



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 62 OF 2019

PREMIER INDUSTRIES LIMITED.....APPELLANT

VERSUS

STEPHEN KILONZO MATILIKU.....RESPONDENT

RULING

1. The subject matter of this ruling is the preliminary objection taken out by the respondent dated 21st February 2019. In the preliminary objection, the respondent claims that the appeal herein is incompetent in view of *Section 75* of the *Civil Procedure Act* and the same should be struck out with costs.
2. By consent of the parties, the objection was prosecuted by way of written submissions. Those of the respondent were filed on 7th May 2019 while those of the appellant were filed on 22nd May 2019.
3. A reading of the respondent's written submission reveal that the attack on the competence of the appeal is based on grounds that there is no automatic right of appeal to the High Court against the kind of orders that are the subject of appeal herein and no leave of the court was sought before the appeal was filed. It is also the respondent's contention that the appeal was filed by advocates who were not properly on record for the appellants; that the Notice of Motion which resulted in the impugned ruling was filed and prosecuted by *Mucheru-Oyatta & Associates Advocates* while the appeal was filed by *Mucheru Law LLP*, a limited liability partnership; that the change of advocates was effected contrary to *Order 9 Rule 9* of the *Civil Procedure Rules* which require that change of advocates after judgment can only be effected with leave of the court and such leave was not obtained by the advocates who filed the appeal on behalf of the appellant.
4. The appellant in its response to the objection maintained that it had an automatic right of appeal to this court given the subject matter of the appeal and it did not therefore need to seek leave of the court before filing the appeal.
5. On the claim that the appeal was filed by advocates who were not properly on record, the appellant contended that an appeal was a different and independent matter from the suit in the lower court; that parties to an appeal have a right to either retain the advocate who represented them in the lower court or appoint a different advocate to represent them in the appeal proceedings without seeking leave of the court.
6. I have considered the points taken in preliminary objection, the written submissions made on behalf of the parties and the authorities cited. It is not disputed that the ruling challenged on appeal was in respect of an application which sought stay of execution of the decree issued in the suit for the duration of the moratorium gazetted on 1st July 2016 by the Managing Trustee Policy Holders Compensation Fund or the setting aside of the judgment entered in the suit so that hearing could start *de novo*.
7. The memorandum of appeal filed on 11th February 2019 reveals that the appellant appealed against the entire ruling of the learned trial magistrate in CMCC No. 612 of 2010 dated 16th January 2019. Though none of the parties availed to this court a copy of the said ruling, grounds No's 7, 8 and 9 clearly shows that the appellant was *inter alia* challenging the trial court's decision to dismiss its prayer seeking setting aside of the *ex parte* judgment entered against the appellant.
8. The power of the court to set aside *ex parte* judgment or an order dismissing a suit for non-attendance is derived from *Order 12 Rule 7* of the *Civil Procedures Rules* (hereinafter the Rules).
9. *Section 75 (1) (a) to (g)* of the *Civil Procedure Act* (hereinafter the Act) specifies the orders from which an appeal would lie as a matter of right but *Section 75 (1) (h)* provides that parties aggrieved by orders made under the Rules from which an appeal is expressly allowed by the rules will also have an automatic right of appeal.

10. Order 43 of the Rules is the provision that prescribes the orders from which appeals will lie as of right. Order 43(1) (h) expressly states that appeals against orders made under Order 12 Rule 7 in applications for setting aside judgment or for dismissal of suits for non-attendance will lie as a matter of right. Since the ruling subject matter of the appeal dealt *inter alia* with prayers for setting aside judgment, I find that it was not necessary for the appellant to seek leave from either the trial court or this court before filing the appeal.

11. The other point of objection taken by the respondent is that the appeal was incompetent as the advocates who filed it came on record after judgment was passed without first obtaining leave of the court as required by Order 9 Rule 9 of the Rules.

12. The Court of Appeal in Tobias M. Wafubwa V Ben Butali, [2017] eKLR had occasion to pronounce itself on whether Order 9 Rule 9 of the Rules was applicable to advocates who had been retained to file and prosecute appeals and they were not on record when judgment in the lower court was passed. The court stated as follows:

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a notice of change of advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

13. In view of the foregoing, it is clear that the firm of *Mucheru Law LLP* did not require the trial court’s leave to be placed on record for the appellant before filing the appeal.

14. For all the above reasons, I am satisfied that the preliminary objection is devoid of merit and it is hereby dismissed with costs to the appellant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Oluoch for the respondent

No appearance for the applicant

Mr. Salach: Court Assistant