



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 663 of 2005

MOHAMED SIAKA ALI PLAINTIFF

VERSUS

SUN PALM LIMITED AND 3 OTHERSDEFENDANTS

RULING

The 2nd Defendant/Applicant has filed Chamber summons dated 12th November, 2007 under provisions of Order XLII Rule 1 sub-rules 3 and 4 of the Civil Procedure Rules and Section 75(1) of Civil Procedure Act.

It seeks this court's leave to appeal against the ruling and order made on 30th October, 2007.

I do agree that the applicant does need leave of this court to file the appeal against the order as per the provisions of Order XLII of Civil Procedure Rules.

The Notice of Appeal is also filed by the applicant as required under Rule 74 of Court of Appeal Rules.

What is required from this court is to interpret the provisions of Order XLI Rule 4(4) of Civil Procedure Rules Vis-à-vis those of Rule 74(4) of Court of Appeal Rules.

The latter provision provides:

“(4) when an appeal lies only with leave or on a certificate that the point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”

Order XLI Rule 4(4) stipulates:

“4(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”

Relying on the aforesaid provision of Civil Procedure Rules, it was contended by the Respondent's counsel that, this court has become functus officio as there is already an appeal filed in the Court of Appeal and thus leave as prayed cannot be granted.

I have carefully considered the two provisions of law.

Order XLI Rule 4 of Civil Procedure Rules provides for procedure to seek an order for stay of execution of the judgment or Ruling pending appeal. That is the limited ambit of the said provision.

Order XLII on the other hand provides for the appeal which shall lie as of right and for those which only lies with the leave of the court. In my considered opinion, Rule 74(4) of Court of Appeal Rules caters for the appeal where the leave of the court is required.

It seems that there is an apparent contradiction between the two provisions specially when the Court of Appeal Rules do not provide for the result or outcome of the Notice of Appeal wherein the leave is refused by the superior court. However, it is not within my domain to make any further observations on the Rules which do not fall within my jurisdiction.

It has been my view that, for the sake of development of law and excepting the obviously incompetent application, I shall not refuse a litigant to appeal against my determinations.

Without making any finding on the issue of contradiction, I shall exercise my inherent jurisdiction and grant leave to appeal.

Costs in the Appeal.

Dated and signed at Nairobi this 30th day of November, 2007.

K.H. RAWAL

JUDGE

30.11.07