a ruling dated 18<sup>th</sup> December, 2019, the trial court in **KISUMU CMCC NO. 18 OF 2018**, dismissed the Appellant/Applicant's application to set aside the judgment and for leave to conduct the defence hearing. Subsequently, the Respondent set in motion the execution process by way of attachment of the property of SBM Bank (K) Ltd.

2. The attachment prompted the Applicant to file a notice of motion dated 21<sup>st</sup> December, 2019 seeking an order of stay of execution pending the hearing of this appeal.

3. The application is supported by an affidavit sworn by David Irungu who describes himself as the General Manager (Resolutions Department) at the Kenya Deposit Insurance Corporation (***Corporation***) who reiterates the grounds on the face of the application and in addition states that execution against SBM Bank (K) Ltd (***SBM***) is unlawful for the reason that the said Bank is not a party to **KISUMU CMCC NO. 18 OF 2018**. He avers that whereas ***SBM vide*** Gazette Notice No. 6833 took over some assets and liabilities of Applicant, such liabilities did not include matters that involved fraud as is the matter in this case and negligence.

4. The application is opposed by way of a replying affidavit sworn on 20<sup>th</sup> January, 2020 by **EDWIN TOO** who describes himself as the Respondent's Accountant. He avers that Kenya Deposit Insurance Fund that the deponent of the supporting affidavit represents is not a party to this suit and the averments of deponent are an attempt to introduce new evidence on appeal. The Respondent also avers that the Applicant has not demonstrated that the attached assets do not include assets that were taken over by SBM and further that the Applicant's counsel by an email dated 20.12.19 gave a professional undertaking to Respondent's advocate that the decretal sum together with auctioneer charges would be paid by 23.12.19. Respondent additionally submits that the firm of Oundo, Muriuki & Company Advocates that filed submission on behalf of the Applicant did not seek leave to come on record after judgment and that its submission ought to be struck out. The Respondent also submits that the Applicant did not seek leave to file this appeal and that the same is a nullity and ought to be struck out.

5. KEVIN KIMANI, legal officer at SBM, by a further affidavit filed by sworn on 04. 02.2020 avers that SBM was not a party to the initial suit and it paid auctioneer charges to forestall unnecessary embarrassment which would have been occasioned had its equipment been carried away by the auctioneer.

**Analysis and Determination**

6. I have considered the application in the light of the supporting affidavit, the replying affidavit and written submissions filed on behalf of both parties and I have deduced the issues for determination as follows:

**1) Whether the firm of Oundo, Muriuki & Company Advocates is properly on record for the Applicant**

**2) Whether the Applicant was required to seek the leave of court prior to filing this appeal**

### 3) Whether the Application is merited

#### **Is the firm of Oundo, Muriuki & Company Advocates is properly on record for the Applicant?**

7. Order 9 Rule 9 provides as follows:

**When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

8. The record demonstrates that the notice of motion dated 21.12.19 was filed by the firm of Osamba Otieno Advocates and that the firm of Oundo, Muriuki & Company Advocates came on record by notice of change of advocate filed on 13.01.20.

9. In my considered view, the firm of Oundo, Muriuki & Company Advocates would only have been required to seek leave of court if it had taken over the matter and filed the appeal and the application in its name. In this particularly case however, the notice of change of advocates filed by the said firm did not require to be sanctioned by the court. I therefore find that **Simon Barasa Obiero v Jackson Onyango Obiero [2016] eKLR** and **Peter Ludasia Makokha v Theresia Hudson, Busia H.C. Civil Appeal No. 18 of 2015** are distinguishable from this case and that the said firm is properly on record for the Applicant.

#### **Was the Applicant required to seek the leave of court prior to filing this appeal**

10. Respondent has raised a novel point of law regarding this court's jurisdiction to determine this application and the appeal on account of Applicant's failure to seek leave contemplated under the provisions of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. Appellant did not submit on the issue of leave to appeal.

11. While it must be appreciated that this court has the jurisdiction to hear and determine appeals from tribunals, subordinate courts or bodies as prescribed by Article 165 of the Constitution and other Acts of Parliament, a party who desires to file an appeal to this court has a duty to demonstrate under what law that right to be heard on an appeal is conferred or if not, show that leave has been granted to lodge the appeal before the court. The above position was espoused by the Court of Appeal in **Nyutu Agrovet Ltd V Airtel Networks Limited (2015) eKLR** which cited with approval the decision by Ringera J (as he then was) in **Nova Chemicals Ltd vs Alcon International Ltd HC MISC APPL 1124/2002** where the learned judge held that:

**“the point of departure must be the recognition that the right of appeal, with or without leave, must be conferred by statute and the same is never to be implied”.**

12. The Court of Appeal further stated that:

**“.....and even Section 75 of the Civil Procedure Act, giving this court jurisdiction to hear appeals from the High court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law, then that court has no business to entertain the matter. (See owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1.**

13. Further to the foregoing, **Edith Wairimu Njoroge V Brooks Holdings Co. Limited & Another [2018] eKLR** Sewe J held that

**it is imperative for the Court to satisfy itself that it does have the requisite jurisdiction to entertain, not only the instant application, but also the appeal itself.**

14. The court also cited with approval the **Major Law Lexicon, Volume 4** which aptly defines jurisdiction thus:

**"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."**

15. I have carefully examined Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules and I find no provision that confers upon the Applicant the **“right of appeal”**. The record does not show that any leave to appeal was sought or obtained after the impugned judgment and before filing of this appeal and this application.

16. In my view, that leave is mandatory as it confers this court with the jurisdiction to hear the appeal. Jurisdictional issues are not matters that fall in the category of procedural technicalities. They go to the root of the matter for without jurisdiction, this court or any other court would do no one more thing than down its tools. (See **Owners of Motor Vessels “Lilian S”**) (supra).

17. The Court of Appeal in **CA Nairobi 86 of 2015 Peter Nyaga Murake v Joseph Mutunga**, while dealing with failure to seek leave to appeal from an order stated:

**“without leave of the High Court, the applicant 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”.**

18. I have considered whether the appeal and the application can be sustained under the provisions of Article 159(2) (d) of the Constitution and find that they unfortunately cannot since as earlier stated, jurisdictional issues are not procedural requirements, for without jurisdiction, the court acts in vain. As was held by the Court of Appeal in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR** that:

**“the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation”.**

19. The same Court of Appeal had previously in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** (five Judge Bench) stated succinctly thus, concerning the issue of taking umbrage under Article 159(2) (d) of the Constitution.

**“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1 B of the Civil Procedure Act Cap 221 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases”.**

20. In the same breath, having already found that jurisdiction stands on a higher pedestal and in a more peremptory position than procedural rules and that the requirements for leave to appeal as was in this matter is a jurisdictional issue, I can only reiterate that it goes to the very heart of substantive validity of court process and determination and certainly does not run afoul of the substantive procedure, dichotomy of Article 159 of the Constitution. (See **Josephat Muchiri Muiruri & another v Yusuf Abdi Adan [2015] eKLR**).

21. I echo Nyarangi JA in the case of **Owners of Motor Vessel “Lilian S” case (Supra)** that

**“..... jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

#### **Whether the Application is merited**

22. Having found that this court’s jurisdiction was not properly invoked, I find that it would be an exercise in futility to delve into the issue of whether or not this application is merited.

#### **Disposition**

23. Consequently and for the reasons stated hereinabove, notice of motion dated 21<sup>st</sup> December, 2019 and the appeal filed on 23.12.19 are hereby struck out with costs to the Respondent.

**DELIVERED THIS 14<sup>th</sup> DAY OF April, 2020**

**T. W. CHERERE**

#### **JUDGE**

**Court Assistant - Ms. Amondi/Ms. Okodoi**

**For the Appellant/Applicant - Oundo, Muriuki & Co. Advocates**

**For the Respondent - Muma Nyagaka & Co. Advocates**

#### **Order**

**This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15h March, 2019.**