



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 31 OF 2018

ABP.....1ST APPLICANT

K S.....2ND APPLICANT

AND

TZS.....RESPONDENT

R U L I N G

1. Before court is an application brought pursuant to **Order 42 rule 6** and **Order 51 rule 1** of the **Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act** seeking for orders staying the proceedings in **Children’s case No. 52 of 2012, In the matter of AAP, AAP and MAP (minors) TZS and ABP** pending hearing and determination of the appeal and to deem the Memorandum of Appeal filed without leave of court as being properly on record.

2. The above application is predicated on grounds that the Applicant had filed an application in the Children’s Court seeking for a declaration that the Children’s case is *sub judice* and *res judicata*, which application was dismissed vide a ruling dated 2nd March 2018. Thus being dissatisfied with the said ruling the Applicant is desirous of appealing against the same. He as a result filed before this court a memorandum of appeal and applied for proceedings and ruling.

3. In his supporting affidavit the Applicant seeks to have the Memorandum of Appeal as filed to be deemed as having been filed with leave of court and on the basis that he has an arguable appeal, likely to succeed, the prayer for stay is being sought within a reasonable time and that stay is not likely to prejudice the Respondent.

4. The application was objected to by a replying affidavit of the Respondent dated 2nd May 2018, where she deposed that the Application is devoid of merit, was filed out of time, is frivolous as an appeal in this matter does not lie as of right and no leave was sought from the court of 1st instance as required by law. Further the Applicant has not demonstrated that he will suffer any substantial loss if stay is not granted. Lastly the application is not in the interest of justice.

5. Having considered the application, affidavits on record and submissions, before court for determination are two issues;

i. Whether or not to deem the memorandum of appeal dated 9th March, 2018 as having been filed with leave of this court.

ii. To grant stay of the proceedings in Children’s case No. 52 of 2018 pending hearing of the Appeal herein.

6. It is not in dispute that in order to appeal against the order subject matter the Applicant required leave as leave does not lie as of right as espoused by **Section 75(1)** of the **Civil Procedure Act**, meaning that one must seek leave in order to be granted the right of appeal.

Further **Order 43(1)(3)** directs where and within which period such an application is to be made. It provides as follows:

“(3) An application for leave to appeal under Section 75 of the Act shall in the 1st 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 14 days from the date of such order.”

7. There are many authorities which speak to the subject in question as well.

In the case of **Harambee Sacco Society Limited v Lawrence Njagi Mbungu Misc Application 484 of 2015** reference was made to several Court of Appeal rulings touching on the issue before court and since the same are on all fours with matters arising herein, I will quote a few.

Peter Nyaga Murage v Joseph Mutunga, Nairobi C.A Case No. 86 of 2015 the Court stated; -

“without leave of 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 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 staying an intended appeal against an order which is appealable only with leave, which has not been sought and obtained, is dead in the matter.”

In **K.C.B. Ltd v Tony Manaseh Esipiya C.A. Case No. 105 of 1998** the case of **G.R. Mandaria V Rattan Singh (1965) E.A.** was referred to where the court said;

“where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or *res judicata* fails and a suit permitted to proceed, no preliminary decree arises but only an order. The unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.”

8. It follows therefore that the Applicant herein ought to have sought leave to file an appeal against the order being challenged with the court of first instance, either orally at the time of making of the order or Fourteen days from the date of that order this was not done.

9. And since no such application was made in the court of first instance the Applicant has no right of appeal as the same accrues from leave. The law specifically states where the leave was to be sought at first. Certainly, this is not the right forum. The right of appeal has not accrued; the memorandum is not properly before the court; the process is wrong *ab initio*; and as such there is no competent appeal that is likely to succeed or upon which the orders being sought for would be anchored upon.

10. The application must therefore fail. Costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF JANUARY, 2019.

.....

ALI-ARONI

JUDGE