REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.30 OF 2017

NATIONAL BANK OF KENYA.....APPELLANT

VERSUS

MAURICE ONYANGO OKONGO.....RESPONDENT

(Being an Appeal from the Ruling and Orderin Kisumu CMCC NO.493 of 2006 delivered byHon. R.M.Ndombi (RM) on 21.2.17)

JUDGMENT

1. **NATIONAL BANK OF KENYA*(hereinafter referred to asappellant*)**sued **MAURICE ONYANGO OKONGO *(hereinafter referred to as respondent)*** in the lower court, claiming Kshs. 507,418.50 plus interest and costs arising out of an unpaid loan advanced to the respondent on or about 22.1.91.

2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

3. Subsequently, the respondent by a notice of motion dated 4.7.16; brought under Order 17 rule 2(3) of the Civil Procedure Rules urged the court to dismiss the suit for want of prosecution.

4. In a ruling delivered on21st February, 2017**,**the learned trial Magistratefound appellant guilty of inordinate delay and dismissed its suit for want of prosecution.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 23rd March, 2017which set out 5 grounds of appealwhich I have summarized into 3 grounds to wit:

1. ***The learned trial magistrate erred in law and fact in in dismissing appellant's suit for want of prosecution***

2. ***The learned trial magistrate erred in law and fact in failing to consider reasons for the delay in prosecution the case***

3. ***The learned trial magistrate erred in law and fact in dismissing the case on a technicality***

SUBMISSIONS BY THE PARTIES

6. On 20th March**, 2018**, thecourt directed that the appeal be canvassed by way of written submission which the parties dutifully filed.

Appellant's submissions

7. Appellant concedes that the suit had not been set down for hearing for more than a year but holds the view that the delay was excusable. Appellant placed reliance on ***Hoswell Mbugua Njuguna v Celtel Kenya Limited [2014] eKLR*** where the court found delay inordinate but excusable on the grounds that the court diary had been closed and at one time the court file was missing.

Respondent's submissions

8. Respondent holds the view that this appeal is incompetent on account of appellant's failure to seek leave contemplated under the provisions of Section 75 and 76 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. To this end, he relied on the following decisions. Respondent submitted that the record of appeal does not show that any leave to appeal was sought or obtained after the ruling and before filing of the appeal hence the appeal should be struck out with costs. Respondent placed reliance on the following authorities:-

i. Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR where the Court of Appeal emphasized the centrality of the issue of jurisdiction.

ii. *Ivita -v- Kyumbu (1984) KLR 441)* where the court set out the test to be applied in determining an application for dismissal of suit for want of prosecution including a determination whether the delay is prolonged and inexcusable and whether justice can still be done despite such delay.

9. Respondent submits that failure on its part to comply with Order 11 was no excuse for the appellant not to fix the case for hearing. To this end, respondent cited **Nilani V Patel (1969) EA**.

Analysis and Determination

10. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See ***Mbogo v Shah & Another (1968) EA 93*** and ***Selle& Another v Associated Motor Boat Co. Ltd. & Others {1968) EA, 123)***. It then behooves this court to summarize the evidence that was tendered before the trial court.

The evidence

11. It is not contested that the suit was filed way back on 22.11.01. The suit was fixed for hearing on 8.2.07 when it was stood over generally. Appellant took no steps to set down the suit for hearing provoking the respondent to apply for its dismissal for want of prosecution vide Notice of Motion dated 25.8.08. That application came up for hearing on 9.7.13 and was abandoned by consent on condition that appellant pays throw away costs of Ksh. 5,000/-. The suit was listed again for hearing on 18.7.14 when it was rescheduled to 4.9.14 when parties were directed to comply with Order 11. Appellant duly complied but had not set down the suit for hearing by the time the application for dismissal was filed 2 years later.

12. Respondent has raised a novel point of law regarding this court's jurisdiction to determine this appeal which must be determined before the substance of the appeal can be considered. 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 Agrovet 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 mustbe the recognition that the right of appeal, with or without leave, must be conferred bystatute and the same is never to be implied".***

The Court of Appeal further 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 tomean that these provisions of law also confer the right of appeal on the litigants. The power orauthority to hear an appeal is not synonymous with the right of appeal which a litigant shoulddemonstrate that a given law gives him or her to comebefore this court. To me, even if jurisdiction and the right of appeal may be referred to side byside or in the same breath, the two terms donot meanone 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. (See owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1.***

13. Respondent holds the view that this appeal is incompetent on account of appellant's failure to seek leave contemplated under the provisions of Section 75 and 76 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. Appellant did notsubmiton the issue of leave to appeal. I have carefully examined Section 75 and 76 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules and I find no provision that confers upon the appellantthe **"right *of appeal"*** under Order 17 rule 2(3) of the Civil Procedure Rules. The record does not show that any leave to appeal was sought or obtained after the impugned ruling and before filing of this appeal.

14. In my view, it is that leave which confers this court with the jurisdiction to hear the appeal. 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 orany othercourt would do no one more thing thandown itstools. **(See Owners of Motor Vessels "Lilian S") (supra).**

15. 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 quanon 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".***

16. This court is bound by the decisions of the Court of Appeal and has no reason to depart from them. Appellant has no right to appeal

except with leave. Only leave, when obtained, would confer jurisdiction to this court to hear and determine the merits of this appeal. No leave was either sought or granted. The appeal is therefore a nonstarter*in limine*.

17. I have considered if the appeal 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 v Peris Pesi Tobiko & 2 Others*** **(**Supra**)**, that:

> ***"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".***

18. The same Court of Appeal in ***Mumo Matemu v Trusted Society ofHuman Rights Alliance & 5 Others CA 290 of 2012*** (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 toArticle 159 of the Constitution and the overriding objective principle of Section 1A and 1B 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".***

19. 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***).

20. I echo Nyarangi JA in the case of Owners **of Motor Vessel"Lilian S" case(Supra)** that

> ***"……. jurisdiction is everything without it; a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

DISPOSITION

21. In view of the foregoing, I find that the appeal herein, as filed, is incompetent. Having said that, it would in my view be an ultimate futile undertaking of proceedings to determine the merits of the appeal which would amount to this court sitting in vain. The same is thus struck out and dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 19TH DAY OF JULY 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellant -Mr. Yogo

For Respondent -Ms. Julu/Mr. Njoga