



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 40 OF 2015

MACHAKOS COUNTY.....PLAINTIFF/APPLICANT

VERSUS

KAPITI PLAINS ESTATE LTD.....DEFENDANT/1ST RESPONDENT

AND

BONIFACE MUTINDA KABAKA T/A

KABAKA & ASSOCIATES ADVOCATES.....2ND RESPONDENT

RULING

1. In the Notice of Motion dated 27th May, 2019, the Plaintiff is seeking for the following orders:

a. That leave do issue to the Plaintiff/Applicant to file Appeal to Court of Appeal against the Ruling of Hon. O. Angote, J. delivered on the 5th April, 2019 and orders dated 22nd May, 2019.

b. That an order do issue staying any further proceedings in this case as well as Machakos Misc. Application number 387 of 2017 pending hearing and determination of the intended Appeal.

2. The Application is premised on the grounds that the decision sought to be appealed from was delivered by this court; that being a Ruling on an Application, an Appeal only lies with the leave of this court and that the Respondents will not suffer any prejudice if the Application is allowed.

3. The Application is supported by the Affidavit of the Plaintiff's Legal Officer who has deponed that the Plaintiff is aggrieved by the Ruling of this court delivered on 5th April, 2019; that the Plaintiff has filed a Notice of Appeal; that the Plaintiff's advocates have been supplied with proceedings and that an Appeal in this matter only lies with the leave of the court.

4. In response to the Application, the Respondent filed Grounds of Opposition in which he averred that the Application is bad in law as it offends the provisions of Order 43 Rule 1(3) of the Civil Procedure Rules; that the Application should have been filed within fourteen (14) days from the date of the order and that the Application is time barred.

5. The Respondent finally averred that this court lacks jurisdiction to stay proceedings in Machakos Misc. Application number 387 of 2017 and that the Application is an abuse of the court process since the Plaintiff filed a premature Notice of Appeal without seeking leave to Appeal.

6. In his oral submissions, the Plaintiff's advocate submitted that under Rule 75(4) of the Court of Appeal Rules, a Notice of Appeal may issue notwithstanding that leave is required before such Notice is filed; that the Plaintiff has already filed a Notice of Appeal and that the current Application was not filed out of time.

7. The Plaintiff's counsel submitted that the impugned order of this court was issued on 22nd May 2019 and that they could not have filed the current Application without annexing a formal order which was only issued on 22nd May, 2019.

8. In response, the Respondents' advocate submitted that the Notice of Appeal should not have been filed by the Applicant before seeking and being granted leave by this court; that the current Application should have been filed within fourteen (14) days of the impugned Ruling and that there is no prayer for extension of time within which to file the Application.

9. On the issue of staying the proceedings of the Deputy Registrar, counsel submitted that this court does not have the requisite jurisdiction to do so; that this court has already dealt with the issue of the retainer and that in any event, the order of this court was negative in nature and the same cannot be stayed.

10. In an Application dated 17th April, 2018, the Plaintiff sought to invalidate the proceedings that were commenced by the Respondent on behalf of the Plaintiff. In the same Application, the Plaintiff argued that the 2nd Respondent was not entitled to his legal fees having commenced this suit without instructions. In its Ruling dated 5th April, 2019, this court dismissed the Application as follows:

“69. The analysis of the evidence before me leads me to only one conclusion: the 2nd Respondent is entitled to his fees in respect to this suit...”

11. The Ruling of 5th April, 2019 was delivered in the presence of the advocates for both parties. Other than seeking for a stay of execution of the Ruling, which Application was declined, the Plaintiff's advocate did not make an oral Application for leave to file an Appeal.

12. Indeed, before seeking for leave to file an Appeal, the Plaintiff proceeded to file a Notice of Appeal on 9th April, 2019. The Notice of Appeal filed on 9th April, 2019 is in respect to the decision of this court of 5th April, 2019. That is how the Notice of Appeal has been worded.

13. The Plaintiff has now filed an Application in which he is seeking for leave *“to file Appeal to Court of Appeal against the Ruling of Hon. O. Angote, J. delivered on the 5th April, 2019 and orders dated 22nd May, 2019”*.

14. The Plaintiff has conceded that the leave of the court is required before the Appeal against the Ruling of 5th April, 2019 can be filed. That being the case, the Plaintiff should have sought such leave on the date the court delivered the Ruling (*orally*), or by way of a formal Application within fourteen (14) days. Order 43 Rule 1(3) of the Civil Procedure Rules provides as follows:

“(3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

15. The Ruling of this court having been delivered on 5th April, 2019, the current Application should have been filed on or before 19th April, 2019. However, it was not until 22nd May, 2019 that the Application was filed.

16. Although the Plaintiff has argued that the fourteen (14) days should run from 22nd May, 2019, I have perused the record and have not come across the orders dated *“22nd May, 2019.”*

17. The fact that the orders of this court were formally extracted and issued by the Deputy Registrar on 22nd May, 2019 is not synonymous with stating that the orders being appealed against are dated 22nd May, 2019. The orders of this court are dated 5th April, 2019, although issued on 22nd May, 2019. Indeed, the date of 22nd May, 2019 is irrelevant in so far as the Notice of Appeal that was filed by the Plaintiff is concerned. This court made its orders on 5th April, 2019 and not 22nd May, 2019.

18. In any event, by 22nd May, 2019, the Plaintiff had already filed a Notice of Appeal without the leave of the court. Order 42 Rule 6(4) of the Civil Procedure Rules provides that an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court, a Notice of Appeal has been given.

19. Rule 75(2) of the Court of Appeal Rules obligates a party to file the Notice of Appeal within fourteen (14) days of the date of the decision against which it is desired to Appeal. It is because of the requirement to lodge a Notice of Appeal within fourteen (14) days that the Civil Procedure Rules provided for the filing of an Application for leave within fourteen (14) days of the date of the order.

20. The Plaintiff relied on the provision of Rule 75 (4) of the Court of Appeal Rules to argue that the leave of the court can still be obtained even after filing a Notice of Appeal. Rule 75(4) of the Court of Appeal Rules provides as follows:

“When an Appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the Notice of Appeal.”

21. Rule 75(4) of the Court of Appeal Rules should be read together with the provision of Order 43(3) of the Civil Procedure Rules which requires a party who intends to Appeal against an order that requires the leave of the court to do so within fourteen (14) days of the date of the order. Having filed the Application outside the requisite period of fourteen (14) days, and having not sought for order to extend time within which to file the Application for leave to Appeal, the provision of Rule 75(4) of the Court of Appeal cannot come to the Plaintiff's aid.

22. In any event, the decisions of the Court of Appeal, which are binding on this court, shows that the procurement of leave to Appeal is *sine qua non* to the lodging of the Appeal. Any Notice of Appeal filed without the leave of the court, where such leave is required, is null and void. In the case of *Peter Nyaga Muvake vs. Joseph Mutunga, Nairobi Civil Appeal No. 86 of 2015*, the Court of Appeal held as follows:

“Without leave to 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 water.”

23. That being the law, I find and hold that the Notice of Appeal filed on 9th May, 2019 without the leave of the court is a nullity. Considering that the Plaintiff did not file an Application seeking the leave of the court to file an Appeal against its decision of 5th April, 2019 within fourteen (14) days, and in the absence of an Application seeking to extend time within which to file an Application seeking the leave of the court to lodge an Appeal, I find the Plaintiff’s Application to be unmeritorious.

24. Indeed, in the absence of a valid Appeal before the Court of Appeal, the issue of staying the proceedings of the Taxing Master in Machakos Miscellaneous Application number 387 of 2017 does not arise. Consequently, the Application dated 27th May, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE