



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KIAGE J.J.A)

CIVIL APPLICATION NO. 105 OF 2018

BETWEEN

MASUMALI MEGHJI INSURANCE BROKERS LIMITED.....APPLICANT

AND

AAR INSURANCE KENYA LIMITEDRESPONDENT

(Being an application for stay of execution, injunction pending appeal and leave to appeal from the ruling and order of the High Court of Kenya in Mombasa (Chepkwony, J.) dated 19th October, 2018

In

HCCAPP.No. 99 of 2018)

RULING OF THE COURT

[1] **Masumali Meghji Insurance Brokers Limited** was the defendant in Mombasa **CMCCNo. 1139 of 2017** filed before the Chief Magistrate's Court Mombasa, where it had been sued in a claim for a sum arising from a contract between it and the respondent herein (**AAR Insurance Kenya Limited**). Before the matter was set down for hearing the respondent filed an application urging the court to strike out the defence or to alternatively enter summary judgment against the appellant.

[2] The application was allowed and, in a Ruling, delivered on 18th May, 2018, the learned trial magistrate struck out the defence and entered judgment against the appellant. This prompted the appellant to move to the High Court on appeal and contemporaneously filed an application for stay of the Chief Magistrate's orders dated 7th June, 2018.

[3] The High Court (Chepkwony, J.) after considering the application in question agreed with the trial magistrate's finding that the respondent had proved through several annexures that the amount claimed had been paid to the appellant. She therefore agreed that the appellant had no defence and there was nothing to proceed to trial, and that the defence had been properly struck out. Accordingly, the learned Judge dismissed the application for stay in her ruling dated 19th October, 2018. It is worth noting that the said Ruling was in respect of two applications but the other application is not relevant for purposes of this Ruling.

[4] It is this dismissal that the appellant decided to challenge before this Court by filing a Notice of Appeal dated 25th October, 2018.

Apparently, the appellant's counsel appreciates that he has no automatic right of appeal to this Court and this prompted him to file another application dated 26th October, 2018 before the High Court seeking the same orders of stay that had been dismissed on 19th October, 2018. This time however, he also sought leave to appeal before this Court. That application was dismissed by the learned Judge who made a finding to the effect that the court was already *functus officio* and the appellant should therefore move to this Court for his orders.

[5] The appellant consequently filed the Notice of Motion dated 8th November, 2018 which is subject to this Ruling. His prayer No. 5 is for leave to file the appeal. Obviously therefore, technically speaking, in absence of leave, the appellant's Notice of Appeal on which this application is predicated is not properly before this Court. The Notice of Appeal filed can only be validated if prayer No.5 is allowed in the first instance.

[6] We are aware this Court has pronounced before that the Court does not go behind the Notice of Appeal to determine its validity before it can entertain an application under **Rule 5(2) b** of the Rules of this Court. A distinction must however be drawn here. Where a Notice of

Appeal is filed without leave of Court where such leave is a prerequisite, then it cannot be said that there is a Notice of Appeal on record. **Rule 75** of the Rules of this Court presupposes that the Notice of Appeal filed to initiate the appeal process has complied with all necessary legal pre-requisites. That is to say, the appellant either has an automatic right of appeal or has obtained leave of the court where the right of appeal is not automatic.

[7] Urging prayer No. 5 of his application, Mr Kongere learned counsel for the applicant submitted that the intended appeal had high chances of success and that the learned Judge declined to grant him leave without giving him a hearing. The application was opposed by Mr Mbichire learned counsel for the respondent through the Grounds of Opposition dated 30th November, 2018. According to counsel, the Notice of Appeal is defective and so is the application. To compound the matter, the orders sought seek stay orders of the Chief Magistrate and not of the High Court. He urged us to dismiss the application saying that the same lacked merit.

[8] We have considered the Notice of Motion, the grounds of opposition, the rival submissions by learned counsel and the law. This Court derives its jurisdiction to entertain a stay of execution application from the Notice of Appeal. In the absence of a Notice of Appeal, then the Court is bereft of jurisdiction to entertain this application save for its prayer No. 5 which itself seeks leave to file an appeal to this Court.

[9] Close scrutiny of the said prayer shows that the applicant is not asking us to deem the Notice of Appeal on record as having been duly filed with leave of the Court. Even if we entertained prayer 5 and allowed it, the applicant would still need to restart the process and file a compliant Notice of Appeal. Either way, we would not have jurisdiction to entertain prayers No. 2, 3 and 4 of the application.

[10] Even if we were to assume, *arguendo*, that the Notice of Appeal was valid and properly before the Court, the orders sought are in our view clearly outside this Court's ambit. We say so because the prayer seeks to stay, not the order "**appealed from**" as indicated in the impugned Notice of Appeal, but the decree of the trial magistrate. Neither **Article 164(a)** of the **Constitution of Kenya** nor the Appellate Jurisdiction Act and the Rules thereunder or indeed the Civil Procedure Act give us jurisdiction to entertain appeals straight from the magistrate's court. We cannot therefore be asked to stay orders issued by the magistrate's court, the appeal before the High Court not having been heard. Asking us to invoke our inherent jurisdiction under **Section 3** of the **Appellate Jurisdiction Act** is stretching the jurisdiction of the Court beyond breaking point. It is just not possible.

[11] Whichever way one may look at it, this application is in our considered view hopeless. We do not even need to get into the issues of arguability or the nugatory aspect in respect of the orders of stay. This application is totally devoid of merit. We dismiss it with costs to the respondent.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR