



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. E007 OF 2022

STEPHEN OMONDI JUMA.....APPELLANT

VERSUS

SPROCER AWUOR RABOTE.....RESPONDENT

(Appeal from the Ruling and order of Hon. S.W. Mathenge, Resident Magistrate

at Bondo in Bondo PMCC No. 62 of 2020 delivered on 9/2/2022)

RULING

1. By a Notice of Motion dated 21/3/2022 filed under Certificate of Urgency, the appellant/applicant Stephen Omondi Juma seeks from this court the following orders:

1) Spent

2) Spent

3) That this Honourable court be pleased to stay further proceedings in Bondo PMCC No. 62 of 2019 Sprocer Awuor Rabote (suing as the Legal Representative of the estate of Leonard Taabu Rabote) versus Stephen Omondi Juma pending the hearing and determination of the appeal in Siaya High Court Civil Appeal No. E007 of 2022.

4) That this Honourable Court be pleased to reopen the Defendant's case and the matter be fixed for defence for the police officer to testify.

5) That costs of this application be provided for.

2. The application is predicated on the 8 grounds on the face thereof and supported by an affidavit sworn by Joan Turgutt advocate and annexures which are a Memorandum of Appeal dated 9/2/2022 and the Defendant's list of witnesses and Defendant's list of Documents, both dated 10/12/2019.

3. The appellant/applicant's case is that when the defence case came up for hearing before the trial court on 9/2/2022, the Defendant/appellant herein was ready to proceed with two witnesses being the driver of the accident motor vehicle and the police officer from Bondo Police Station.

4. That after the driver had testified, and when it was the turn of the police officer to testify, the Plaintiff's counsel objected to the police officer testifying on the grounds that the defendant had not filed and served copies of the police file and the Occurrence Book upon the Plaintiff.

5. In the view of the Appellant/Applicant, the two documents are public documents which had been listed as documents to be relied on and that the police officer too had been listed as a witness for the defendant vide the 2 lists dated 10/12/2019 hence the police officer should have been allowed to testify and produce the police file and Occurrence Book hence it is in the interest of justice to reopen the defence case for hearing so that the real issues in dispute are resolved once and for all.

6. The applicant avers in the deposition on his behalf by his counsel that should the case before the trial court be allowed to proceed and judgment delivered and execution proceed, then the appellant stands to suffer irreparable loss and prejudice as this appeal raises triable issues and that unless the proceedings are stayed, the application and the appeal stand to be rendered nugatory. It is further deposed that it is in the

interest of justice and fairness that the orders sought are granted.

7. Counsel also deposes that the Defendant's case having been closed and the matter now pending mention on 6/4/2022 to confirm the filing of written submissions, this court should stay the proceedings in the lower court.

8. Opposing the application and the appeal, and raising a preliminary objection on the competency of this appeal, the Respondent through her counsel Mr. Oluoch Rodney Odhiambo filed 4 grounds of opposition dated 28th March 2022 together with a list of Authorities dated the same day.

9. The Respondent contends that:

1) The application and the Memorandum of Appeal as filed lack merit, is an exercise in frivolity, is incompetent, is an abuse of the court process, a non-starter and solely intended to vex the court and also delay or deny the Respondent fruits of her judgment;

2) The Application has not complied with the Mandatory provision of Section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules;

3) This is a proper case in which the honourable court ought to exercise its powers under Section 79B of the Civil Procedure Act by rejecting the appellant's appeal summarily;

4) This Honourable COURT LACKS JURISDICTION to hear and determine both the Memorandum of Appeal dated the 9th February 2022 and the Appellant's Notice of Motion dated 21st March 2022.

10. The Respondent urged this court to dismiss the Notice of Motion dated 21st March 2022 and the Memorandum of Appeal dated 9th February 2022 with costs.

11. The application was canvassed by way of oral submissions on 30/3/2022 with Ms. Joan Turgutt Advocate arguing the application on behalf of her client the appellant/applicant while Mr. Rodney Oluoch Advocate appeared for the Respondent.

12. In her submissions, Ms. Turgut reiterated the application, the grounds and the depositions contained in her sworn affidavit maintaining that her client's appeal shall be rendered nugatory unless orders sought are granted. She relied on the case of **Ezekiel Mule Muzengi Vs H. Young Co. E.A. Ltd [2019]eKLR** and argued that her client had established an arguable case and had filed the present application timeously. She also argued that they had a **prima facie** case and that the right to be heard was denied to the appellant.

13. Counsel further relied on the case of **David K. Sifuna Vs Emily Kivali Mulaya & Another [2016]eKLR** and argued that the duty of the court is to ensure that justice is done and seen to be done. She also relied on **Section 3 of the Civil Procedure Act** on the necessity to ensure that justice is done to prevent abuse of the court process.

14. She submitted that the Memorandum of Appeal as filed has arguable and meritorious grounds of Appeal which were filed within the stipulated time and timeously. She submitted that a denial of the order of stay of proceedings will be catastrophic as the suit will be determined without hearing the Defendant/Appellant/Applicant herein; who stands to suffer injustice if the application is not granted.

15. Opposing the application, Mr. Rodney Oluoch advocate relied on the 4 grounds of opposition and the list of the Respondent's authorities as filed, and argued that a stay would only be necessary if this court had jurisdiction to hear the matter. That this court has no jurisdiction to hear this appeal because the ruling of the trial court made on 9/2/2022 was premised on **Order 11 of the Civil Procedure Rules** which is on the issue of compliance hence, the appellant was obliged to seek and obtain leave of court under **Section 75 of the Civil Procedure Act and Order 43 (2) of the Civil Procedure Rules**, prior to filing of the appeal herein. Counsel for the Respondent argued that such leave ought to have been obtained on the date of the Ruling impugned or within 14 days of the date of the said Ruling.

16. In counsel's view the absence of such leave should persuade this court to dismiss this application and the appeal.

17. In a rejoinder, Ms. Turgutt counsel for the appellant/applicant submitted that leave was sought and obtained to file the appeal although she had not extracted the order. She urged this court to consider the substance in the interest of justice and not to rely on procedural faults. She submitted that she believed that the lower court had granted leave and that she did not peruse the lower court record.

Determination

18. I have considered the application as presented and as argued for and against. I have also perused the trial court file in **Bondo PMCC No. 62 of 2019** which is a suit between the two parties hereto and which is due for mention on 6/4/2022 but the lower court record was submitted to this court on 23/3/2022 as the appeal was filed challenging a ruling made on 9/2/2022 by the trial magistrate Hon. S.W. Mathenge, Resident Magistrate, disallowing the oral application by the appellant's counsel's application to file the police file and serve the Respondent's counsel. The trial magistrate opined that it would amount to trial by ambush if she allowed fresh documents to be served upon the Plaintiff's counsel and that no reasons had been given why the police file was not served upon the Plaintiff's counsel and that albeit the police file is a public document, it would be unjust to ask the Plaintiff to go perusing all documents listed in any particular list of documents.

19. The main issue for determination in this appeal at this particular point is whether this court has jurisdiction to hear and determine the application as presented, and whether the appeal as filed is competently filed before this court.

20. Akin to the above issue is whether the appellant/applicant has a right of appeal under **Section 79G of the Civil Procedure Act**.
21. As was emphatically stated in **Nyutu Agrovet Ltd as Airtel Networks Ltd [2015]eKLR**, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. Further, that the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of **Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules**, to seek and obtain leave from the lower court to appeal to this court.
22. The Court of Appeal reiterated the above position in the case of **Micro-House Technologies Ltd vs Cooperative College of Kenya [2017]eKLR** and proceeded to strike out an appeal upon finding that the court had no jurisdiction to entertain the appeal before it.
23. In **Serephen Nyasani Menge vs Rispah Onsase [2018]eKLR** Mutungi J of Environment and Land Court at Kisii was confronted with an issue similar to the present one where the Respondent argued that the applicant did not have an automatic right of appeal against the decision and or order of the Learned magistrate as it was not an order that was appealable as of right under **Order 43 of the Civil Procedure Rules**.
24. In his ruling made on 23/11/2018, the Learned Judge observed that in the motion before him, the orders sought to be appealed from did not fall under any of the orders set out under **Order 43 Rule (1) of the Civil Procedure Rules** in respect of which an appeal lies as of right hence the applicant ought to have sought and obtained leave from the court that made the impugned order either at the time of the order was made by way of an oral application or within 14 days from the date the order was made, which requirements are couched in mandatory terms. The Learned Judge held that where leave to appeal is a prerequisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and that consequently, no competent appeal can lie against such an order.
25. In **Francis Ndahebwa Twala vs Ben Nganyi [2018]eKLR**, this court (Aburili J) had the opportunity of determining a similar issue in a judgment delivered on 27/11/2018 and I pronounced myself, quite clearly and authoritatively, relying on the Court of Appeal decisions which are binding on this Court, that where there is no automatic right of appeal, leave to appeal must first be sought and obtained from the court that made the impugned decision before lodging an appeal.
26. In my judgment, was fortified by the Court of Appeal decisions in **Nyutu Agrovet Ltd Vs Airtel Networks Ltd (supra) and Micro House Technologies Ltd vs. Cooperative College of Kenya (supra)**. I then substantively determined whether as a Court i had jurisdiction to hear and determine the merits of an appeal which did not lie as a matter of right but filed without first obtaining leave of court that made the order that was under challenge. I concluded that I had no such jurisdiction to hear and determine the appeal. I downed my tools and struck out the appeal for being fatally incompetent.
27. The question in this matter is, therefore, whether this appeal is competent in the 1st instance and if not, then is the application for stay of proceedings in **Bondo PMCC No. 62/2019** and for reopening of the Defendant's case in the said suit competent before this court?
28. I have perused the proceedings conducted by the trial court on 9/2/2022 and it is clear that what the trial magistrate Hon. S.W.Mathenge, Resident Magistrate disallowed was on oral application by the defence counsel Ms. Turgutt, to serve and his client be allowed to produce documents -a police file as evidence, which documents had been listed by the defendant but were never served upon the Plaintiff's counsel prior to the hearing date.
29. Compliance with the pretrial requirements in civil proceedings is governed by the provisions of **Order 11 of the Civil Procedure Rules on case management and conferences**. **Order 11 of the Civil Procedure Rules** replaced the former summons for directions. The **Order was and is** intended to assist the High Court and the Magistrate's Courts and the parties to expeditiously have the disputes resolved. Parties are expected to file and exchange a list of and statements of their intended witnesses as well as a list of and the documents intended to be relied on at the hearing, before the suit is certified as ready for trial, during the pre-trial conference.
30. In this case, the Plaintiff/now Respondent filed and served lists of and statements of witnesses and documents which were eventually produced in evidence as exhibits.
31. The defendant, now appellant/applicant filed his Memorandum of appearance, defence, list of witnesses and list of documents on 18/12/2019. The list of witnesses contained:
- 1) **Driver Stephen Omondi Juma;**
 - 2) **Base commander/Representative Usenge Police Station;**
 - 3) **Any other witnesses as may be required with the leave of the court.**
32. The list of documents was as follows:
- 1) **Drivers' licence;**
 - 2) **Police file/Occurrence Book**
 - 3) **Any other documents as may be required with the leave of the court.**
33. The current firm of advocates for the Defendant filed Notice of change on 23/6/2020 and on 12/4/2021, another list of documents was

filed which was accompanied by the Driver's ID, Driver's license, Driver's statement, all of John Odero Apondi.

34. I note that vide Notice to parties under **Order 11 Rule 3 (i)(f) of the Civil Procedure Rules**, the trial court issue Notice to parties to have the matters listed for directions on 25/3/2020. The Notice was dated 21/2/2020.

35. I have perused the provisions of **Section 75 of the Civil Procedure Act**, which is implemented by **Order 43 of the Civil Procedure Rules**. The provisions are clear and they stipulate in no uncertain terms, the decrees or orders that can be appealed from as a matter of right.

36. Under **Order 43 Rule (4) of the Civil Procedure Rules**, 'order' includes both an order granting the relief applied for and an order refusing such relief. In addition, **Order 43 Rule 2 of the Civil Procedure Rules** provides that **an Appeal shall lie with leave of the court from any other order made under these Rules.**

37. I have perused **Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules**. I do not find any mention of Order 11 being one of the orders from which an appeal under **Section 75 of the Civil Procedure Act** would lie.

38. What that means is that orders made under **Order 11 of the Civil Procedure Rules** are not appealable as of right hence a party aggrieved by an order granting or denying prayers under **Order 11 of the Civil Procedure Rules** must first seek and obtain leave from the court that made the order sought to be appealed from. Such leave can be granted at the time of making the order impugned or a party aggrieved can apply for leave in writing within 14 days of such order. This is what **Order 43 Rule 3 of the Civil Procedure Rules** provides.

39. The trial court record as perused does not contain any application whether oral or in writing, for leave to appeal and no order on leave to appeal is available.

40. The appellant/applicant, from the exposition above, ought to have sought and obtained leave to appeal from the impugned order of 9/2/2022. Absence of leave to appeal as explained above renders not only the application dated 21/3/2022 impotent, but deprives this Court the jurisdiction to hear and determine this appeal on its merits. It is trite law that jurisdiction is everything, without which, a court of law acts in vain. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** where the Court of Appeal pronounced itself on the question of jurisdiction and at what stage of the proceedings it can be raised by the parties or invoked by the court on its own motion:

"With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

See Words and Phrases Legally defined – Volume 3: I – N Page 113

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined."

41. For all the above reasons, I am in total agreement with the objection raised by the Respondent's counsel that this court has no jurisdiction to entertain the application dated 21/3/2022 and therefore the appeal upon which the application is predicated is accordingly incompetent. I proceed and dismiss the application dated 21/3/2022 and strike out the Memorandum of appeal dated 9/2/2022 as filed on 25/2/2022 with costs to the Respondent.

42. The trial court file and record shall forthwith be remitted back to Bondo PM's court for further necessary judicial proceedings.

43. I so order.

44. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 4TH DAY OF APRIL, 2022

R.E. ABURILI

JUDGE