



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.160 OF 2018

ADILI CORPORATE LIMITED.....APPELLANT

-VERSUS-

JOSEPHINE MARY RYAN.....RESPONDENT

(Application to strike out the Memorandum of Appeal lodged on the 27th day of March 2018 from the Ruling and Order of the Senior Resident Magistrate at Nairobi (The Honourable D.O. Mbeja) dated the 6th day of March 2018 in Chief Magistrate's Court Civil Suit No. 5428 of 2017)

RULING

The Respondent has approached this court by way of a Notice of Motion dated the 30th day of June 2018 under Sections 1A, 1B, 3, 3A and 75 of the Civil Procedure Act and Orders 43 Rule 2 and 51 rule 1 of the Civil Procedure Rules seeking orders that;

1. The memorandum of Appeal lodged in this Honourable Court on the 27th day of March 2018 be struck out.
2. The costs of the Application be awarded to the Applicant.

The application is supported by the affidavit of Josephine Mary Ryan sworn on 30th June, 2018 and it's premised on the grounds set out on the body of the same.

The application is made on the ground that no leave was sought to Appeal against the order/Ruling of the court made on the 6th day of March, 2018.

It is deponed that on the 20th day of November, 2017, the Respondent took out an application under Order 13 Rule (2) of the Civil Procedure Rules, seeking judgment on admission. That upon hearing the application, the learned trial magistrate rendered his Ruling and entered judgment on admission against the Appellant – as prayed in the plaint for a sum of Kshs.2,850,000/-.

That no leave was sought to Appeal against the said judgment either formally or informally and that notwithstanding, the Appellant filed the Appeal herein on the 6th day of March 2018 and for that reason, it is deponed, the memorandum of Appeal lodged in this court is unmaintainable in law and should be struck out.

The Appellant opposed the Application by way of a replying affidavit sworn by Stephen Kara Karianjahi, on 24th July 2018 and filed in court on the same day. He avers that the Applicant/Respondent has not been interested in the Appellant/Respondent having his day in court and has pushed all manner of objections to avoid getting the real story. He contends that the overriding principle in Civil Procedure/Litigation is to avoid hardship, expense, delay but to focus on substantive justice which the Applicant/Respondent is not interested in. That, substantive justice will be served by allowing the Respondent to continue with the action herein especially now that it was blocked from being heard in the lower court through application of technicalities which should be abhorred.

The Application was canvassed by way of written submissions which this court has duly considered. The Applicant submitted that on the 20th day of November, 2017 the Respondent herein moved the trial court with an application under Order 13 Rule (2) of the Civil Procedure Rules, for judgment on admission against the Appellant herein. That, on the 6th day of March, 2018, the court entered judgment on admission against the Appellant and being dissatisfied with the said order, the Appellan filed the memorandum of Appeal which is the subject of this application.

The Applicant contends that the Appeal was filed without the leave of the court and hence, this court lacks jurisdiction to entertain the Appeal as filed. Counsel for the Applicant has relied on the case of **Owners of Motor Vessel "Lilian S" Vs. Caltex Oil (Kenya) Limited (1989) KLR 1** to the effect that jurisdiction is everything and without it, the court has no power to make one more step and that where a

court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence.

The Respondent averred that without the leave of the court in law, the Appellant is not entitled to lodge the Memorandum of Appeal dated the 26th March 2018. Counsel has relied on the case of **Peter Nyaga Muvaka –Vs- Joseph Mutunga** where an appeal was filed without the leave of the court in an application for stay of execution. The case of **Javer Vs. Pioneer General Assurance Society Limited Civil Application No. 80 of 1990** was also relied on to stress the point that leave is necessary before a party files an Appeal where a party is required to seek leave. On whether the objection on jurisdiction is a technicality which can be cured by the provisions of Article 159 of the Constitution, the Respondent has relied on the case of **Kakuta Maimai Hamisi -Vs. Peris Tobiko Civil Appeal No. 154 of 2013** in which, the Court of Appeal stated that jurisdiction is not a matter of procedural technicality to be cured by the provisions of Article 159 of the Constitution.

In his brief submissions, Counsel for the Appellant submitted that it would be premature to strike out the Appeal without the benefit of interrogating the whole facts and the law surrounding the Appeal. That the Applicant has tried all ways to avoid hearing the matter on merits having succeeded in the lower court and it’s now their wish that they will manage to have this court not see through their mischief and strike out the memorandum of Appeal. They have relied on the case of **D.T. Dobie & Company (Kenya) Limited Vs. Muchina (1982) KLR** in which Madan J.A held that no suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.

It is common ground that the Respondent brought an Application dated 20th November, 2017 which was premised on the provisions of Order 13 Rule (2) of the Civil Procedure Rules. The said application was allowed by the court and judgment entered against the Appellant on admission. Being dissatisfied with the judgment, the Appellant filed the present Appeal.

The only issue that the court has to determine is whether leave was necessary before the Appellant could file the Appeal and whether it was sought before filing the Appeal. The answer to the first limb of the issue is to be found in Section 75 of the Civil Procedure Act which sets out the orders from which Appeals lie as of right. It is trite clear from the said section that order 13(2) is not one of those orders from which appeals lie as of right. This therefore means that leave of the court was necessary before the Appellant could lodge his Appeal. In so stating, I find support in the case of **Peter Nyaga Muvake** (supra) in which the Court of Appeal held:

“In the absence of leave, the court lacked jurisdiction to entertain, hear and determine the Applicant’s appeal. Without leave to appeal, the applicant was not entitled to give notice of Appeal.

(II) That where leave to appeal is necessary, the procurement of leave is a sine qua non (an essential condition) to the lodging of a Notice of Appeal.

(III) That in the absence of the leave to Appeal, there was no valid notice of Appeal, therefore, the jurisdiction of the court had not been properly invoked.”

Then, was the leave sought? I have keenly read through the replying affidavit and the submissions by the Appellant. No where has it stated that it sought leave to appeal. Counsel has instead argued that failure to seek leave to appeal is a procedural technicality which can be cured by Article 159 of the Constitution. I refuse to be persuaded by that argument based on the case of **Kakuta Maimai Hamisi -Vs. Peris Pesu Tobiko** (supra) in which, the Court of Appeal held;

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

Having stated that, I have no hesitation in finding, and I do hereby find that the Notice of Motion dated 30th June, 2018 has merits and the same is allowed with costs. The memorandum of appeal dated the 26th day of March, 2018 is hereby struck out with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 5th day of November, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....**For the Appellant**

.....**For the Respondent**