



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL AND ADMIRALTY DIVISION AT NAIROBI
CIVIL CASE NO. 568 OF 2008

TERAZZO ENTERPRISES LIMITED.....PLAINTIFF/ APPLICANT

VS

PAVEMENT CLUB AND CAFE.....DEFENDANT/RESPONDENT

BLUE ELEPHANT LIMITED.....DEFENDANT/RESPONDENT

SHAILESH PATEL.....DEFENDANT/RESPONDENT

AND

JAIMINI PATEL.....1st INTERESTED PARTY

SEEMA PATEL.....2nd INTERESTED PARTY

ARTUR MILDOV.....3rd INTERESTED PARTY

VADIM MILDOV.....4th INTERESTED PARTY

RULING

1. On 3rd October 2016, Hon Lady Justice Farah Amin, rendered herself on an application by the Plaintiff/Judgment-creditor (‘ the Plaintiff”)which had sought to have the directors of the 1st Defendant to be examined on oath as to the 1st Defendant’s means and property. The Plaintiff also sought to have the former directors of the 1st Defendant examined on oath.
2. The ruling by Hon Lady Justice Amin also disposed of a preliminary objection, which had been raised by the former directors of the 1st Defendant. The points raised *in limine* by the former directors, who were the 3rd Defendant and the 1st and 2nd Interested Parties, were mainly points of law targeted at avoiding any liability under the decree issued much earlier in favour of the Plaintiff.
3. The application by the Plaintiff/Judgment –creditor was correctly stated to have been substantively brought under Order 22 Rule 35 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act was also mentioned. The Plaintiff contested the points of preliminary objection while the former directors

resisted the application by the Plaintiff, as did the Defendants.

4. The court finally ruled that the directors (both old and new) had to be cross-examined by the Plaintiff. The court also dismissed the preliminary objection.

5. The Interested Parties are dissatisfied with the ruling and seek to appeal against the ruling in its entirety. They however did not file their notice of appeal. The reason that none was filed is because in time as the Applicant could not appeal as of right.

6. The Court of Appeal like all judicial forums must retrieve its jurisdiction from either the Constitution or from statute: see **Samuel Kamau Macharia & 2 Others v Keya Commercial Bank Limited & Another [2012]eKLR**. Section 75(1) of the Civil Procedure Act (Cap 21) is explicit on what appeals lie as of right to the Court of Appeal. The section is also clear that the High Court has powers to grant leave where an appeal does not lie of right but a party is still desirous of appealing. Section 75(1) is adequately supplemented by subsection (h), which provides that appeals shall also lie, as of right where the rules provide for the same. Preliminary objections are not amongst matters where appeals lie as of right unless the objection is subsumed in the main application and decision where an appeal lies as of right. Leave must otherwise be sought otherwise any appeal filed in the absence of leave will be deemed fatally incurable: see **Peter Nyaga Muvake vs. Joseph Mutunga CACApp No Nai 86 of 2015 [2015]eKLR** .

7. The essential reason for the requirement of leave or permission to appeal is that unmeritorious appeals are identified and brought to an early end. If a litigant is unable to point to and persuade the court that his intended appeal is merited, there would be no justification to allow the appeal to be filed in the first place. This helps to save costs and precious judicial time. By the same streak, permission or leave to appeal will only be granted when it is shown that there is some compelling reason why the appeal ought to be pursued and heard at another court of higher hierarchy for example where a matter involves public interest. Leave to appeal is however not to be granted as of right and a litigant intending to appeal must seek to satisfy the court why leave or permission ought to be granted.

8. The Applicant herein did not seek leave when the decision was rendered. It would have been easier for the court as the presiding judge was then fully seized with the issues. The current application also does not state why leave or permission is being sought apart from stating that the Applicant has an undoubted right of appeal, which in view of the provisions of Section 75 of the Civil Procedure Act is not true. The only right the Applicant had was to ask the court as it now has to look at the decision and see if it may be considered afresh by a higher court.

9. I have looked at the decision by my sister judge, it would certainly be inappropriate for me to critic or moderate its merits. I however hold the view that the issues which the Applicants raised, even as they appeared to simply question the courts judicial oversight role post a decree, were substantial and weighty enough to lead me to the conclusion that they ought to be heard again by a court of higher hierarchy. When the Applicants question whether the court can re-open the decree and pass liability, that is an issue that may demand that the parties' rights be settled by a higher court. I would grant leave to appeal noting that the application for such leave was also filed within a reasonable time of the decision being made.

10. It leaves me with the question of filing of the Notice of Appeal out of time.

11. A notice signaling the intention to file an appeal arising out of a decision of this court ought to be filed within fourteen days of the decision being handed down. The Applicants are yet to file their Notice of Appeal. It is slightly over three months since the decision sought to be appealed from was made. The Applicants say they could not file their appeal in the absence of any right to do so. They say they could only file the Notice of Appeal once they were sure their appeal was acceptable. They needed the permission or leave of the court to file an appeal.

12. I have since agreed with the Applicants that they are entitled to leave. I would also agree with the Applicants that an Appeal or a Notice of Appeal cannot be lodged after the prescribed time has expired and without the leave of the court as such filing renders the documents so filed a " nullity and of no legal

consequence” : see **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014]eKLR**. Likewise, to file an appeal or notice of appeal where there is no right of appeal and without the court’s leave to appeal and thereafter seek the court’s leave to accept or admit the appeal is presumptive of the legal process and the powers of the court. The Applicants were right in seeking the leave first.

13. I take note of the fact that the application for leave and extension of time was filed timeously. I also take note of the fact that this court has the power under section 7 of the Appellate Jurisdiction Act (Cap 9) to extend the time for the giving of a notice of intention to appeal, notwithstanding the fact that the time for giving such notice could have expired.

14. Extension of time is founded on the court’s equitable and discretionary powers: see **Henry Mukora Mwangi vs. Charles Gichina Mwangi CACiv Appln No Nai 26 of 2004**. It is not granted as of right and a party must lay a basis for the same. All the circumstances of the case must be considered, including whether the respondent will suffer any prejudice and whether failure to comply with the timeline was self-forced.

15. I am satisfied with the explanation advanced by the Applicants for the non-compliance. I am also satisfied that the respondents stand to suffer no prejudice but rather the administration of justice will be promoted. In the circumstances of this case therefore, I will exercise my unfettered discretion and unconditionally allow the application to file the Notice of appeal out of time.

16. In the result, I grant the Applicants leave to file an appeal arising from the ruling and decision of Farah Amin J dated 3rd October 2016. Secondly, I extend the time for filing of the relevant Notice of Appeal from the decision of Farah Amin J dated 3rd October 2016 by a further 15 days from the date of this ruling.

17. I see no reason why the Applicants should not pay the costs of the application. The leave to appeal ought to have been at least sought orally at the time the decision was handed down. Time would have been saved and, so too, some costs. The Respondents will have the costs of the application. Orders accordingly.

Dated, signed and delivered at Nairobi this 9th day of February 2017.

J.L.ONGUTO

JUDGE