REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 62 OF 2016

WILHEMSEN SHIP SERVICES LIMITED.....APPELLANT

VERSUS

GHARIB HASHIM RASHID.....RESPONDENT

R U L I N G

1. For determination is the Appellants application dated 22/11/2017 seeking orders that leave be granted for the Appeal to be filed and the Memorandum of Appeal filed on 10/5/2016 be deemed duly filed. The application is supported by the Affidavit sworn by **Cynthia Mutune, Advocate.**

2. The reasons advanced to ground the application are that the ruling was delivered on the 15/4/2016 in the presence of Miss Mutune Advocate. On that day, the Appellant contends, Miss Mutune sought leave to appeal and the court remarked that appeal was as of right which it is averred was construed to mean leave was not required. The record is however silent of such request and the words attributed to the court.

3. To the appellant, the question of the competence of the appeal only arose during the hearing and long after the directors had been given hence, it was contended that Order 42 Rule 13 estopped the Respondent from rising the objection on the competence of the appeal as an issue of jurisdiction of the court. It was further contended that the purpose of Order 42 Rule 13 was to give effect to preparedness of the parties towards meeting the overriding objective and purpose of the court under Sections 1A, 1B & 3B of Civil Procedure Act as read with Article 159 of the constitution.

4. The applicant then cited to court the decisions in ***Republic vs University of Nairobi [2017] eKLR***, in which the need to give parties their day in court was underscored as well as the decision in ***Phillip Chemwolo vs Augustine Kubende [1986] KLR 495*** for the proposition of law that the occurrence of a blunder should not be the basis for a court of law to shut its doors to a litigant.

5. The appellant beseeched the court to note that the appeal had been substantially argued before the issue was raised in response to the submissions on appeal and invited the court to rely on the decision of the Court of Appeal in ***JANET OSEBE GECHUKI VS COMMISSIONER OF CUSTOMS & EXCISE & ANOTHER, CACA NO. 12 OF 2016 [unreported]*** for the proposition of the law that in such a situation substantial justice demands that the appeal be heard on the merits.

6. For the Respondent the application was opposed by a Replying Affidavit of the Respondent sworn on the 11/12/2017. The gist is that leave was never sought not granted and it is not open for the court to infer same - it was either granted or not granted. The court was referred to the precedent in ***Fred Ben Okoth vs Equator Bottlers Ltd [2015] eKLR*** where it was held that the sanctity of court records is paramount for the dignity of the court to be upheld and that the insinuation that a judicial officer never accurately recorded proceeding, would be to declare a misconduct against such judicial officer.

7. The decision in ***Nicholas Kiptoo Araps Korir Salat vs IEBC [2014] eKLR*** was then cited for the proposition that an appeal filed without leave is incompetent and no leave can be subsequently granted to validate it.8

8. On Order 42 Rule 13, counsel submitted that the same only applies to territorial jurisdiction and that the issue of jurisdiction can be argued at any time and stage of the proceedings. On article 159, the counsel cited to court the decisions in ***Harambee Sacco vs Njagi [2014] eKLR*** and that of ***Mumo Matanu vs Trusted Societies CACA 290/2012*** for the proposition that provision does not render all other provision of the law ottios.

Analysis and determination

9. Irrespective of the submissions by the parties the question this court must pose and answer is whether the interests of justice would be

served by granting leave and if the leave if granted it shall have a retrospective effect.

10. In answering that some of the material facts to be considered is the nature of the case to be pursued by the leave sought and the conduct of the applicant after the decision sought to be challenged was made. However before that endevour is made the court must be certain that the impugned decision required leave to appeal.

11. It is common ground and note disputed that the application giving rise to the current appeal and application was one that sought to strike out the suit for being *res judicata*.

12. That application was not disclosed to have been made pursuant to any disclosed rules under the Civil Procedure Act but the reasons given were that the matter having been canvassed and determined at the Employment and Labour Relations Court, the same was *res judicata* and therefore the suit was geared to service no justitiable purpose at all but was a mere frivolity intended to scandalize, and abuse the process of the court. These words to me brought the application under the ambit of **Order II Rule 15(1) b & d** of the Civil Procedures Rules. Having been so grounded, there was right of appeal without the need of leave of the court in terms of Order 43 Rule 1(b).

13. Consequently there was no need for leave and both counsel here wholy and utterly misunderstood the nature of the ruling delivered on the 15/4/2016 in taking the view that there was need for leave.

14. In any event, the parties having addressed the court substantively on the appeal, it is only in the interests of substantial justice that the appeal be heard on the merits rather than being defeated on the need for leave. Even if there was need for leave, I would readily grant that leave and direct that it validates the appeal already filed for the purposes of being heard on the merits in Janet Osebe Gechuki's case (supra) the Court of Appeal said:-

> ***"Moreover the appeal having been fully argued, it is only fair and just that substantive justice takes precedence, and that the same be determined on merit. Accordingly we reject this ground".***

15. On the decision by the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat vs IEBC & Other***, this court has held in ***Charles Githinji Muigua vs Charles Kiiru Karanga [2016] eKLR*** that the Supreme Court was applying the Supreme Court Act rules made there under while this court in this matter can only apply the Civil Procedure Act and its rules. I am yet to change my view because that decision was challenged on appeal and was upheld.

16. Under Article 259(9) of the constitution the provision to Section 79G and Order 50 Rule 6 of the Act, this court has the latitude and discretion to extend time even where the time appointed has since passed and therefore to hold otherwise would be contra statute. I would not walk that path if there was need for leave.

17. The upshot is that I dismissed the application for having been brought without regard to the law and on the basis that to grant the Orders sought would be for the sake of it rather than securing the interests of justice.

18. However noting that the same was instigated and brought about by the Respondents contention that leave was required, I Order that each party shall bear own costs.

Dated, signed and delivered this 4th day of February 2019.

P J O OTIENO

JUDGE