



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CIVIL APPLICATION NO. NAI. 101 OF 1997

BETWEEN
RAMZAN ABDUL DHANJI APPLICANT

AND

THE UNION INSURANCE COMPANY OF KENYA LIMITED RESPONDENT

RULING OF THE COURT

This is an application by the respondent under rule 80 of the Rules of this Court to strike out Civil Appeal No. 172 of 1996 on the ground that the said appeal is against an order from which leave is required to appeal and it is not in dispute that such leave was neither sought nor granted. The application giving rise to the decision from which it is intended to appeal was made for stay of execution and to set aside the judgment of 10th January, 1996. By an oral application the respondent applied to add a prayer to set aside the consent order of 21st November, 1995. The first prayer was under Order XX1 r. 22 in respect of which an appeal can only lie with leave. Once the prayer to set aside the consent order was also included the application to set aside the judgment of 10th January, 1996, the latter was overtaken and indeed the setting aside of the consent order became the crux of the application. The judgment, after all, was only consequential to the consent order. Indeed, the learned judge was alive to this position as he stated in his ruling as follows:-

"At the outset it should be noticed that the judgment in the case was as written by Kuloba, J. after the plaintiff's receiving evidence. The basic question raised by the present application is whether the consent order by which the proceedings in the suit were stayed pending arbitration according to the arbitration clause in the contract between the parties should have been vacated or set aside". We agree. That being the correct position, the application was to set aside the consent order. Such an application does not lie under any provisions of the Civil Procedure Rules and in accordance with S.75 of the Civil Procedure Act leave to appeal is required from the order for such an application. If, as is cited at the head of the Chamber Summons, S 3A of the Civil Procedure Act applied then also leave is required. It follows that leave not having been sought or granted no appeal lies. Accordingly, the application succeeds and is granted as prayed with costs. The appeal No. 172 of 1996 is, therefore, ordered to be struck out also with costs.

Made and delivered at Kisumu this 18th day of June, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR