



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**(CORAM: GICHERU, LAKHA & OWUOR, J.J.A.)**  
**CIVIL APPEAL NO. 187 OF 1999**

**NIAZSONS (K) LIMITED .....APPELLANT**  
**AND**

**CHINA ROAD & BRIDGE CORPORATION (KENYA) .....RESPONDENT**

**(Appeal from the Ruling/Order of the High Court of Kenya at  
Nairobi (Justice Onyango Otieno) dated 15th April, 1999  
in  
H.C.C.C. NO. 126 OF 1999)**

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**RULING OF THE COURT**

On 10 March 2000 when this appeal was still part-heard the Court of its own motion ordered that the advocates for the parties herein make their respective submissions on 27 March 2000 on the question as to whether the appellant has a right of appeal to this Court from the decision of the superior court given on 15 April 1999.

The plaintiff filed a suit in the superior court claiming an injunction and damages arising from a sub-contract agreement made between the parties whereby the plaintiff undertook to execute certain road works. The defendant applied for a stay of the suit against it on the ground that it was brought in respect of a matter which the plaintiff had agreed to refer to arbitration. The plaintiff took some preliminary objections to the application which the learned judge heard and, having done so, he dismissed them. It is against that decision that this appeal has been brought.

The question is whether an appeal lies. The appellant contends that it does as a matter of right and that, in the alternative, if it lies only with leave it is argued that the defendant is estopped from relying upon it. In a contrary submission the defendant's advocate maintained that an appeal did not lie as of right but only with leave and urged upon us that the course of conduct relied upon by the appellant amounted only to a representation of law and that such a representation did not give rise to an estoppel.

We have carefully considered the position in the matter. The learned judge, however, ruled on the preliminary objections but did not proceed to dismiss or grant the application for stay. The same is still pending. In these circumstances, there is no order granting or refusing to grant an Order of stay within the meaning of **section 75(1)(d)** of the Civil Procedure Act which can be the only basis for an appeal to lie as of right. Since there is no such basis, that section has not even begun to apply to the facts of the present case. In our judgment, there is no right of appeal. The appellant, however, does have a right to appeal to this Court with leave of the superior court or failing that of this Court. It is not in dispute that no such leave has been sought or obtained with the result that we have no jurisdiction to make any order in the matter.

Mr. Billing sought to persuade us that there was a course of conduct on the part of the Respondent amounting to a representation when he submitted that there was a right to appeal. Assuming, without deciding, that there was a representation which was binding the Respondent about legal relations, we are unable to confer jurisdiction upon ourselves to entertain an appeal which lies only with leave when no leave has been sought or obtained. It is trite that there can be no estoppel against the statute. Nor can jurisdiction be conferred by estoppel, consent, acquiescence or default.

For these reasons, we are constrained to hold that this appeal is incompetent for want of leave. Accordingly, it is struck out but with no order as to costs.

**Dated and delivered at Nairobi this 31st day of March, 2000.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR