



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 96 OF 2016

BETWEEN

RAYLEIGH W. WANYAMAAPPELLANT

AND

LORNA MUKHWANA WANYAMA1ST RESPONDENT

KHISA MUYUNDO ALIAS ZABLON KASISI MUYUNDO.....2ND RESPONDENT

HENRY WAMALWA WANYAMA3RD RESPONDENT

MAURICE JUMA WANYAMA4TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Bungoma (S. Mukunya, J.) dated 27th July, 2016 in HCCA No. 43 of 2012)

JUDGMENT OF ASIKE-MAKHANDIA, JA

The appellant, **Rayleigh W. Wanyama** through a notice of motion application before the High Court sought directions on the mode of proceeding with his appeal. When both appellants and respondents appeared before court to take the said directions, counsel for the respondents raised an oral preliminary objection to the effect that the appellant had filed an application in **Bungoma CMCC No. 460 of 2009** seeking to be enjoined in that suit which application was dismissed by Hon. Ng'ang'ar, S.R.M. and no appeal was preferred against that decision. The appellant then filed another application seeking several orders among them an order for review and setting aside the ruling and order of Ng'ang'ar aforesaid. What was of interest though was that the application did not attack the ruling sought to be reviewed but rather the subsequent ruling by Hon. Atiang, RM on review in which he found the appellant not to be a party to the suit. It was therefore, submitted that the appellant had no locus to file the appeal.

The preliminary objection was countered by counsel for the appellant who submitted that the appellant had been enjoined in the suit by dint of the orders granted by Hon. Kyambia.

The learned Judge (Mukunya, J.) in his ruling observed that the orders by Hon. Kyambia were granted ex parte. The application was to be argued inter parties after due service hence the orders granted were not final. That after inter parties hearing the application was dismissed and the result therefore was that the interested parties including the appellant were not made party to the suit. That when the trial court declined to enjoin him to the suit he ceased to have any recognition in the suit as a party. He failed to appeal against the said order thus his door was shut. The court held that the application to review the said orders was misconceived and that the appellant had no capacity to file the appeal. The preliminary objection was accordingly upheld and the appeal was struck out with no order as to costs.

Aggrieved by the ruling the appellant has now lodged the appeal before us. The appeal raises 12 grounds to wit that; the learned Judge erred in law when he; struck out the appellant's appeal at the time the appeal was coming up for directions; struck out the appeal on a preliminary objection which was not filed; struck out the appeal on grounds that the appellant lacked capacity when the issue of capacity could not have been raised as a preliminary objection; denied the appellant an opportunity to canvass the issues raised in the appeal; dealt with the issue of the appellant's capacity when the same was a substantive issue in the appeal; dealt with matters of fact disguised as matters of law; held that the appeal had no merit without hearing the same; held that since the appellant had not been enjoined to the suit as an interested party by earlier orders his subsequent application for review and setting aside the judgment was misconceived; struck out the appeal without allowing the appellant an opportunity to ventilate issues before court; misdirected himself and failed to address the issues raised by the appellant; dealt with substantive issues raised in the appeal without considering the entire record of appeal; and that the Judge was biased against the

appellant.

At the plenary hearing of the appeal, **Mr. Wamalwa**, learned counsel holding brief for **Ms. Mumalasi**, appeared for the appellant, while **Mr. Simiyu**, learned counsel appeared for the 1st respondent and held brief for **Mr. Mukisu** for the 2nd respondent.

The appellant in his written submissions pointed out that at the time when the appeal was struck out, it had been set down for the taking of directions and that the Judge had not had the opportunity to appreciate the facts of the case to be able to sift and understand which matters were contested or not and thus occasioned an injustice to the appellant who was not given an opportunity to be heard. That the oral preliminary objection was an ambush on the appellant and the court ought not to have entertained the same. The appellant argued that he was never served with a notice of intention to raise a preliminary objection and that the preliminary objection was based on hotly contested facts which ought to have been deliberated upon at full trial. To buttress this point the appellant cited **Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR**. It was submitted further that the issue of capacity was a substantive issue raised in the appeal and it was erroneous for the court to allow the canvassing of the issue at the preliminary stage and that it was a factual issue and not a matter of law. (See:

Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors [1969] EA 696 at 700). Relying on Articles 25 and 159 of the Constitution and the decision in **Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others, CA No. 18 of 2013**, the appellant submitted that he was not given an opportunity to be heard. That all the issues raised in the preliminary objection were factual and highly contested yet a preliminary objection ought to only be raised on points of law. He faulted the Judge for finding the appeal not to have merit without hearing the parties on the same. That the Judge ignored the order issued on 29th January, 2010 enjoining the appellant to the suit substantively and with finality as the same was not made in the interim. Finally, the appellant argued that the learned Judge was biased when he allowed the respondents to ambush the appellant and made substantive findings without considering the evidence on record.

Submitting orally in opposition to the appeal, Mr. Simiyu stated that the appeal is incompetent. The appellant was thrown out of the proceedings after which he went back to seek a joinder which he was denied. He then appealed to the High Court and the appeal was also dismissed. The moment he chose not to lodge an appeal against the ruling dismissing his application to be enjoined as a party, the appellant was precluded from challenging that decision pursuant to Section 68 of the Civil Procedure Act. That pursuant to Section 74, the appellant could only challenge the decision if it is against the law. Counsel further submitted that Section 79(d) forbids a second appeal unless the issues are captured in Section 72 and that Order 43 of the Civil Procedure Rules provides a list of orders from which appeals can be preferred as of right. The appellant approached court under Order 45 Rules 1 & 2 from which appeals are not as of right and therefore leave ought to have been sought first.

In a brief rejoinder, Mr. Wamalwa conceded that the appellant ought to have sought leave before filing the instant appeal either in the High court or this Court. Having failed to do so the appeal was therefore incompetent.

I have anxiously considered the record, rival submissions by counsel and the law. Counsel for the appellant having conceded to the appeal being incompetent over to the fact that leave was not sought and obtained either from the High court or this Court before it was lodged, the issue for determination is whether this appeal is incompetent on that ground. There is therefore no need to go into the merits of the appeal.

It is common ground that this appeal did not lie as of right. As such, it was trite that the appellant obtained leave of court before he could lodge it. Leave is a prerequisite to the assumption of jurisdiction by this Court. In the case of **Kenya Commercial Bank Limited v Esipeya [2015] eKLR**, this Court held that:

"...having chosen to raise the limitation point by way of a preliminary objection under no particular Order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the Superior Court which was neither sought nor obtained."

Given the foregoing the appeal is clearly incompetent and ought to be struck out since the impugned ruling arose out of a preliminary objection. Likewise, this Court in **Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR**, made reference on failure to seek leave to appeal from an order and expressed itself thus:

"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 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 the water."

As to whether Article 159 of the Constitution can cure the failure by the appellant to obtain leave, we find instructive the observations of this Court in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** that:

"The right of appeal goes to jurisdiction and is so fundamental that 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) of the Constitution to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation".

Similarly, in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012** this Court

rendered itself thus:

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the Civil Procedure Act Cap 221 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.”

Granted the foregoing, I am satisfied that the appellant having not obtain leave to appeal against the ruling dated 27th July 2016, this appeal is in the circumstances incompetent. It is accordingly struck out with no order as to costs.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules since Odek, J.A passed on before the delivery of the Judgment. As Kiage J.A concurs, orders accordingly.

Dated and delivered at Nairobi this 3rd day of April, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT KISUMU

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JUDGMENT OF KIAGE, J.A

I concur with the Judgment of my learned brother Makhandia JA, which I considered in draft, and have nothing useful to add.

Dated and delivered at Nairobi this 3rd day of April, 2020.

P.O. KIAGE

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JUDGE OF APPEAL