



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 22 OF 2019**

**HON. ELISHA OCHIENG ODHIAMBO.....APPELLANT**

**VERSUS**

**HON. WASHINGTON JAKOYO MIDIWO.....RESPONDENT**

***(An appeal from the Ruling and Order of Honourable Tom M. Olando SRM***

***Siaya delivered on 22<sup>nd</sup> May 2019 in Siaya Election Petition No. 2 of 2017)***

**JUDGMENT**

1. The appeal herein challenges the order of 26.6.2019 to the effect that the Respondent pays the costs in an election petition, by instalments of Kshs. 50,000/=, per month.

2. Before hearing the appeal I brought to the attention of Parties Counsel the provision of **Order 43 of the Civil Procedure Rules and Section 75 of the Civil Procedure Act** which stipulate orders which are appealable as of right and provide that in respect of all other orders not specifically provided for under Order 43, leave of court making the order must be sought and obtained first, and Mr. Oduol has correctly conceded that no leave of the trial Court was sought prior to filing of this appeal and that such an appeal from an order for payment of costs by instalment does not lie as a matter of right.

3. The relevant provisions of the Civil Procedure Act for the purposes of this appeal are as follows:

***"75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted: .....***

***(h)Any order made under rules from which an appeal is expressly allowed by rules.***

***"76(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."***

4. The Civil Procedure Rules provide for appeals from orders in Order 43. The relevant provision of which is:

***"43(2) an appeal shall lie with the leave of the court from any other order made under these Rules."***

5. It is, therefore, clear from the foregoing that under the Civil Procedure Act, an appeal only lay from an order in the circumstances set out in Section 75 and that by Section 76 it is specifically stated that, save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction.

6. The only provision which could possibly be applicable is section 75(1)(h), which provides that an appeal may lie from any order **"made under rules"** from which an appeal is **"expressly allowed by rules."** This category of orders must be ascertained by reference to Order 43, rule 1(1). It gives an appeal as of right from thirty-one special types of orders set out in paragraphs (a) to (ee) inclusive of sub-rule (1). All these are clearly **"made under rules."** Sub-rule (2) then proceeds:-

***"(2) An appeal shall lie with the leave of the court from any other order made under these Rules." (Emphasis added).***

7. The application from which the order giving rise to this appeal was made was under section 3A of the Civil Procedure Act and Order 21 Rule 12 of the Civil Procedure Rules on stay of execution of Decrees. The applicant **Hon. Washington Jakoyo Midiwo** had sought for leave

of court to pay the taxed costs in an election petition by way of instalments of Kshs 50,000 per month on account that he was not possessed of sufficient means to clear all the taxed costs of Kshs 1,716, 820 at once.

8. Execution of decrees on costs is governed by Order 21 of the Civil Procedure Rules. There is no right of appeal from such order of payment of costs by instalments.

9. That being the case, this appeal was misconceived as it was filed without leave of the trial court which made the Order appealed from. Without leave of court that made the order appealed from, this court is devoid of jurisdiction to hear and determine this appeal and without jurisdiction, this court must down its tools and say no more. The appeal is accordingly dismissed.

10. As the appeal has been dismissed on account of jurisdiction and as the Respondent never raised this issue at the earliest opportunity to avoid wasting of judicial time, I order that each party shall bear their own costs of the appeal.

**Dated, Signed and Delivered at Siaya this 18<sup>th</sup> day of November, 2019.**

**R.E ABURILI**

**JUDGE**

**In the presence of:**

Mr. Oduol Adv. holding brief for Mr. Orwenyo Adv. for the appellant

Mr. Olony h/b for Mr. Sala Adv. for the Respondent

CA: Modestar and Winnie