



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 114 OF 2019**

**BETWEEN**

**MOST REV. ZACCHEAUES OKOTH .....APPELLANT/APPLICANT**

**AND**

**ERASTUS IAN KHANDIRA.....RESPONDENT**

**RULING**

1. By a notice of motion dated and filed on 15<sup>th</sup> October, 2019, brought under Section 1A, 1B, 3, 3A and 79 G of the Civil Procedure Act and Order 42 rule 6(1) and Order 51 (1) of the Civil Procedure Rules and all enabling provisions of the law, the Appellant/Applicant prays for orders **THAT:**

**1) The Honourable Court be pleased to stay execution of the Ruling dated 18<sup>th</sup> September, 2019 pending the hearing and determination of this appeal**

**2) Costs be provided for**

2. The application is based on the grounds among others that the Respondent has commenced execution, the Applicant stands to suffer substantial loss and that the appeal has high chances of success and shall be rendered nugatory if stay is not granted.

3. The application is supported by an affidavit sworn by the Applicant on 15<sup>th</sup> October, 2019 in which he reiterates the grounds on the face of the application. Annexed to the affidavit is the impugned ruling and memorandum of appeal in this matter.

4. In opposing the application, the Respondent has filed a notice of preliminary objection on the grounds that the application offends Section 75(1)(h) of the Civil Procedure Act and Order 43 rule 1(1) to (3) of the Civil Procedure Rules which require that leave be sought before an appeal from a ruling under Order 22 rule 48, 55 and 68 of the Civil Procedure Rules is filed.

**Analysis and Determination**

5. I have carefully considered the notice of motion *vis a vis* the Preliminary Objection and the submissions filed on behalf of the Respondent.

6. Respondent has raised a novel point of law regarding this court's jurisdiction to determine this application and appeal. While it must be appreciated that this court has the jurisdiction to hear and determine appeals from tribunals, subordinate courts or bodies as prescribed by Article 165 of the Constitution and other Acts of Parliament, a party who desires to file an appeal to this court has a duty to demonstrate under what law that right to be heard on an appeal is conferred or if not, show that leave has been granted to lodge the appeal before the court. The above position was espoused by the Court of Appeal in **Nyutu Agrovat Ltd V Airtel Networks Limited (2015) e KLR** which cited with approval the decision by Ringera J (*as he then was*) in **Nova Chemicals Ltd vs Alcon International Ltd HC MISC APPL 1124/2002** where the learned judge held that:

**“the point of departure must be the recognition that the right of appeal, with or without leave, must be conferred by statute and the same is never to be implied”.**

7. The Court of Appeal in **Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1** stated that:

**“.....and even Section 75 of the Civil Procedure Act, giving this court jurisdiction to hear appeals from the High court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law, then that court has no business to entertain the matter.**

8. Respondent holds the view that this application and appeal are incompetent on account of Appellant's failure to seek leave contemplated under the provisions of Section 75 of the Civil Procedure Act and Order 43 rule 1(1) to (3) of the Civil Procedure Rules.

9. I have carefully examined Section 75 of the Civil Procedure Act and Order 43 rule 1(1) to (3) of the Civil Procedure Rules and I find no provision that confers upon the appellant the **“right of appeal”** under Order 22 rule 48, 55 and 68 of the Civil Procedure Rules.

10. The record does not show that any leave to appeal was sought or obtained before filing of this appeal.

11. In my view, it is that leave which confers this court with the jurisdiction to hear the appeal and any application thereto. Jurisdictional issues are not matters that fall in the category of procedural technicalities. They go to the root of the matter for without jurisdiction, this court or any other court would do no one more thing than down its tools.

12. The Court of Appeal in **CA Nairobi 86 of 2015 Peter Nyaga Murake v Joseph Mutunga**, while dealing with failure to seek leave to appeal from an order stated:

**“without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal and without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water”.**

13. I have considered if the appeal and the application can be sustained under the provisions of Article 159(2) (d) of the Constitution and find that it cannot since as earlier stated, jurisdictional issues are not procedural requirements, for without jurisdiction, the court acts in vain. As was held in **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR**,

**“the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation”.**

14. The Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012 [2013] eKLR** (five Judge Bench) stated succinctly thus, concerning the issue of taking umbrage under Article 159(2) (d) of the Constitution.

**“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1 B of the Civil Procedure Act Cap 221 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases”.**

15. In the same breath, having already found that jurisdiction stands on a higher pedestal and in a more peremptory position than procedural rules and that the requirements for leave to appeal as was in this matter is a jurisdictional issue, I can only reiterate that it goes to the very heart of substantive validity of court process and determination and certainly does not run afoul the substantive procedure, dichotomy of Article 159 of the Constitution.(See **Josephat Muchiri Muiruri & another v Yusuf Abdi Adan [2015] eKLR**).

## **DISPOSITION**

16. In view of the foregoing, I find that the appeal herein and the resultant notice of motion dated and filed on 15<sup>th</sup> October, 2019, as filed, are incompetent. It would in my view be an ultimate futile undertaking of proceedings to determine the merits of the application which would amount to this court sitting in vain. The Appeal and the notice of motion dated and filed on 15<sup>th</sup> October, 2019 are thus struck out with costs to the Respondent.

**DELIVERED AND SIGNED IN KISUMU THIS 10<sup>th</sup> DAY OF December 2019**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant

For Appellant/Applicant

For the Respondent