



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 9 OF 2017

GRACE WANJIRU KARIUKI.....1ST APPELLANT

MWANGI WANJIRU.....2ND APPELLANT

V E R S U S

LYDIAH NJAMBI.....RESPONDENT

RULING

The matter came up for directions on 08/03/2018 where the advocate for the respondent sought to have the appeal summarily dismissed under **Section 79B of the Civil Procedure Act**. That **Order 43 Rule 1 of the Civil Procedure Rules** lists the orders which can be appealed against. That at page 3 of the record of appeal is where it is indicated where the appeal is all about. That the lower court gave directions and that is not something that can be appealed against. That on 28/02/2017, there is nothing the court did capable of being brought to this court.

In response, advocate for the appellant stated that they are appealing against is under **Order 43 Rule 1(e) of the Civil Procedure Rules** which deals with exclusion of counterclaim. The proceeding at page 3 and ruling at page 6 struck out defendants who were added in the counterclaim. The court indicated they were unprocedurally joined and they were ordered to amend the counterclaim. Although **Order 43 Rule 1** deals with appeals as of right, they applied for leave to appeal and it was granted. They therefore prayed that the appeal be allowed to proceed.

Section 79B of the Civil Procedure Act provides:

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding [Section 79C](#), reject the appeal summarily.

Order 43 Rule 1(e) of the Civil Procedure Rules provides:

*An appeal shall lie as of right from the following Orders and rules under the provisions of [Section 75\(1\)\(h\)](#) of the Act— **Order 7, rule 12** (exclusion of counterclaim);*

Section 75(1)(h) of the Civil Procedure Act provides:

An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted— any order made under rules from which an appeal is expressly allowed by rules.

Order 7, rule 12 of the Civil Procedure Rules provides:

Where a defendant sets up a counterclaim, if the plaintiff or any other person named in the manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent suit, he may at any time before reply, apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application, make such order as shall be just.

As per the records, the appeal is against the ruling delivered on 28/02/2017. Perusing through the proceedings of 21/02/2017, the court indicated it would give ruling directions on 28/02/2017. On the said date, the court held the defendant had filed defence and counterclaim and included two parties as defendants who were not in the original suit, therefore the parties who have been added are strangers to the suit

and ought to be struck out. The counsel was given an opportunity to amend the defence.

Therefore **Order 7, rules 8, 9 and 10 of the Civil Procedure Rules** is applicable in this instance.

Order 7, rule 8 of the Civil Procedure Rules provides:

Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.

Order 43, rule 1 (2) of the Civil Procedure Rules provides:

An appeal shall lie with the leave of the court from any other order made under these Rules.

The appellant duly applied for leave of the court to file an appeal and the leave was granted.

The question is whether the directions which were given are an order which is appealable. The appeal was admitted and was coming for directions as provided under **Order 42 rule II Civil Procedure Rules**.

An order is defined in Wikipendia Dictionary:

“A court order is an official proclamation by a Judge (or a panel of Judges) that defines the legal relationship between the parties to a hearing, a trial, an appeal or other court proceedings. Such ruling requires or authorizes the carrying out of certain steps by one or more parties to a case.”

Black’s Law Dictionary:

“Definition of Order in a general sense. A mandate, precept, a command or direction authoritatively given, a rule or regulation.”

My view is that the directions given by the trial Magistrate were an order appealable to the High Court with the leave of the Court. The appeal has been admitted, and it is therefore too late to urge the court to summarily reject it. The counsel for the respondent was not seeking review of the order admitting the appeal. My view is that the objection is not properly before court and is therefore without merits. I dismiss it with costs.

Dated at Kerugoya this 14th day of December 2018.

L. W. GITARI

JUDGE