



**Sanpac Limited v Stanbic Bank Limited (Civil Appeal
320 of 2018) [2023] KECA 960 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 960 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 320 OF 2018
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
JULY 28, 2023**

BETWEEN

SANPAC LIMITED APPELLANT

AND

STANBIC BANK LIMITED RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi –
Commercial Davison (Tuiyott J) delivered on 13th July 2018 in Civil Case No. 34 of 2007)*

JUDGMENT

1. This appeal is from a Ruling delivered on 13th July 2018 in the High Court (Tuiyott J. - as he then was). In the Ruling, the learned Judge dismissed a motion dated 12th April 2018, that had been filed by the appellant Sanpac Limited. The motion brought under Order 17 Rule 2 of the [Civil Procedure Rules](#) sought to have the appellant's suit against the respondent Stanbic Kenya Limited, which had been dismissed on 31st October 2014, reinstated.
2. In its memorandum of appeal, the appellant has challenged the Ruling of the learned Judge on 7 grounds. The grounds faults the learned Judge: for failing to appreciate that the evidence presented by the appellant clearly demonstrated its efforts in prosecuting the case; in failing to make a finding that none of the appellant's letters to the Deputy Registrar elicited any response; in making a finding that the delay in prosecuting the case is not excusable, without considering the appellant's efforts in locating the file; in failing to consider that the case was part-heard and the only reason the matter could not proceed was because proceedings had not been typed and the file could not be traced; in failing to appreciate that the claim by the appellant before the trial court being a claim of over 17 million together with interest, and the effort made by the appellant, clearly demonstrates the appellant's interest in prosecuting the case; in failing to make a finding that the notice to dismiss the suit under Order 17 Rule 2 of the [Civil Procedure Rules](#) 2010 was never served on the appellant's advocate; and in dismissing the appellant's notice of motion contrary to the evidence provided by the appellant.



3. The appellant has filed written submissions in which it has traced the history of the suit in the High Court from 28th January 2007 when the suit was filed, to 31st October 2014 when the appellant's suit was dismissed for non-attendance, up to 13th July 2018, when the appellant's application for reinstatement was dismissed.
4. The appellant submits that it has been interested in prosecuting its case and that its case was partly heard but the trial Judge was transferred, and this resulted in delays as it took time for the proceedings to be typed and there was also lack of communication from the trial court as the appellant's letters went unanswered.
5. Urging the Court to allow its appeal, the appellant relied on *D. Chandulal K. Vora & Co. Ltd. vs Kenya Revenue Authority* [2017] eKLR, in which this Court stated that:

“The main consideration for courts is to do justice to the parties in a suit. The discretion to dismiss a suit or strike out an appeal or pleadings generally ought to be exercised sparingly and judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantive justice to the parties over and above the strictures of rules of procedures, which have been stated to be mere hand maiden of justice.”
6. The appellant argued that the right to be heard is a fundamental right and that an appeal of such nature cannot be strangled out of life, because of failure to obtain leave. He urged the Court to determine the appeal on merit.
7. The appeal was opposed by the respondent who filed written submissions in which it urged the Court to strike out the appeal as the appellant failed to seek leave as required under Order 43 Rule 2 of the *Civil Procedure Rules*. The respondent argued that Order 17 Rule 2 of the *Civil Procedure Rules* under which the appellant's motion was dismissed, falls outside the ambit of Order 43 Rule 1 and therefore leave was required to file the notice of appeal.
8. The respondent relied on *Rayleigh W. Wanyama vs Lorna Mukwana Wanyama & 3 Others* [2020] eKLR, in which it was held that where leave of court is required, it is a prerequisite to the assumption of jurisdiction by the Court. The respondent also relied on *Peter Nyaga Muvake vs Joseph Mutunga* [2015] eKLR, in which this Court held that the procurement of leave to appeal is a “*sine qua non*” to the lodging of the notice of appeal, and that without leave, there can be no valid notice of appeal.
9. During the hearing of the appeal, Mr. Makori appeared for the Appellant while Mr. Allen Gichuhi SC appeared for the Respondent.

Both counsel highlighted their written submissions, each urging the Court to find in favour of their client.
10. We have considered this appeal, the contending submissions, and the law. It is not disputed that the appellant's suit in the High Court has been pending since 2011, and that although the suit was partly heard, the trial Judge was transferred and the typing of proceedings took time. It is also not disputed that the suit was dismissed for want of prosecution, leading to the appellant's motion for reinstatement of the suit, which motion was dismissed, giving rise to this appeal.
11. The issue for determination is whether the learned Judge of the High Court properly exercised his discretion in dismissing the appellant's motion. But before we address this issue, we must first address a pertinent issue regarding jurisdiction. That is, whether the appellant required leave to file the appeal, if so, whether leave was obtained, and if not, what are the consequences?



12. From the record of proceedings, it is apparent that a notice to show cause was issued to the appellant under Order 17 Rule 2 of the Civil Procedure Rules, requiring it to appear before court on 31st October 2014, to show cause as to why the suit should not be dismissed for want of prosecution. On 31st October 2014, there was no appearance for the appellant, consequent to which the appellant's suit was dismissed under Order 17 Rule 2 of the Civil Procedure Rules.
13. This Order states as follows:
- “(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction may dismiss the suit.
2. If cause is shown to the satisfaction of the court, it may make such orders as it deems fit to obtain expeditious hearing of the suit.
2. Any party to the suit may apply for its dismissal as provided under sub-rule 1.
2. The court may dismiss the suit for non-compliance with any direction given under this order.”
14. By a notice of motion dated 12th April 2018, the appellant moved the court under Order 17 Rule 2, to set aside the order of dismissal of its suit for non-attendance, and reinstatement of the suit for hearing. This motion was the subject of the ruling dated 13th July 2018, which is subject of this appeal. It is therefore evident that the Ruling dismissed the appellant's motion for reinstating under Order 17 Rule 2 of the Civil Procedure Rules.
15. Section 75(1) of the Civil Procedure Act states as follows:
- “(1) An appeal shall lie as of right from the following orders and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted”.
16. Section 75(1) read together with Order 43 Rule 1 provides for the orders and rules from which a right of appeal lies as of right. Order 17 is not included under the orders and rules listed in Order 43 Rule 1. This means that any decision arising from Order 17 is only appealable with leave of court. The appellant has not demonstrated to the Court that it obtained any leave to appeal the order of 13th July 2018. In fact, there is an implied admission that leave was not obtained as the appellant urges the Court that it has a fundamental right for its appeal to be heard, and that fundamental right should not be defeated by failure to obtain leave.
17. The issue of failure to obtain leave has been addressed by this Court in several decisions, some of which were cited by the parties. In Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] eKLR, this Court asserted that:
- “The question of a right to appeal goes to jurisdiction and is so fundamental, we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2)(d) of the Constitution. We do not consider Article 159(2)(d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds, and defaults of litigation.”



18. In *Peter Nyaga Muvake vs Joseph Mutunga* [2015] eKLR, this Court was categorical that:

“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 “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.”

19. The appellant’s position is the same as that of the appellant in the above-cited decisions. Under section 75 of the *Civil Procedure Act*, as read with Order 43 of the *Civil Procedure Rules*, the appellant required leave to appeal the order that was made by the learned Judge of the High Court rejecting its application for reinstatement of the suit under Order 17 Rule 2. The appellant not having obtained leave, we have no jurisdiction to entertain its appeal. That is to say that the appeal before us is incompetent and we have no jurisdiction to address the issues raised therein.

20. The appeal is accordingly struck out with costs. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

HELLEN OMONDI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

