



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NUMBER 69 OF 2016

SIMON CHEGE NGUGI.....APPELLANT

VERSUS

DIRECT LINE ASSURANCE CO. LTD.....1ST RESPONDENT

LAWRENCE MURIUNGI GICHUNGE.....2ND RESPONDENT

R U L I N G

1. The Applicant filed a Notice of Motion application dated 10th March, 2016 where he sought orders to wit: -

a. The appeal be struck out with costs.

b. Costs of the application be paid by the Appellant/1st Respondent.

2. The 1st Respondent in response deponed a replying affidavit to the effect that the application before court is incompetent since the application was brought under Orders 45 and 40 of the Civil Procedure Rules.

3. The Applicant and 1st Respondent filed their respective submissions. The Applicant submitted that the appeal should be dismissed since it was filed without leave of the court. He argued that the motion dated 30th November, 2015 filed sought review orders and mandatory injunction and therefore Order 40 Rule 2 which deals with temporary injunction was cited but no such relief was sought on temporary basis. He claimed that the main orders cited and upon which orders were accordingly sought were Order 45 Rule 1 and Sections 1A and 1B, 3 and 3A. According to the Applicant, the subordinate court granted review orders prayed and declined to grant the mandatory injunction sought. He further argued that the appeal is vague and in that it complains about everything and nothing at the same time. He argued that a court cannot give a right of appeal it only gives leave to appeal. He submitted that the right to appeal is governed by statutes and in particular, Civil Appeals are governed by Sections 67 and 75 of the Civil Procedure Act as read with Order 42 and 43 of the Civil Procedure Rules. He urged the court to allow the application and dismiss the appeal.

4. The Appellant on his part submitted that Order 51 Rule 10(2) provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. He argued that merits/demerits of the appeal cannot be the basis for striking out an appeal. He added that Order 43 provides for right of appeal and that the learned magistrate in stating the right of appeal within

30 days was well informed of the said provision in law and their applicability to the matter that was before the court and the ruling made. He advised that if the Applicant was aggrieved, he should have challenged the ruling to the extent of stating the right of appeal. He concluded that the applicant is challenging the jurisdiction of court.

5. The issue of determination is whether the appeal should be struck out for failure to seek leave of the court before lodging of the appeal.

6. The history giving rise to the present application dates back to an application dated 30th November, 2015 filed by the Appellant in the lower court which sought orders for review of the ruling delivered on 13th November, 2015 and orders to the effect that the Defendant secures with the interested party's lawyer the balance of the decretal sum claimed by the Applicant herein under Civil Suit CMCC 4526 of 2013, Milimani, Nairobi, Lawrence Muriungi Gichunge Vs Joseph M. Nganga, Josephine Muchina & Simon Chege of Ksh.1,726,778.00 as stated in the warrant of sale issued against the Applicant. The trial court ruled on the matter by granting Review orders and rejecting the injunction sought.

7. A party filing an appeal is required to show under what law the appeal is filed and whether he has a right to file the appeal. If not, he is required to show that he has sought leave from the court and granted before lodging the appeal. Section 75 of the Civil Procedure Act provides orders from which an appeal lies as of right, the Appellant's case does not fall within this preview. Furthermore Order 43 of the Civil Procedure Rules that provides for orders from which an appeal lies as of right review application. Any party aggrieved by the decision in an application for review, has a right to appeal without necessary seeking the leave of the court.

8. In the present case though one of the prayers sought was review of the ruling delivered on 13th November, 2015, the Appellant was granted the orders of review as sought. The Appellant's contention in Appeal must have arisen from the 3rd prayer in the application, being a mandatory injunction that was not granted.

9. The question arising therefore is whether this appeal as lodged ought to have been filed as of right or leave must have been sought. The application in the trial court was brought under Order 45 Rule 1(a), 40 Rule 2(1) of the Civil Procedure Rules and Sections 1A and 1B, 3 and 3A of the Civil Procedure Act. Order 40 Rule 2, (1) provides for temporary injunctions but the Appellant in his wording of prayer 3 crafted the same as seeking a mandatory injunction. Mandatory injunctions do not fall under Order 43 Rule 2. Subsequently, Order 43 Rule (2) comes in play where an appeal then lies with the leave of the court from any other order made.

10. Looking at the court record, it is evident that the Appellant did not seek leave to appeal as required under the law. Right of Appeal does not constitute a right to appeal as was held in the case of **Nyutu Agrovelt Ltd Vs Airtel Networks Limited (2015) eKLR**.

11. In the upshot, the application dated 10th March, 2016 is allowed as prayed. Costs of the application and the appeal are awarded to the Respondent.

Dated, signed and delivered at Nairobi this 15th day of September, 2016.

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L. NJUGUNA

JUDGE

In the presence of

..... *for the Appellant.*

..... *for the Respondent.*