



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 34 OF 2016

(FORMERLY CIVIL APPEAL 184 OF 2015)

JOSEPH MWALUKUKU.....APPELLANT/APPLICANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

1. By a Notice of Motion dated 31st January, 2019, the Appellant/Applicant seeks stay of execution of the judgment delivered by this court (L. N. Waithaka J) on 5th December, 2018 pending the hearing and determination of this application and for leave to file an appeal out of time against the said judgment. The application is brought under Rule 4 of the Court of Appeal Rules and Section 7 of the Appellate Jurisdiction Act.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Joseph Mwalukuku sworn on 31st January, 2019. The applicant states that judgment was delivered on 5/12/2018 in his absence and in the absence of his advocates. That they only learnt of the delivery of judgment on 30th January, 2019 and being dissatisfied with the same, he intends to lodge an appeal. Relying on advise the applicant avers that his intended appeal is meritorious with very good chances of success as it raises serious questions of law and fact. That the delay in filing the intended appeal is not unreasonable and the present application has been filed expeditiously.

3. In opposing the application, the respondent filed grounds of opposition dated 27th March 2019 in the following terms:

i. The application is frivolous, lacks merit, is an abuse of the process of the court and should be dismissed with costs to the respondent.

ii. Pursuant to Section 15 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya, the judgment dated 5th December 2018 was final and cannot be subject to further appeal.

iii. Pursuant to Section 75 (2) of the Civil Procedure Act, a second Appeal does not lie to the Court of Appeal from an order passed in Appeal at the Environment and Land Court.

iv. That this Honourable court therefore lacks jurisdiction to grant leave to file an Appeal to the Court of Appeal pursuant to Section 15 (4) of Chapter 301 and Section 75 (2) of Chapter 21 of the Laws of Kenya.

4. The application was canvassed by way of written submissions which were duly filed by both parties. I have considered the application and the submissions made. The first issue to determine is whether this court has jurisdiction to grant the leave sought to file appeal out of time. The judgment herein arose from the decision of the Business Premises Rent Tribunal in Mombasa Tribunal Cases Nos. 99, 100, 102 and 107 of 2012 delivered on 17th December, 2015. The Applicant contends that he is aggrieved by the judgment of this court (Waithaka, J) delivered on 5th December, 2018 and seeks leave to file an appeal out of time to the Court of Appeal.

5. Section 15 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya provides as follows:

15. Appeal to court

(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination of order, appeal to the Environment and Land Court:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) In hearing appeals under subsection (1) of this Section the court shall have all the powers conferred on it by or under any written law.

(4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal

6. I have considered the proviso to Section 15(4) of Cap 301. The proviso clearly indicates that the decision of this court is final and not subject to further appeal. In the case of **Ramadhan Mohamed Ali –v- Hashim Salim Ghanim (2016) eKLR**, the Court of Appeal expressed as follows:

“As we indicated earlier, the first issue that calls for determination before addressing the merits of the appeal is the issue taken by the respondent whether the Appellant has a right of appeal to this court. Mr. Mogaka, learned counsel for the respondent in a short and succinct submission argues that by dint of Section 15 (4) of the Act, the Appellant did not have a right of Appeal to this court from the decision of the High Court in the exercise of its Appellate jurisdiction from the decision of the Tribunal. He relied, in support of that proposition, on the judgment of this court in Premchand Nathu & Co Ltd & 4 Others –v- Kariuki, C.A. No.33 of 1990.... Ultimately, we are satisfied that there is no right of second appeal to this court from the original decision of the Tribunal. Accordingly, we find that the respondent’s objection is well founded and strike out this appeal with costs to the respondent. It is so ordered.”

7. In the case of Premchand Nathu & Co. Ltd & 4 Others –v- Kariuki (1990) eKLR, the Court of Appeal also considered Section 15 of Cap 301 and stated:

“...any appeal to the High Court from the Tribunal and the proviso to sub-section 4 which has prescribed in no uncertain words that the decision of the High Court “on any appeal” shall be final and not subject to further appeal, there is, in our view, a clear manifestation of the intention of the legislature to bring to finality to the appeal with the decision of the High Court. Trying to take the appeal on some pretext or the other beyond the High Court is, in our view, an attempt to defeat the purpose of the legislature.

8. Going by the proviso of sub-section 4 of Section 15 of Cap 301, and being guided by the above decisions of the court of Appeal, it is manifestly clear that the Applicant has no right of appeal to the court of appeal in this matter which emanated from a decision of the Tribunal. The jurisdiction of this Court is statutory. For this Court to entertain this application would be to confer jurisdiction on itself in the face of statutory provisions against appeals from a decision of this court to the Court of Appeal in regard to a decision from the Tribunal. I am therefore unable to grant the leave sought to appeal out of time as the law is quite clear that there is no right of second appeal to the Court of Appeal from the decision of this court on matter that originated from a decision of the Tribunal. In addition, I note that the applicant has invoked the provisions of Rule 4 of the Court of Appeal Rules and Section 7 of the Appellate Jurisdiction Act. In my view, jurisdiction under those provisions is for the Court of Appeal and not this court. Consequently, it is my finding that I do not have jurisdiction to entertain the application and grant the orders sought.

9. The upshot is that the Notice of Motion dated 31st January 2019 is without merit and the same is dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of March 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Wafula for respondent

Ondieki holding brief for Lumatete for applicant

Yumna Court Assistant

C.K. YANO

JUDGE