



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 70 OF 2019

PHILEMON KIOGORA MUNJURI.....APPELLANT

VERSUS

WILLIAM KAMUNGE GAKUL.....RESPONDENT

(Being an appeal against the Ruling of Hon L.W. Kabaria (Ms) Senior Principal Magistrate

delivered on 1st day of February 2019 in CMCC No 4212 of 2013)

RULING

INTRODUCTION

1. On 13th February 2019, the Appellant filed his Notice of Motion application dated 12th February 2019. The same was brought pursuant to Order 42 Rule 6(1) of the Civil Procedure Rules 2010 and all other enabling provisions of the Law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

- 1. Spent.**
- 2. Spent.**
- 3. THAT this Honourable court be pleased to strike out the suit.**
- 4. THAT costs of this application and the suit be awarded to the 1st Defendant.**

2. On 14th February 2019, this court granted him an order for stay of execution for thirty (30) days and directed that a hearing date of the said application be taken at the Registry.

3. On 12th March 2019, the Respondent filed a Notice of Motion application of even date. It was filed under the provisions of Order 15 Rule 15 of the Civil Procedure Rules 2010. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

- 1. Spent.**
- 2. Spent.**
- 3. THAT pending the hearing and determination of the intended appeal, this Honourable court be pleased to vary, discharge and/or vacate the orders herein issued on 14th February 2019 by Honourable Lady Justice Kamau.**
- 4. THAT costs to be provided for.**

4. The Respondent also filed a Preliminary Objection dated 12th March 2019 on the same date. The grounds were that:-

- 1. The appeal was incurably defective as it offended mandatory provisions of Order 43 Rule (1) & (2), Order 42 Rule (2) of the Civil Procedure Rules 2010 as read together with Section 79B of the Civil Procedure Act.**

2. There were no orders issued on 1st February 2019 capable of being appealed against.

5. Although this court could have dealt with the said applications and Preliminary Objection together so as to avoid time, the parties opted to have the Preliminary Objection heard and determined first as its effect, if allowed, was to dismiss the entire Appeal.
6. The Respondent's Written Submissions were dated and filed on 23rd April 2019 while those of the Appellant were dated and filed on 14th May 2019.
7. Parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE RESPONDENT'S CASE

8. The Respondent submitted that under Order 43 of the Civil Procedure Rules, appeals shall lie as a matter of right from orders listed in Rule 1(a) –(aa) and that where orders are not provided under the said Order 43 of the Civil Procedure Rules, then leave would have to be sought before an appeal could be filed.
9. It was his argument that the order the Appellant was seeking to appeal against was under Order 22 Rule 18 of the Civil Procedure Rules which was clearly not provided for under Order 43 (1) (K) of the Civil Procedure Rules and hence he should have sought leave to appeal before lodging the Appeal herein.
10. In this regard, he relied on the case of **Serephen Nyasani Menge vs Rispah Onsare [2018] eKLR** where the court therein held that failure to seek leave to file an appeal was fatal and consequently, no competent appeal could be lodged.
11. He further urged this court to reject the Appeal under Section 79B of the Civil Procedure Act as the Appellant did not annex a certified copy of the decree or order to be appealed from as mandated under Order 42 Rule 2 of the Civil Procedure Rules.
12. He added that there were no orders capable of being appealed from or stayed for the reason that on 7th February 2019 the Appellant was presented in court under warrant of arrest.
13. He thus urged this court to allow his Preliminary Objection.

THE APPELLANT'S CASE

14. On his part, the Appellant argued that the Notice to Show Cause (NTSC) orders were granted on 1st February 2019 and he filed his Notice of Motion application on 13th February 2019. It was his contention that he filed the said application seeking a stay of execution within the required period of appeal.
15. It was therefore his submission that the Appellant's allegation that no leave to appeal was granted was mere speculation with no merit.
16. He therefore urged this court to dismiss the Preliminary Objection.

LEGAL ANALYSIS

17. Notably, the Appellant submitted in respect of the aforesaid two (2) applications and the present Preliminary Objection. As he and the Respondent had agreed that the said Preliminary Objection should be heard and determined first, this court only analysed his Written Submissions in respect of the Preliminary Objection only.
18. Order 22 Rule 18 of the Civil Procedure Rules states that:-

“Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

19. Order 43 Rule (1) (1) (K) of the Civil Procedure Rules stipulates as follows:-

(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—

(k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution)

20. Further, Section 75 of the Civil Procedure Act provides that:-

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-

a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;

b. an order on an award stated in the form of a special case;

c. an order modifying or correcting an award;

d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

e. an order filing or refusing to file an award in an arbitration without the intervention of the court;

f. an order under [section 64](#);

g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

h. any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

21. It was therefore evident that the order the Appellant was seeking to appeal against was pursuant to proceedings under Order 22 Rule 18 of the Civil Procedure Rules and consequently, leave had to be sought before the Appeal herein could be filed.

22. This court therefore agreed with the Respondent that the Appeal herein was incurably defective and could not be cured under the provisions of Article 159(2) (d) of the Constitution of Kenya that mandates courts to administer justice without undue regard to procedural technicalities.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Preliminary Objection dated and filed on 12th March 2019 was merited and the same is hereby upheld.

24. The effect of this is that the Appellant's Appeal that was dated 12th February 2019 and lodged in court on 13th February 2019 stands as automatically dismissed and/or struck out with costs to the Respondent and any consequential orders issued herein are set aside, vacated and/or discharged.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of November 2019

J. KAMAU

JUDGE