



**4MB Mining Limited c/o Ministry of Mining, Juba Republic of
South Sudan v Union Link Logistics & 3 others (Civil Appeal
44 of 2020) [2023] KECA 306 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 306 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 44 OF 2020
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MARCH 17, 2023**

BETWEEN

**4MB MINING LIMITED C/O MINISTRY OF MINING, JUBA REPUBLIC OF
SOUTH SUDAN APPELLANT**

AND

**UNION LINK LOGISTICS 1ST RESPONDENT
FREIGHT FORWARDERS (K) LIMITED 2ND RESPONDENT
MISNAK INTERNATIONAL (UK) LIMITED 3RD RESPONDENT
TOTAL LINK LOGISTICS 4TH RESPONDENT**

*(Being an appeal from the ruling delivered and orders made by the High Court of
Kenya at Mombasa (Chepkwony, J.) on 14th May 2020 in HCC Case No. 30 of 2018)*

JUDGMENT

1. By a plaint dated April 27, 2018, the appellant, 4MB Mining Limited, instituted suit against the 3rd respondent, Misnak International (UK) Limited seeking judgment for, among other things, an order for release of a consignment of cargo. Union Link Logistics, Freight Forwarders (K) Limited and Total Link Logistics, the 1st, 2nd and 4th respondents respectively were named in the suit as interested parties.
2. The 3rd respondent raised a preliminary objection to the suit. It contended that the suit was defective as the appellant had not sought leave to serve summons out of the jurisdiction. The 1st and 2nd respondents on the other hand applied by a motion dated May 7, 2018 to have the suit struck out on grounds that it was unprocedural and had been instituted without leave of the court.



3. The preliminary objection and the application dated May 7, 2018 were heard before Njoki Mwangi, J who in a ruling dated July 6, 2018 and delivered on her behalf by PJ Otieno, J on July 6, 2018 dismissed the preliminary objection as well as the application. The 3rd respondent successfully appealed against that ruling before this Court in Civil Appeal No 118 of 2018. In a judgment delivered on July 25, 2019, this Court set aside the said ruling of the High Court delivered on July 6, 2018 and substituted therefor an order allowing the preliminary objection to the effect that the High Court lacked jurisdiction to entertain the suit. In that judgment, this Court awarded costs of the suit before the High Court as well as the costs of the appeal to the 3rd respondent.
4. The 3rd respondent then returned to the High Court with an application for orders that judgment be entered in its favour upholding the preliminary objection dated May 7, 2018 and for an order that the High Court file in the suit be placed before the taxing officer for assessment of costs. That application was heard before DO Chepkwony, J who in a ruling delivered on May 14, 2020 allowed it. In doing so, the learned Judge expressed that taxation of costs was the only avenue available as this Court had awarded costs to the 3rd respondent. The Judge concluded:

“The upshot therefore is that the application dated November 6, 2019 be and is hereby allowed in terms of prayer 1 and 2. Costs to follow the cause. The orders granted herein apply to 2nd and 3rd interested parties as their prayers are similar to those of the defendant/ applicant.”
5. Aggrieved, the appellant lodged a notice of appeal dated May 26, 2020 and thereafter lodged this appeal dated July 10, 2020. The main complaint, based on the Memorandum of Appeal is that the award of costs by the learned Judge to the 1st and 2nd respondents was erroneous as the award for costs by this Court in its judgment delivered on July 25, 2019 in Civil Appeal No 118 of 2018 was restricted to the 3rd respondent.
6. Cognizant that leave to appeal against the ruling of the High Court delivered on May 14, 2020 was required, counsel for the appellant moved the Court, by an application dated July 13, 2020 seeking orders: (a) for enlargement of time within which to file the application for leave; (b) leave to appeal against the ruling; (c) admission of the record of appeal herein, and (d) stay of proceedings in the High Court in so far as such proceedings relate to taxation of costs in favour of the 1st and 2nd respondent. The prayer for enlargement of time within which to file the application for leave of that application, being a matter for a single Judge was heard before Gatembu, JA who in a ruling delivered on November 5, 2021 declined the request for extension of time on grounds that no explanation had been given for the delay in presenting the application.
7. Against that background, when this appeal was scheduled for hearing on October 24, 2022, Mr Inamdar, learned counsel for the 1st and 2nd respondents, and holding brief for Mr Okere, learned counsel for the 3rd respondent, submitted that there is no valid or competent appeal before the Court, and the matter is in any event overtaken by events as the bills of costs before the High Court have already been taxed.
8. Orally highlighting his written submissions dated October 21, 2022, Mr Inamdar urged that the appeal does not lie to this Court as or right whether under Section 75(1) of the *Civil Procedure Act* or Order 43 Rule1(1) of the *Civil Procedure Rules*; that the appellant never sought leave to appeal before the lower court and neither has this Court granted leave; that the appellant tacitly acknowledged the requirement for leave by presenting the application dated July 13, 2020. It was urged on the strength of the decisions of this Court in *Peter Nyaga Muvake vs Joseph Mutunga* [2015] eKLR and *Nyutu Agrovet v Airtel*



Networks Ltd [2015] eKLR that where, as here, there is no automatic right of appeal, then the appellate court has no jurisdiction to hear or determine the appeal.

9. On his part, learned counsel Mr Ngonze for the appellant submitted that there is no application before the Court to strike out the appeal; that there is indeed an automatic right of appeal as the Court, in its ruling of November 5, 2021 indicated leave was unnecessary (a statement taken by counsel completely out of context); that in any event an oral application for leave to appeal was made before the High Court.
10. On the substance of the appeal, Mr Ngonze in his “draft submissions” that do not appear to have been dated, signed or filed, faulted the learned Judge for purporting to uphold a preliminary objection that had already been upheld by this Court; that the High Court could not re-evaluate and adjudicate on a matter that had already been determined by this Court in its judgment delivered on July 25, 2019 in Civil Appeal No 118 of 2018; that nothing justified the awarding costs to the 1st and 2nd respondents by the High Court.
11. In reply, Mr Inamdar submitted leave to appeal was not granted by the High Court; that if leave to appeal was sought and granted by the High Court as urged by Mr Ngonze, it makes no sense that the appellant moved this Court by its application dated July 13, 2020 seeking leave to appeal.
12. We have considered the rival arguments. Questions regarding the competence of this appeal and the jurisdiction of the Court to entertain it have been raised. The order the subject of this intended appeal is an order for payment of costs. Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules spell out orders from which an appeal lies as of right and stipulates that leave to appeal is required with respect to any other order. Although learned counsel for the appellant alluded to leave to appeal having been granted by the High Court, there is no evidence in the record of appeal to support that claim. The fact that the appellant in its application dated July 13, 2020 sought orders for enlargement of time within which to file the application for leave and for leave to appeal against the ruling is acknowledgment that leave is not only required but that it had not been granted.
13. In Peter Nyaga Muvake v Joseph Mutunga (above), this Court in declining to entertain an application for stay of execution stated:

“In this case, the applicant did not seek or obtain leave to appeal against the decision of Mabeya J As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant’s appeal. 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 42 of the Civil Procedure Rules, the procurement of leave to appeal is a 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” [Emphasis]

14. Similarly, the appellant not having obtained leave to appeal to this Court against the order on costs the subject of the impugned ruling of the High Court of May 14, 2020, there is no competent appeal before the Court. Accordingly, the appeal is hereby struck out with costs to the 1st and 2nd respondents.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

