



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 41 OF 2018**

**EMILIO KINYUA IRERI.....APPELLANT**

**VERSUS**

**AYUB ODARI OSODHI.....1<sup>ST</sup> RESPONDENT**

**EDUCATIONAL SCIENTIFIC & TECHNIAL EQUIP CO. LTD.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling delivered by Hon. Mbeja on*

*8<sup>th</sup> December, 2017 in civil Suit Number, 1286 of 2017)*

*Between*

**EMILIO KINYUA IRERI.....PLAINTIFF/APPLICANT**

**VERSUS**

**AYUB ODARI OSODHI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EDUCATIONAL SCIENTIFIC & TECHNIAL**

**EQUIP CO. LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The ruling herein relates to the Respondents/Applicant's application dated 10<sup>TH</sup> day of September, 2019 brought under Section 75 of the Civil Procedure Act, Order 43 Rule 1(1) (2) (3) and 4 and Order 2 Rule 15 of the Civil Procedure Rules in which the Respondents/Applicants have sought for orders that:-

1. The memorandum of appeal filed herein on the 30<sup>th</sup> day of January, 2018 be struck out for want of leave of this court and for want of service upon the respondents.
2. Costs of the application be borne by the respondent.

It is grounded on the annexed affidavit of Catherine Ngala, sworn on the 10<sup>th</sup> day of September, 2019 and on the grounds set out on the body of the same.

The deponent avers that the Appeal filed on the 30<sup>th</sup> January, 2018 is against the ruling of Hon. Mbeja delivered on 8<sup>th</sup> day of December, 2017 which allowed the matter to be referred to arbitration. That the appellant never sought leave of the court to file the appeal against the said ruling/order.

The deponent further avers that upon filing the appeal, the Appellant never bothered to effect service upon the Respondents' advocates despite the respondents' counsel's letter dated the 15<sup>th</sup> July, 2019 to the Appellant's counsel protesting their failure to serve them with the memorandum of appeal. They have urged the court to strike out the appeal.

The court has perused the application and the affidavit in support of the same. I have also looked at the application dated the 25<sup>th</sup> July, 2017 which gave rise to the ruling delivered on the 8<sup>th</sup> day of December, 2017, which is the subject of this appeal.

The said application was brought under Section 6 of the Arbitration Act and under Article 159 (2) (C) of the Constitution of Kenya. It sought to stay the suit before the trial court pending reference to arbitration as provided for in the knock agreement between the insurers of the Plaintiff and the Defendant namely Jubilee Insurance Company Limited and Intra Africa Assurance Company Limited, respectively. It also sought for an order that upon granting the stay, the suit in the lower court be struck out and dispute be referred to arbitration.

Upon hearing the application, the Learned Magistrate allowed prayer (1) of the application which was for stay of proceedings. The Appellant herein was not satisfied with that ruling and he appealed to this court on the 30<sup>th</sup> January, 2018.

The Respondents/Applicants have now sought to have the memorandum of appeal struck out for want of leave of the court and for want of service upon them.

On the issue of leave, this court is able to establish that the application before the trial court was mainly brought under Section 6 of the Arbitration Act.

Order 46 of the Civil Procedure Rules deal with Arbitrations under an order of a court and other alternative Dispute Resolution. The application before the trial court was made specifically under Order 46, Rule 1 of the Civil Procedure Rules. Under Order 43 of the Civil Procedure Rules, Order 46 is not among those with an automatic right of appeal.

On the issue of service, the Respondents state that they were not served with the memorandum of appeal. On the 9<sup>th</sup> day of July, 2019, counsel for the Respondents wrote to the Deputy Registrar requesting for a copy of the memorandum of appeal. A copy of the said letter is annexed to the supporting affidavit and is marked as annexure CWN3. Further, the Respondents' counsel wrote a protest letter dated 15<sup>th</sup> July, 2019 to the appellant's counsel on their failure to serve them with the memorandum of appeal which letter, they ignored. A copy of that letter is annexed and marked as annexure CWN4. This letter was written slightly over two months before the present application was filed.

The court notes that neither the appellant nor his counsel attended court on the 31<sup>st</sup> October, 2019 when the application came up for hearing. This was despite the fact that counsel for the appellant was served with the application on the 16<sup>th</sup> September, 2019 and the date of the hearing of the same has been indicated therein. The application therefore proceeded ex-parte.

In view of the analysis made hereinabove, I find that it was necessary for the Appellant to seek leave before filing the present appeal but there is no evidence that leave was sought for as required under the law.

With the evidence availed to the court by the counsel for the Respondents, I also find that the memorandum of appeal was not served upon the Respondents.

In the upshot, I find that the application dated the 10<sup>th</sup> September, 2019 has merits and it is hereby allowed as prayed. Costs of both the application and the appeal are awarded to the respondents.

It is so ordered.

Dated, signed and delivered at **NAIROBI** this 7<sup>TH</sup> day of **NOVEMBER, 2019**.

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents