



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA AT NAIROBI**  
**Civ Appli 42 of 2003**

**POSTAL CORPORATION OF KENYA.....APPLICANT**

**AND**

**KAMCONSULT LIMITED.....1<sup>ST</sup> RESPONDENT**

**TELKOM KENYA.....2<sup>ND</sup> RESPONDENT**

*(An Application to strike out the Notice of Appeal from the Ruling/Order of the High Court of Kenya at Nairobi (Ringera, J) dated 11<sup>th</sup> December, 2001*

**in**

**H.C.C.C. NO. 262 OF 2001 (OS))**

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**RULING OF THE COURT**

Before us is an application by way of notice of motion stated to have been brought under “**Rule 1(2), 42(1) and 80** of the Court of Appeal Rules”. In this application, the applicant **POSTAL CORPORATION OF KENYA** seeks an order that the notice of appeal dated the *20<sup>th</sup> December, 2001* and filed on the *21<sup>st</sup> December, 2001* by the first respondent **KAMCONSULT LIMITED** be struck out with costs. The application is brought on the following grounds:-

- “1. THAT no qua right of appeal lies to the Honourable Court of Appeal in respect of the decision of the High Court delivered on 11<sup>th</sup> December, 2001.**
- 2. THAT the first Respondent has no right of appeal as against the decision and cannot lodge a competent Notice of Appeal.**
- 3. THAT the costs of this application be provided for in any event.”**

There was a supporting affidavit sworn by Mr. Ahmednassir, the learned counsel for the applicant herein.

The background to this application may be briefly stated. As a result of a ruling dated and delivered on *17<sup>th</sup> September, 2001* by Ringera, J (as he then was) in which he held that the arbitrator in an Arbitration Cause between the Applicant and the Respondents had no jurisdiction, the First Respondent filed an application dated *2<sup>nd</sup> October, 2001* seeking various prayers *inter alia*, a stay of execution, review and costs. On *3<sup>rd</sup> October, 2001* the applicant’s counsel filed grounds of objection and gave

notice that he would raise a preliminary objection on a point of law. The 2<sup>nd</sup> respondent's counsel filed a similar notice of preliminary objection. The superior court allowed counsel to submit on the preliminary objection. In his ruling dated 11<sup>th</sup> December, 2001, the learned Judge stated *inter alia*:-

***“Before the commencement of the hearing of the motion, the respondents took preliminary objections of which due notice had been given that no appeal or review lay against the order or decision of the court arising out of proceedings under section 17 of the Arbitration Act”.***

The learned Judge proceeded to consider the rival submissions and in the end upheld the preliminary objection by expressing himself thus:-

***“To conclude, I am of the opinion that the right of review of orders and /or decisions made pursuant to a reference under section 17(6) of the Arbitration Act is neither expressly conferred by the Act nor is it to be implied on a proper interpretation of the application of rule 11 of the Arbitration rules. In the premises, I uphold the preliminary objection by respondents that there is no jurisdiction to entertain the applicant's motion on notice dated 2<sup>nd</sup> October, 2001. I order it dismissed with costs to the respondents”.***

Being aggrieved by that ruling the 1<sup>st</sup> respondent filed a Notice of Appeal pursuant to **rule 74** of this Court's Rules. It is that notice of appeal that the applicant herein seeks to be struck out.

Mr. Ahmednasir submitted that since his preliminary objection was upheld by the superior court the only way open to the 1<sup>st</sup> respondent was to seek leave to file an appeal and as leave was neither sought nor granted, the 1<sup>st</sup> respondent had no right of appeal. Consequently, it was submitted the notice of appeal that was filed was incompetent and should be struck out with costs.

Mr. Ochieng Oduol for the 2<sup>nd</sup> respondent associated himself with the submissions of Mr. Ahmednasir.

To answer those submissions, Mr. Khalwale, for the 1<sup>st</sup> respondent, sought to rely on **section 66** of the **Civil Procedure Act**, which, in his view, confers right of appeal from decrees of the superior court. He submitted that the matter in the superior court was a review under **Order XLIV** of the Civil Procedure Rules.

We think it appropriate to take up the matter from the submission of Mr. Khalwale. It is true that what was before the superior court was an application for review. But as soon as that application for review was filed, Mr. Ahmednassir filed grounds of objection in which he intimated that he would be raising a preliminary objection on a point of law. In his Grounds of Objection filed on 3<sup>rd</sup> October, 2001, **Ground 3** stated:-

***“Section 10 of the Arbitration Act expressly bars any intervention in matters governed by the Act, and no provision exists for a review intervention in the Act and the 2<sup>nd</sup> respondent gives notice that it will raise preliminary objection on a point of law that such a review as the one contemplated by the applicant has no basis in law”.***

Similarly, Mr. Ochieng Oduol counsel for **TELKOM KENYA LIMITED** filed a notice of Preliminary Objection based on the question of jurisdiction. It was this preliminary objection that was considered by the superior court in its ruling of 11<sup>th</sup> December, 2001. As already observed earlier in this ruling that preliminary objection on the issue of jurisdiction was upheld by the superior court. In **G.R. MANDAVIA VS. RATTA SINGH [1965] E.A. 118 at P. 124-5 Law JA** said:-

***“The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal will lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue and finally disposed of at first instance, a preliminary decree arises from which an appeal lies;***

***but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction, or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal. It follows that in my view the preliminary objection succeeds. The appeal is incompetent and must accordingly be dismissed.”***

And in ***KENYA COMMERCIAL BANK LIMITED VS. TONY MANASEH ESIPEYA – Civil Appeal No 105 of 1998*** (unreported) this Court stated:-

***“The defendant did not make a formal application to strike out the plaint but instead raised a preliminary objection at the trial that the plaintiff’s claim was time-barred. The learned Judge dismissed the preliminary objection and it is against that decision that the defendant has now appealed to this Court.***

***Following the ruling and order of the learned Judge, the defendant’s Advocates extracted what they called a PRELIMINARY DECREE. They did not ask the superior court for leave to appeal because they thought the learned Judge’s ruling gave rise to a preliminary decree from which an appeal lies to this Court as of right. Mr. Khawaja for the appellant submitted that the ruling resulted in a preliminary decree and leave to appeal was not required. Mr. Chumba for the respondent, on the other hand, submitted that the ruling gave rise to an order appealable only with leave which leave was neither sought nor obtained. We decided to deal with this point first before going into the merits of the appeal.***

The Court considered other matters; made reference to the case of ***G.R. Mandavia*** (supra) and finally expressed itself thus:-

***“It was held, inter alia, that where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave. In the course of his judgment Law JA said at page 124:***

***“The position is in my opinion clear, when a suit is disposed of on a preliminary point, an appeal will lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue and finally disposed of at first instance, a preliminary decree arises from which an appeal lies; but where a preliminary issue alleging misjoinder limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal.”***

***In the present case the limitation point was taken as a preliminary issue and it failed. What arose was not a preliminary decree but merely an order from which an appeal only lay with leave. The defendant as the unsuccessful party had no right of appeal except with leave. Leave to appeal was not obtained. The consequence of this is that this appeal is incompetent and it is hereby struck out.”***

Similarly in the present application, the preliminary objection having been raised on the issue of jurisdiction it follows that the order was appealable only with leave and as such leave was neither sought nor obtained the notice of appeal filed by the 1<sup>st</sup> respondent must be incompetent. We order that the same be and is hereby struck out with costs to the applicant ***Postal Corporation of Kenya*** and 2<sup>nd</sup> respondent ***Telkom Kenya***.

***Dated and delivered at Nairobi this 13<sup>th</sup> day of October, 2006.***

***E.O. O’KUBASU***

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***JUDGE OF APPEAL***

***J.W. ONYANGO OTIENO***

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**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**