



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 658 OF 2019

KCB BANK (K) LIMITED.....APPLICANT

VERSUS

PETER WAINAINA NGUGI.....RESPONDENT

RULING

1. The appellant, *KCB Bank Limited* (the applicant) moved this court by way of a Notice of Motion dated 11th November 2019 seeking the following orders:

i. That there be stay of execution of the order of the Honourable Court made on 6th November 2019 requiring the 1st Garnishee the Applicant herein to forthwith pay to the decree holder the sum of KShs.6,780,950/-.

ii. That the Honourable Court be pleased to set aside the Garnishee order absolute issued by the court on 6th November 2019 and any other consequential orders therein.

iii. That costs of the application be provided for.

2. The application is expressed to be brought under *Order 22 Rule 22, Order 43 Rule (1), Order 51 Rule (1)* of the *Civil Procedure Rules, 2010* and *Sections 1A, 3A and 63 (e)* of the *Civil Procedure Act*. It is supported by the grounds stated on its face and the depositions in the supporting and further affidavits sworn by *Tom Ogola* on 11th and 18th November 2019 respectively.

3. The applicant is aggrieved by the trial court's decision to issue a garnishee order in execution of a decree issued by the lower court in favour of *Peter Wainaina Ngugi* (the respondent) against *African Merchant Assurance Company Limited (AMACO)* who held two bank accounts with the applicant. Being dissatisfied with the trial court's decision, the applicant filed the current appeal. Subsequently, the applicant filed the instant application seeking to stay execution of the impugned order pending disposal of the appeal.

4. In a nutshell, the applicant contends that if stay is not granted, the judgment creditor will complete the execution process which was already underway and if execution was levied, the applicant will suffer substantial loss since AMACO had stopped depositing funds into the affected bank accounts namely account numbers [xxxx] and [xxxx]; that at the time the impugned order was issued, the said accounts did not have sufficient funds to satisfy the decree issued by the court, a fact which was brought to the trial court's attention before it issued the said order.

5. The application is opposed through a preliminary objection dated 25th November 2019 and grounds of opposition dated 26th November 2019.

In the preliminary objection, the respondent raises two main grounds to the effect that the application was incompetent, misconceived and an abuse of the court process and that the court lacked jurisdiction to entertain the application.

6. To expound on the claim that the court lacked jurisdiction to deal with the application, the respondent contended that there was no competent appeal before the court as the applicant did not have an automatic right of appeal against the trial court's order and no leave was obtained from the trial court before lodging the appeal; that no decree has been sent to this court for execution pursuant to *Order 22 Rule 22* of the *Civil Procedure Rules* which is one of the legal provisions relied upon by the applicant.

7. In the grounds of opposition, besides duplicating the points advanced in the preliminary objection, the applicant attacked the application contending *inter alia* that it amounted to an appeal through the back door which should not be entertained by this court; that the applicant has not come to court with clean hands as despite having sufficient funds in the respondent's bank account, the applicant has variously refused to

comply with the court order and was cited with contempt of court by the trial court; that the application is made in bad faith with the aim of delaying the respondent's enjoyment of fruits of his judgment and that the same should be dismissed with costs.

8. The application was canvassed by way of oral submissions. During the hearing, the applicant was represented by learned counsel *Ms. Mathenge* while learned counsel *Ms. Obaga* appeared for the respondent.

9. In her submissions, *Ms. Mathenge* reiterated the grounds supporting the motion as expounded in the two affidavits filed in support of the motion. In addition, she argued that the applicant has an arguable appeal and that since the applicant had complied with all the preconditions for grant of stay pending appeal, it was entitled to the orders sought.

10. In response to the points taken in the preliminary objection, *Ms. Mathenge* argued that the court had inherent jurisdiction and power to entertain any matter before it under *Article 165* of the *Constitution*.

11. On her part, *Ms. Obaga* opened her submissions by noting that as the appeal was filed against a garnishee order *nisi* issued under *Order 23 Rule 4* of the *Civil Procedure Rules*, it was incompetent as the law did not provide for an automatic right of appeal against such an order; that an appeal against such an order can only lie with leave of the court and no such leave was sought or obtained by the applicant before filing the appeal; that therefore, the court cannot grant the orders sought as its jurisdiction had not been properly invoked. For this proposition, counsel relied on the Court of Appeal authority of *Peter Nyaga Muvake V Joseph Mutunga, [2015] eKLR* alongside other persuasive decisions.

12. *Ms. Obaga* in addition urged the court to find that *Order 22 Rule 22* of the *Civil Procedure Rules* was not applicable in this case since no decree has been sent by another court to this court for execution; that the application was incompetent and misconceived and ought to be dismissed with costs.

13. In her rejoinder, *Ms. Mathenge* conceded that there was no automatic right of appeal against the order appealed against and that the applicant did not obtain leave to appeal against the trial court's order before lodging the appeal. In her view, failure to obtain leave was just a procedural technicality which could not render the appeal and the application incompetent.

14. I have carefully considered the application, the affidavits on record, the preliminary objection, the grounds of opposition and the parties' rival submissions as well as the authorities cited.

It is common ground that there is no automatic right of appeal against the order challenged on appeal as *Order 23 Rule 4* pursuant to which the impugned order was made is not among the orders listed in *Section 75* of the *Civil Procedure Act* and *Order 43* of the *Civil Procedure Rules* which sets out the orders from which appeals lie as a matter of right. An appeal against a garnishee order *nisi* or absolute can only be made with leave of the court. As noted earlier, the applicant has through its counsel admitted that the instant appeal was filed without leave of the court.

15. I strongly disagree with the position taken by *Ms. Mathenge* that failure to obtain leave to file an appeal where the appellant did not have an automatic right of appeal was a mere procedural technicality which did not affect the competence or validity of an appeal.

16. In my view, failure to obtain leave to appeal where such leave was required was a fundamental omission which went to the root of the competence of an appeal. It is not a procedural technicality which as submitted by *Ms. Mathenge* can be disregarded under *Article 159* of the *Constitution*. It is a matter which affects the jurisdiction of this court to entertain such an appeal and any application filed therein.

Put differently, an appeal filed without leave of the court where such leave is required does not properly invoke the appellate jurisdiction of the court and the court would not consequently have any basis to entertain an application filed in the appeal.

17. A similar position was taken by the Court of Appeal in *Peter Nyaga Muvake V Joseph Mutunga, [supra]* where the court was confronted with a situation where the applicant had filed a Notice of Appeal intending to challenge an order issued by the High Court from which there was no automatic right of appeal. The Notice of appeal had been filed without first obtaining leave to appeal. The court expressed itself as follows:

“In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J. As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant's appeal. 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 42 of the Civil Procedure Rules, the procurement of leave to appeal is a 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. We so find and hold.”

18. In view of the foregoing, I have no doubt in my mind that there is no valid appeal on record on the basis of which the orders sought can be granted. I therefore find merit in the respondent's preliminary objection and the same is upheld. The applicant's Notice of Motion dated 11th November 2019 is accordingly struck out with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Mathenge for the applicant

Ms Obaga for the respondent

Ms Carol: Court Assistant