



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 385 OF 2015

WILSON KANYI KAREITHI.....APPELLANT

VERSUS

MOUNT PLEASANT LIMITED1ST RESPONDENT

SBI INTERNATIONAL HOLDING

AG KENYA2ND RESPONDENT

BENHUR MILTON MULONZIA.....3RD RESPONDENT

RULING

1. Vide a Notice of Motion dated 13th August 2015 and filed in court on the eve date, the applicant/appellant Wilson Kanyi Kareithi seeks from this court orders for stay of execution of the ruling, proceedings, orders and all consequential orders made on 4th April 2015 in Milimani CM CC 5/2014 pending hearing and determination of the 5th interested party's appeal. He also prayed for costs of the application.
2. The grounds upon which the application is predicated are that; the trial magistrate declined to stay proceedings pending appeal; that the trial court unilaterally ordered for release of shs 1,935,742.00 deposited in court on 11th March 2014 by the 2nd respondent despite finding that there was no evidence to prove that either party was a director/shareholder of Mount Pleasant Company and without a review application; there is a dispute over the directorship of Mount Pleasant Company between the appellant and Muchemi Mwangi; that the applicant shall suffer irreparable loss unless stay is granted as the release of funds will prejudice the applicant's interests in the matter and leave the company indebted to creditors as the money risks being withdrawn by illegitimate directors while the issue of disputed directorship has not been resolved. The appellant has an arguable appeal with high chances of success; the applicant has a legitimate claim and will be prejudiced; he is willing to abide by any directions of the court as the amount involved is deposited in court; the respondents will not suffer any prejudice if the orders of stay are granted, the application has been made within reasonable time and without undue delay.
3. The application is supported by the affidavit sworn by the appellant Wilson Kanyi Kareithi reiterating the grounds in support of the application and annexing as exhibits copies of the impugned ruling, and order of 11th August 2015; application upon which the orders of 4th August 2015 were made; consent filed on 31st March 2014; and searches from Registrar of

companies showing the Directorship and shareholding of Mount Pleasant Limited.

4. The application is opposed. The 1st respondent company Mount Pleasant Limited filed a replying affidavit sworn by Mucemi Mwangi a director of the company contending that the appellant failed to disclose material information within his knowledge that would assist the court to arrive at a just and expeditious determination of the application before it; that the allegation that there exists a dispute as to the directorship of the 1st respondent is false and only intended to subvert a loan agreement dated 31st October 2012 which ushered in Frank David Gitura Kariithi and Mucemi Mwangi. Further, that there were no proceedings for determination of any dispute relating to the directorship of the 1st defendant; that the CR12 annexed by the applicant are not genuine; that the applicant participated in the lower court proceedings as an interested party and never contested the deponent's authority to sue on behalf of the 1st respondent company as its director; that there is no ground upon which the balance of the contractual sum which was admitted could not be released to the 1st respondent; that the 1st respondent and its directors risked being listed as defaulters with Credit Reference Bureaus owing to the company accounts being overdrawn substantially as shown by a demand issued by Co-operative Bank of Kenya as annexed and admitted by the appellant in his paragraph 9 of his supporting affidavit; that the 1st respondent is indeed indebted to creditors; that the 1st respondent's entitlement to the money in question is not contested but that it is clear that the appellant has developed a personal interest in the money deposited in court for the benefit of the 1st respondent which claim if any should be pursued through an independent cause; and that the order of 4th August 2015 should be enforced to minimize irreparable loss to the 1st respondent including loss of opportunities and the cost of money owed to the creditors if stay is granted.
5. The 1st respondent through its director Mr Mucemi Mwangi also filed a Notice of Preliminary objection on a point of law dated 24th August 2015 and filed on 25th August 2015 contending that;
 1. The Memorandum of Appeal dated 12th August 2015 is incompetent, a nullity and not allowed by law and should be struck out.
 2. The appellant did not seek leave or obtain leave before filing his appeal as required by the law.
 3. That the appellant be condemned to pay costs of the application.
6. The parties agreed to canvass the application dated 12th August 2015 by way of written submissions.
7. The appellant/applicant filed his on 12th October 2015 challenging the preliminary objection dated 24th August 2015 and his submissions on his application dated 12th August 2015 were filed on 3rd November 2015.
8. The 1st respondent's submissions on the preliminary objection are dated 29th October 2015 and filed on 30th October 2015 whereas its submissions on the application dated 12th August 2015 is dated 2nd December 2015.
9. It is a general principle of law that a preliminary objection is determined in limine because of its preliminary significance and if found to be meritorious, it might determine the whole suit or appeal herein and therefore there would be absolutely no reason why the court should determine the merits of the application.
10. The 1st respondent has raised the objection as to the competence and therefore legality of the entire appeal contending that the appellant's Memorandum of Appeal dated 12th August 2015 emanates from the ruling and orders made by the lower court as a consequence of an application made under Section 1A, 1B and 3A of the Civil Procedure Act, 2010. Further, that appeals from such orders do not fall within the category of appeals that lie as of right and therefore the appellant required to seek and obtain leave of court prior to filing the appeal. In this case, it is submitted that no such leave was sought and or obtained.
11. Further, that the pronouncement by the trial court that "Right of appeal within 30 days", cannot be construed as granting leave. That leave must expressly be sought and obtained, and that the

- onus was on the appellant to show to this court incontrovertible proof that leave was indeed sought and obtained in the lower court. That the record does not show that leave was sought or obtained. Consequently, it was submitted by the 1st respondent that the appeal is incompetent, a nullity and not allowed in law hence it should be struck out with costs.
12. In opposing the preliminary objection filed by the 1st respondent, the appellant/applicant submitted that the preliminary objection was a non starter and only intended to derail the proper determination of the matter and to cloud the issue in a veiled attempt to dissuade the court from determining the real question in issue. That the preliminary Objection is unmerited, frivolous, unjustified and an abuse of the court process and only intended to delay the just determination of the matter.
13. The appellant invited the court to determine this matter on its merits and avoid technical objections that do not serve the greater need for justice, relying on Sections 1A, 1B and 3A of the Civil Procedure Act. It was also submitted that the 2nd and 3rd respondents had not objected to the application and that the 1st respondent did not apply for review of the ruling of 4th August 2015. The rest of the submissions by the appellant go to the merits of the application for stay pending appeal.
14. Having considered the brief rival submissions by both parties to this application on the competence of the appeal and therefore the application for stay pending appeal, I am in total agreement with the 1st respondent that this appeal and therefore the application has absolutely no competence and is for dismissal for the reasons that : Order 43 of the Civil Procedure Rules lists other provisions of the Civil Procedure Rules in respect of which appeals can be preferred from orders made there under. Section 1A, 1B, 3A and 63 of the Civil Procedure Act and “ all other enabling provisions of the law” under which the application dated 25th May 2015 was brought seeking for release of shs 1,935,742,00 the 1st respondent is not included in Order 43 of the Civil Procedure Rules. In the absence of leave having been obtained to file this appeal, it follows that this appeal and therefore the application are all incompetent and must be struck out. Section 75 of the Civil Procedure Act provides that:

(1) An appeal shall lie as of right from the following orders and shall also lie from any other order with leave of the court making such order of the court to which an appeal would lie if leave were granted.....

(h) any order made under rules from which an appeal is expressly allowed by the Rules.”

15. Clearly, this appeal is not against a judgment since the substantive matter in the lower court has not been determined. It therefore follows that an appeal from an order or ruling under Sections 1A, 1B, 3A of the Civil Procedure Act can only be brought with leave of the court first being sought either at the time of delivery of such ruling or by way of an application filed within 14 days from the date of delivery of the ruling. (see **CA Nyeri 14/2013; CA 88/1996; CA 215/2010**).
16. In **CA 105/98 KCB Ltd V Esipeya** the Court of Appeal held that leave to appeal was necessary where there is no express right of appeal flowing from the rules under Order 43 of the Civil Procedure Rules and Section 75 of the Civil Procedure Act.
17. In **Nyutu Agrovat V Airtel Networks Ltd [2015] e KLR** the court held that leave to appeal does not constitute the right of appeal. That the right of appeal must precede leave. Citing with approval Ringera J (as he then was) in **Nova Chemicals Ltd V Alcon International Ltd HC Miscellaneous Application 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.” 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 the 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 to 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(see Owners of Motor Vessel “Lillian S” V Caltex Oil (K) Ltd [1989] KLR 1.”

18. Having examined Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules which provisions specify 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 file an appeal, in my humble view, the order allowing release of funds deposited in court to the 1st respondent is not listed as one which is appealable as a matter of right. That being the case, leave of court ought to have been sought and obtained whether at the time of delivery of the ruling or within 14 days by way of a formal application, as the order was not exempt from the requirement of leave under order 43(b) of the Civil Procedure Rules. Without that leave, therefore, the court herein is deprived of jurisdiction to hear and determine the appeal and any other interlocutory applications like the instant one, since it is the leave to appeal that confers this court with jurisdiction to hear this appeal and application for stay pending appeal.
19. Further, I am not persuaded that jurisdictional issues fall into the category of procedural technicalities. They proceed to the root of the matter and without jurisdiction, the court cannot and would not do no one more thing than down its tools. (See **Owners of Motor Vessel “Lillian S” V Caltex Oil (K) Ltd**(supra).
20. As correctly submitted by the 1st respondent and espoused in the above Court of Appeal decision of **Nova Chemicals Ltd V Alcon International Ltd HC Miscellaneous Application 1124/2002** citing Ringera J, leave to appeal from an order is different from the right of appeal; such that whereas a right of appeal emanates from statute or the Rules, the leave on the other hand is a power conferred on the court which power is discretionary. In this case, as no right of appeal existed, the trial magistrate’s pronouncement at the end of her ruling that: “ Right of appeal within 30 days” in my humble view did not by any stretch of imagination amount to leave to appeal from her order. The reason for my conclusion is that the right of appeal accrues from statute and is not left to the discretion of the court to pronounce or confer. It is an express right under Section 79G of the Civil Procedure Act. It therefore follows that since the order appealed from herein did not fall under Section 75 of the Civil Procedure Act or Order 43 of the Civil Procedure Rules, the appellant/applicant should have sought and obtained leave to appeal either upon pronouncement of the ruling/order or by filing of an application seeking leave to appeal within 14 days of such delivery of the ruling. I am further fortified on this point by the decision of the Court of Appeal in **CA Nairobi 86/2015 Peter Nyaga Meirake V Joseph Mutunga** where the Court of Appeal stated 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 and which leave has not been sought and obtained is dead in the water.”

21. Albeit the applicant urged this court to determine the merits of the matter and ignore the objections raised which in his view were procedural technicalities, and whereas I am in agreement that procedural technicalities should be sacrificed at the altar of substantive justice, in **Kakuta Maimai Hamisi V Persi Pesi Tobiko & 2 Others [2013] e KLR** the Court of Appeal stated

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.”

22.The same Court of Appeal in **Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** stated in a five judge bench 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 Laws of Kenya and Section 3A and 3B of the Appellate Jurisdiction Act Cap 9) Procedure is also a hand maiden of just determination of cases.”

23.Therefore, based on the above authoritative pronouncements and my exposition on of this matter, I find that the preliminary objection as taken by the 1st respondent challenging the competency of this appeal and hence the application for stay pending appeal is sound and merited in law and it did not require any evidential depositions or discretion of this court. It was a pure point of law that went to the jurisdiction of this court to hear and determine an appeal. **(See Mukisa Biscuit Manufacturer Ltd vs West End Distributors Ltd (1970) EA. 469).**

24.Accordingly, I find this appeal and the application for stay highly incompetent and the same are hereby struck out. Costs follow the event and are in the discretion of the court. In this case, I note that the appellant and 1st respondent are closely related. The appellant is a major shareholder and a director of the 1st respondent company. In order to avoid escalation of this dispute and to promote reconciliation between the appellant and his co-Directors in the 1st respondent's company, I order that each party bear their own costs of this appeal as struck out and of the application for stay, which is also struck out. And in the spirit and letter of the Constitution as espoused under Article 159 of the Constitution, I implore the appellant and the 1st respondent and its other directors to embrace Alternative Dispute Resolution Mechanisms especially mediation to resolve their differences which in my view are very minor and capable of an amicable settlement.

Dated, signed and delivered in open court at Nairobi this 6th day of July 2016.

R.E ABURILI

JUDGE

In the presence of : Miss Mwaniki h/b for Mr Omondi for the appellant/applicant

Mr Kibathi for the 1st Respondent

N/A for 2nd Respondent

Court Assistant: Adline