



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 484 OF 2015

HARAMBEE SACCO SOCIETY LIMITEDAPPLICANT

VERSUS

LAWRENCE NJAGI MBUNGU1ST RESPONDENT

BENARD MWAWAZA MWAKITAWA2ND RESPONDENT

ANTONY KIIRU MBUTHIA3RD RESPONDENT

RULING

1. By a Notice of Motion dated 4th November 2015 and filed on the same day, the applicant Harambee Sacco Society Limited seeks from this court orders for enlargement and extension of the time within which the applicant may file an appeal against the ruling of the magistrate's court (Nchoe Ag SRM) delivered on 25th September, 2015 to fourteen days from the date of determination of this application. That the court be pleased to grant ex parte conservatory orders of stay of the proceedings in CMCC 1050 of 2015 pending the interpartes hearing and determination of this application. Costs of the application be provided for.

2. The application is predicated on the grounds on the face of the application and supported by an affidavit sworn by Gladys Gichohi the applicant's Head of Legal and Company Secretary. The said affidavit basically contends that the delay in filing the appeal following the ruling of 25th September 2015 by the trial magistrate dismissing the applicant's preliminary objection ("the decision") was due to the fact that the advocate had to inform the applicant who had to convene a Board of Directors meeting to discuss the decision and reach a consensus on the way forward and hence the time for appeal lapsed in between.

3. Further, that the appeal as intended has good chances of success and is meritorious: that the respondents will not suffer any prejudice which cannot be compensated by way of costs. That it is in the best interest of justice that the application be allowed to enable the applicant pursue its right of appeal and that the application had been brought without inordinate delay. The affidavit annexes a draft Memorandum of Appeal setting out 6 grounds of appeal.

4. The application is opposed by the respondents through a replying affidavit sworn by Ian Maina Mbuthia advocate on 26th January 2016. Mr Maina deposes contending that the application lacks merit and is only intended to deny the respondents the right to speedy trial enshrined in the Constitution. That the applicant's application is an abuse of the court process and is meant to frustrate the cases and only

being used as a delaying factor; that the case proceeding in the magistrate's court will not prejudice the applicant and that the appeal has no chance of success.

5. The application was argued before me orally on 27th January 2016 with Mr Odundo submitting on behalf of the applicant whilst Mr Maina Mbutia submitted on behalf of the respondents.

6. The advocates rival submissions largely mirrored the grounds and supporting affidavit and the replying affidavit while reiterating the same with Mr Odundo maintaining that the application was filed without inordinate delay as soon as instructions to appeal were received by the applicant's Board of Directors. That in any event any delay can adequately be compensated by an award of costs since the intended appeal is meritorious .

7. In opposition to the application, Mr Maina Mbutia submitted that the delay was inordinate as it could not have taken 30 days for the Board to sit and decide whether or not to file an appeal. Further, that the lower court had jurisdiction to hear the dispute. In addition, it was contended that had the impugned ruling been attached to this application the court would appreciate the reasoning of the trial magistrate.

8. None of the parties advocates relied on any decided cases. I have anxiously considered the application by the applicant, the grounds, supporting affidavit, draft Memorandum of Appeal and the replying affidavit together with the brief submissions by the parties advocates.

9. Whereas I quite agree that a party's right of appeal should not be impeded some delay which can be explained to the satisfaction of the court, I took the liberty at the close of the submissions to ask the applicant's advocate whether he sought leave of the court below to appeal against that decision which arose as a result of the applicant raising a preliminary objection to the entire suit to the effect that the trial magistrate had no jurisdiction to hear and determine a dispute which was governed by the provisions of the Co-operative Societies Act (Section 76 thereof). The said Section of the law ousts the jurisdiction of the courts in entertaining disputes between Co-operative Societies and their members or past members or between or among members and or past members of the Co-operative Society. The Act confers jurisdiction to hear such disputes to a Co-operative Societies Tribunal.

10. Regrettably the ruling of the trial court which the applicant's Head of Legal Ms Gladys Gichohi the deponent of the supporting affidavit deposes at paragraph 2 thereof read was never annexed to the said affidavit. It is therefore difficult for this court to tell precisely what the reasoning of the trial magistrate was in her decision wherein she dismissed the preliminary objection raised by the applicant.

11. Nonetheless, from the draft Memorandum of Appeal, this court has been able to gauge that the applicant raised a Preliminary Objection on the trial court's jurisdiction to hear and determine the dispute which Preliminary Objection was dismissed.

12. There is no evidence that the Preliminary Objection was raised by way of a chamber summons or Notice of Motion, but since a Preliminary Objection can be raised at any time and even by an oral or written notice, in the absence of any evidence that it was taken by way of a written application, this court presumes that it was taken by way of a notice of preliminary objection and canvassed by the parties' advocates.

13. The next question would be, would such a decision be appealable as of right without first seeking leave of the trial court to appeal against that decision?

14. This court appreciates that it has the jurisdiction to hear and determine appeals from decisions of subordinate courts, tribunals, bodies or authorities as espoused in Article 165 of the Constitution and any other written law.

15. On the other hand, a party who desires to exercise the right of appeal whether by way of seeking

extension of time which has lapsed or directly upon the impugned decision being made, must and has a duty to demonstrate under what law that right to be heard on an appeal is conferred or accrued and if not, show that the leave by the trial court has been granted to file an appeal.

16. The above strong position is supported by the decision of the Court of Appeal in **Nyutu Agrovets Ltd V Airtel Networks Ltd [2015] e KLR** wherein the Court of Appeal held that leave to appeal does not constitute the right to appeal. The right must precede leave. The same court cited with approval Ringera J (as he then was) in **Nova Chemicals Ltd V Alcon International Ltd HC Miscellaneous Application 1124/2002** wherein the learned Judge pronounced 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”.

17. The Court of Appeal then went on to state 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 for a court to entertain a matter (jurisdiction) is not conferred by the law then court has no business to entertain the matter(see owners of motor vessel “Lilian S” V Caltex Oil (K) Ltd [1989] KLR1.”

18. It is not in dispute that the intended appeal arises from the preliminary objection ruling made by Honourable Nchoe Ag Senior Resident Magistrate. Section 75 of the Civil Procedure Act specifies the orders from which parties have a right of appeal without leave, which implies that in certain other orders, a party would require leave of the court to seek to file an appeal.

19. That leave, it must be understood, is not the same as leave to appeal out of the stipulated statutory period as espoused in Section 79G of the Civil Procedure Act. It is the permission of the court that made the order allowing an appeal to lie to the appellate court.

20. My careful perusal of Section 75 of the Civil Procedure Act reveals that the order dismissing the preliminary objection raised by the applicant is not listed as one of those orders which an aggrieved party may file an appeal challenging the decision as a matter of right. That being the case. Leave of the court that made the order was necessary. Since that decision (order is not exempt from leave as provided for under Order 43 Rule 6 of the Civil Procedure Rules).

21. Without leave of the trial court first being sought and obtained, this court would be acting in vain if it was to grant the orders sought herein as it is devoid of the jurisdiction to hear the intended appeal even if it was to grant leave extending the period within which the appeal is to be filed.

22. A jurisdictional issue is not a matter of procedural technicality. It goes to the root of the matter at hand and without jurisdiction, this court would be making orders which are void ab initio (see **Owners of Motor Vessel “Lilian S” V Caltex Oil (K) Ltd** (supra) case.

23. The Court of Appeal, quite recently again in **Nairobi CA 86/2015 Peter Nyaga Murage V Joseph Mutunga**, pointing to the applicant's failure to seek leave of court to file an appeal from an order held that:

“ 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.”

24. An earlier decision by the Court of Appeal in **Kenya Commercial Bank Ltd V Tony Manaseh Esipiya CA 105/98** further supports the position material to this application that :

“.....but having chosen to raise the limitation point by way of a preliminary objection under no particular order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the superior court which was neither sought nor obtained.”

25. The Court of Appeal in the **KCB Ltd V Toney Manaseh Esipiya** (supra) case further cited with approval **G.R. Mandaria V Rattam Singh [1965] EA 118** where it was held that:

“ Where a preliminary issue alleging misjoinder, limitation lack of jurisdiction or resjudicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order, the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.”

26. Law JA at page 124 of the same decision expressed himself thus:

“ The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal will lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue, and finally disposed of at first instance, a preliminary decree arises which an appeal lies; but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or resjudicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal.”

27. With the above authoritative and binding decisions in mind, I have no doubt that the application for extension of time under Section 79 G of the Civil Procedure Act to file an appeal out of time presupposes that first, the applicant has an automatic right of appeal from a decision/order of the subordinate court to the High Court and secondly, that time for filing of that appeal could be extended hence, the prayer for enlargement of that time to accommodate the intended appeal. But that is not the scenario in this case where there was no automatic right of appeal and no leave of the trial court was sought and obtained to lodge an appeal from the ruling on a preliminary objection. Had that leave been granted in the first instance , then this application for leave to file an appeal out of time would not arise.

28. It is that initial leave of the trial court that would clothe this court with jurisdiction to consider any appeal. In other words, the applicant as the unsuccessful party in the preliminary objection raised had no right to appeal against that dismissal by the trial court except with leave of that court.

29. I reiterate that a jurisdictional issue is not a procedural technicality curable by the application of Article 159 (2) (d) of the Constitution since the said Article does not oust or confer jurisdiction and without jurisdiction, a court of law acts in vain. In **Kakuta Maimai Hamisi V Persi Pesi Tobiko and 2 Others[2013] e KLR** the Court of Appeal was categorical that:

“ the right of appeal goes to the 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”

30. The Court of Appeal in **Mumo Matemo V Trusted Society of Human Rights Alliance & 5 Others CA 290/2012** comprising a five Judge Bench warded that:

“ 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 1B of the Civil Procedure Act Cap 21 and Sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure us also a hand maiden of just determination of cases.”

31. Consequently, it is my humble view that despite the fact that none of the parties hereto raised this very important issue, this court is deemed and presumed to know the law and the court follows the law. It must therefore, before determining the merits of any matter or cause before it determine whether it has jurisdiction to venture into the merits territory since, as I have previously held in **Josephat Muchiri Muiruri and Another V Yusuf Abdi Adan [2015] e KLR**,.....jurisdiction stands on a higher pedestal and in a more preemptory position than procedure 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 processes and determination and certainly does not run a foul the substantive procedure, dichotomy of Article 159 of the Constitution.

32. I also reiterate the often cited decision of Nyarangi JA in the case of **Owners of Motor Vessel “Lilian S” V Caltes Oil (K) Ltd** (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 down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

33. In the instant case, albeit what prompted the applicant to approach this court is the very issue of jurisdiction , regrettably, this court’s hands are firmly tied to the law as espoused in the many binding decisions of the Court of Appeal that I have cited and relied on in my recent past decisions.

34. The upshot of all the above is that I hereby strike out the applicant’s application dated 4th November 2015 and dismiss it.

As the reasons for the dismissal have been researched by the court in extenso on its own motion, without the assistance of the parties advocates, I decline to award any costs and order that each party shall bear their own costs of the application.

Dated, signed and delivered in open court at Nairobi this 10th day of March 2016.

R.E. ABURILI

JUDGE.

In the presence of Mr Odundo for the applicant

N/A for the Respondent

Adline: Court Assistant