



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 95 OF 2019**

**TRIDENT INSURANCE CO. LTD.....APPELLANT/RESPONDENT**

**-VERSUS-**

**KYALO MUSYOKA (Suing as the Personal Representative of)**

**PURITY MWONGELI MUTAVA.....RESPONDENT/APPLICANT**

**RULING**

1. The Preliminary Objection (P.O) for determination is filed by the Respondent and is dated 20/12/2019. It is grounded as follows:

a) **That** the appeal emanates from the orders sought under Order 21 Rule 12 of the Civil Procedure Rules, 2010 which requires mandatory leave from Court before lodging an appeal.

b) **That**, the Honorable court lacks jurisdiction to entertain the Applicants application for want of the necessary leave as envisaged under Order 43 Rule 2 of the Civil Procedure Rules 2010.

c) **That**, the memorandum of appeal dated 16/12/2019 is defective, incompetent and filed without the requisite leave of the court.

2. Directions were given that the P.O be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

3. The Respondent through Mr. Mutala submits that leave of court is required where one wishes to appeal on an order that is not listed in Order 43 of the Civil Procedure Rules (CPR). He relies on the case of **Nyutu Agrovet Ltd –vs- Airtel Networks Ltd (2015), eKLR** where the Court of Appeal held 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 breadth, 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.”*

4. He has also cited the case of **Peter Nyaga Muvake –vs- Joseph Mutunga [2015] eKLR** where the Court of Appeal held that;

*“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.”*

5. He submits that failure to seek leave means that this court has no jurisdiction to hear and determine the application and intended appeal. He contends that jurisdictional issues go to the root of the matter and are not procedural technicalities. He relies on the case of **Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** where the Court of Appeal stated that;

*“The question of a right to appeal goes to jurisdiction and is so fundamental 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)** to be a panacea, nay, a general whitewash that cures and mends all ills,*

*misdeeds and defaults of litigation.”*

6. The Applicant through Mr. Kokul submits that the subsisting warrants made the matter so urgent that it was impossible to seek leave. It contends that lodging an application for leave would have allowed execution to take place thus rendering the prayer before this court nugatory.

7. Relying on section 3A of the Civil Procedure Act (CPA), the Respondent submits that nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice to be met or prevent abuse of the court process. The Respondent has also relied on Article 159(2)(d) to submit that justice shall be administered without undue regard to procedural technicalities.

8. The Applicant appreciates that the Constitution is not a general white wash that mends all ills, misdeeds and defaults of litigation but contends that there should also be an appreciation of the purpose that the legislator and Constitution intended to protect. He submits that the court ought to take cognizance of whether the appeal is arguable or not and relies on **Nrb HCMA No. 997 of 2003; Fitzgerald Kennedy Omangu –vs- The Postmaster General Postal Corporation of Kenya & 2 Others** where the Court held that an Applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.

#### **Analysis and determination**

9. The Applicant filed a declaratory suit against the Respondent *to wit* Makindu SPMCC No. 177 of 2019 and it was determined in his favour. Through an application dated 11/12/2019 and filed under certificate of urgency, the Respondent sought stay of execution and leave to liquidate the decretal sum of Kshs.3,075,779/= into monthly installments of Kshs.150,000/=. The application was brought under sections 1A, 1B & 3A of the CPA and Order 21 Rule 12 of the CPR, 2010. The trial Magistrate declined to grant interim orders hence this appeal.

10. Order 43 Rule 1 of the CPR is an elaboration of section 75 of the CPA and it gives a list of orders and rules from which an appeal shall lie as of right. Order 21 Rule 12 is not in the list. Order 43 rule 2 provides that “*An appeal shall lie with the leave of the court from any other order made under these Rules.*” This provision is self explanatory and couched in mandatory terms. It means that leave of court is mandatory for any appeal hinged on an order not listed in Rule 1. It is not in dispute that the respondent did not seek leave before filing the appeal.

11. The Respondent’s argument that there were circumstances impeding the seeking of leave is self defeatist because Order 43 Rule 3 of the CPR provides that leave can be sought orally at the time when the order is made or within 14 days from the date of such order. It was therefore not a must for the Respondent to file a formal application for leave and there is nothing on record to show that an oral application was made.

12. Order 43 Rule 3 also provides that “*an application for leave shall in the first instance be made to the court making the order sought to be appealed from...*” However, section 75 of the CPA recognizes that leave can also be sought from “*...the court to which an appeal would lie..*” Accordingly, it is evident that the respondent had a chance to seek leave from this court but did not do so.

13. From the quoted law and the jurisprudence of the Court of Appeal, it is my considered view that the application and appeal are incurably defective. Indeed, even Article 159 of the Constitution cannot salvage them.

14. The upshot is that the Preliminary Objection (P.O) has merit and is upheld. The Memorandum of Appeal dated 16<sup>th</sup> December 2019 together with the application of even date are incurably defective and are struck out with costs.

Orders accordingly.

***Delivered, signed & dated this 8<sup>th</sup> day of October 2020, in open court at Makueni.***

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***H. I. Ong’udi***

***Judge***