



**JTG Enterprises Limited v China Gezhouba Group & another (Civil Appeal (Application) E707 of 2023) [2024] KECA 596 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 596 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E707 OF 2023  
MA WARSAME, S OLE KANTAI & PM GACHOKA, JJA  
MAY 24, 2024**

**BETWEEN**

**JTG ENTERPRISES LIMITED ..... APPLICANT**

**AND**

**CHINA GEZHOUBA GROUP ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An application to strike out an appeal from the ruling of the High Court of Kenya at Nairobi (Alfred Mabeya, J.) delivered on 22nd August, 2023 in Nairobi HCCC No. E649 of 2021)*

**RULING**

1. Before us is a Notice of Motion dated 12<sup>th</sup> September, 2023 by the applicant. The prayers sought are rather difficult to follow and therefore we shall set them out as framed by the applicant. The prayers sought are as follows:
  1. ... Spent
  2. That this Honorable Court be pleased to strike out and dismiss the present appeal and all consequential orders and proceedings thereto;
  3. That consequent upon the grant of prayer 2 above, this Court be pleased to summarily dismiss the appellant's/1<sup>st</sup> respondent's Nairobi Court of Appeal Civil Application No. E418 of 2023 (*China Gezhouba Group vs. JTG Enterprises Ltd and the Honorable Attorney General*);
  4. That this Court be pleased to set aside and/or lift the interim orders of stay of execution made on the 6<sup>th</sup> day of September 2023 in Nairobi Court of Appeal Civil Application No. E418 of 2023 (*China Gezhouba Group vs. JTG Enterprises Ltd and the Honorable Attorney General*);
  5. That costs of this application and the appeal be paid



by the appellant 1<sup>st</sup> respondent.

2. The application is supported by the grounds on the body of the motion and the supporting affidavit dated 12<sup>th</sup> September, 2023 together with the further affidavit dated 11<sup>th</sup> October, 2023, both sworn by Joseph Thuo Gichuhi, the applicant's director.
3. The thrust of the application is that by decree of the trial court in HCCC No. E649 of 2021 on 9<sup>th</sup> August, 2023, the applicant obtained judgment against the 1<sup>st</sup> respondent for a sum of Kshs. 682,763,067.00 together with costs and interest. Dissatisfied with that decision, the 1<sup>st</sup> respondent filed a notice of appeal dated 18<sup>th</sup> August, 2023. Contemporaneously, it filed an application for stay of execution dated 16<sup>th</sup> August, 2023 anchored on order 42, rule 6 of the Civil Procedure Rules before the trial court.
4. When the application came up for hearing on 22<sup>nd</sup> August, 2023, the trial court ordered the 1<sup>st</sup> respondent to pay the sum of Kshs. 84,054,610.68 to the applicant; sums admitted as owed to the applicant during the hearing of the main suit. Aggrieved by those orders, the 1<sup>st</sup> respondent filed the present appeal dated 25<sup>th</sup> August, 2023. The applicant argues that the appeal was lodged without first seeking leave from the High Court.
5. According to the applicant, an appeal against the orders emanating from order 42, rule 6 of the Civil Procedure Rules can only lie with leave of the court as couched in order 43, rule 1 (2) of the [Civil Procedure Rules](#) and section 75 of the [Civil Procedure Act](#).
6. The applicant argues that upon realizing this defect, the 1<sup>st</sup> respondent filed an application before the trial court dated 1<sup>st</sup> September, 2023 seeking leave to file an appeal ex post facto. That application has neither been determined nor has leave been granted to file the present appeal. The applicant conceded that the application for leave was still pending for ruling before the trial court.
7. According to the applicant, the orders complained against were premised on the 1<sup>st</sup> respondent's own admission of the debt and as such no issues were canvassed. That the trial court ordered the 1<sup>st</sup> respondent to settle the amount which it had expressly admitted. On this basis, the applicant argued that since no issues were canvassed in the trial court, this Court lacked the jurisdiction to determine the present appeal as the order was premised on the 1<sup>st</sup> respondent's own admission of indebtedness. It is for these reasons that the applicant urged this Court to grant the orders as prayed.
8. Justifying a dismissal of the Civil Appeal no. E418 of 2023, the applicant contended that the said appeal was wholly predicated upon the present appeal. It pointed out that the 1<sup>st</sup> respondent has since filed an application for stay of execution pending appeal. It argued that equally that appeal was a nonstarter and one for striking out. The applicant contended that it should not be denied the benefit of enjoying the fruits of its judgment and that since the appeal was premature, it ought to be dismissed.
9. The application is opposed by the 1<sup>st</sup> respondent. It filed a replying affidavit sworn by Tang Yazhou, the 1<sup>st</sup> respondent's General Manager. It urged this Court to dismiss the application for the following reasons: that the 1<sup>st</sup> respondent was dissatisfied with the findings of the trial court issued on 23<sup>rd</sup> August, 2023; that it preferred an appeal on 25<sup>th</sup> August, 2023 against those orders; it conceded that the appeal against the impugned orders of 23<sup>rd</sup> August, 2023 was filed without leave; that it consequently formally filed an application on 1<sup>st</sup> September, 2023; that it complied with order 43, rule 1 (3) of the [Civil Procedure Rules](#) since it filed the said application within 14 days after the impugned order had been issued and; that the notice of appeal was filed pursuant to rule 77 (4) and (5) of this [Court's Rules](#).



10. The application was heard on 5<sup>th</sup> February, 2024. The applicant was represented by Mr. Kihiko together with Mr. Mutungi while Mr. Wandati appeared for the 1<sup>st</sup> respondent. Mr. Wandati also held brief for Mr. Bett for the 2<sup>nd</sup> respondent. The applicant rehashed the contents of its application and affidavits in its written submissions dated 11<sup>th</sup> October, 2023. It also relied on its digest of authorities dated 11<sup>th</sup> October, 2023 urging this court to allow the application. The 1<sup>st</sup> respondent on the other hand relied on its written submissions dated 12<sup>th</sup> October, 2023. It reiterated the contents of its replying affidavit praying that the application be dismissed with costs.
11. respondent filed the appeal challenging the orders of the High Court dated 22<sup>nd</sup> August, 2023 wherein the court issued the following orders:
  1. That there shall be a stay of execution but the admitted sum of Kshs. 84,054,610.68 plus interest thereon be paid forthwith;
  2. That the rest to await the ruling which shall be on notice.
12. It is also not denied that the orders arose from the 1<sup>st</sup> respondent's application dated 16<sup>th</sup> August, 2023 seeking a stay of execution of the judgment of the trial court delivered on 22<sup>nd</sup> August, 2023. The said application was hinged upon the provisions of order 42, rule 6 of the *Civil Procedure Rules*.
13. Firstly, we note that the applicant urged us to dismiss Civil Application No. E418 of 2023 for the reason that it was related to the present appeal. We find that prayer unmerited for the following reasons: It is common ground that we do not have the said application before us. How then would this bench address its mind to it absent being seized of the matter? Secondly, as stated by the applicant, the 1<sup>st</sup> respondent obtained stay orders in the said Civil Application no. E418 of 2023 to preserve that appeal. To dismiss the said application resultantly would result in this court sitting on an appeal on its own decision. Thirdly, it appears that from the facts set out in the application, that appeal revolves around the judgment dated 22<sup>nd</sup> August, 2023 and not the ruling of the trial court dated 23<sup>rd</sup> August, 2023. How then can this Court summarily dismiss that appeal at this stage when it's totally unrelated to the facts of the present appeal? The prayer seeking to strike out/dismiss that appeal is misconceived and must consequently fail at this juncture. The way this application and the prayers are drafted shows the need for proper drafting and consideration of the issues before filing an omnibus application which is confusing, to say the least.
14. This Court will not tire to remind parties that proper drafting of pleadings is so paramount that it goes to the kernel of administration of justice. Where pleadings create incertitude to a fact finder, it will be impossible to understand the remedies being sought. As a result of this, a would-be good case is butchered because of poorly drafted pleadings. Parties are encouraged to draft painstakingly while bearing in mind that the very draft of that pleading could lead to its actual success or failure.
15. Turning to prayer 2 of the application seeking to strike out the present appeal, section 75 (1) (h) of the *Civil Procedure Act* provides that an appeal shall lie as of right from any order made under the rules from which an appeal is expressly allowed by rules. Order 43, rule 1 (1) of those *Rules* expressly sets out several orders and rules contemplated by section 75 (1) (h) of the *Act*. At rule 1 (2) of order 43, an appeal shall lie with leave of the court from any other order made under these Rules. Such an application shall be made orally or in writing but within 14 days from the date of the impugned order at the court being appealed from.
16. It is our understanding of the above provisions that where no appeal lies as of right and only as of leave, a party must obtain leave to file the appeal. However, order 43, rule 1 (3) contemplates a scenario where a party files an appeal but seeks leave to file that appeal after filing that appeal. This is because the said



provision allows a party to, within 14 days from the date of the impugned order, seek leave to appeal. It does not couch in mandatory terms, that leave must be sought first before an appeal is filed. Be that as it may, the applicant readily conceded that the application for leave was filed within 14 days and that is pending ruling before the trial court.

17. It is on the strength of that reasoning that rule 77 (4) of this Court's Rules provides that  
“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.” (underline ours)
18. Our apex court in the case of Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others SC. Application No. 16 of 2014; [2014] eKLR held as follows:  
“Suffice it to say that under the current Court Rules, one need not seek and get certification before filing a Notice of Appeal. A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”
19. This Court takes the same approach. One does not need to seek leave first before filing a notice of appeal. Of importance is that the said notice of appeal has been filed within the timelines as a jurisdictional pre-requisite.
20. Turning to the present application, and at the risk of repetition, we note that the 1<sup>st</sup> respondent filed an application before the trial court dated 1<sup>st</sup> September, 2023 seeking leave to appeal out of time. That application is yet to be determined. It is our view improper for us to strike out the appeal before the trial court determines the issues whether leave to appeal should be granted or not.
21. After all, our jurisdiction abhors the power to strike out a suit or an appeal *in limine* on technical grounds as the same is found to be draconian and harsh. It ought to be used sparingly and in the most hopeless of disputes. In our view, the present application was filed prematurely and did not holistically consider all the provisions of the law regarding appeals with leave of the court. It does not fall within the parameters of a plain and straight case calling for its striking out.
22. In view of the foregoing, we find that the present application is devoid of merit and it is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY 2024.**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb**

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**JUDGE OF APPEAL**



I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

