



**Awounda & 2 others v Omondi & 6 others (Civil Appeal
E059 of 2023) [2023] KEHC 24046 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E059 OF 2023
RPV WENDOH, J
OCTOBER 19, 2023**

BETWEEN

**OPIYO TAIWO LEO ATIENO AWOUNDA 1ST APPELLANT
KADEM RESOURCES LIMITED 2ND APPELLANT
PHOBOS EXPLORATION KENYA LIMITED 3RD APPELLANT**

AND

**ZEDEKIAH OMONDI 1ST RESPONDENT
PAVE AUCTIONEERS 2ND RESPONDENT
DINAH NASIMIYU KITUYI 3RD RESPONDENT
OCS MASARA POLICE STATION 4TH RESPONDENT
PHOBOS EXPLORATION & MINING WORKS LIMITED 5TH RESPONDENT
NGIRA EXPLORATIONS & MINING WORKS LIMITED 6TH RESPONDENT
ALMAR CONTAINERS (EAST AFRICA) LIMITED 7TH RESPONDENT**

RULING

1. This ruling is in respect to the notice of preliminary objection dated 22/9/2023(the objection). The objection is against the application dated 1/9/2023.
2. The application dated 1/9/2023, precipitated from the ruling and order of Hon. A. Munyony dated and delivered on 9/8/2023. Zedekiah Omondi (the 1st respondent) filed an application dated 22/12/2022 before the subordinate court seeking temporary injunction restraining the applicants' either by themselves, their employees, servants, workers and/or agents from dealing with Generator S/ No. 100K N-P-0110P-18 (the generator). The 1st respondent further asked that the court do issue an



- order directing the 3rd interested party (4th respondent) to release the generator to the 1st respondent. The Magistrate allowed the application as prayed by a ruling dated and delivered on 26/4/2023.
3. The 1st respondent filed a further application dated 17/5/2023 seeking orders that the generator be in the custody of OCS Migori Police Station; that the court do hold the OCS Masara Police Station in contempt and the court do order that the OCS Masara Police Station do enforce the orders above.
 4. The resultant orders extracted ordered were *inter alia*: -
 - a. The respondent/2nd defendant herein namely Opiyo Taiwo Leo Atieno Awounda T/A Kadem Enterprises Resources Ltd be committed to civil jail for a period of 6 months from the date of arrest for disobeying the court orders issued on 26/4/2023 in Migori CMCC 215 of 2022.
 - b. The Migori County Commander of Police, Migori OCPD and/or OCS Migori Police Station to ensure compliance with the orders with the help of the OCS Masara Police Station.
 - c. The OCS Migori Police Station and OCS Masara Police Station to attend court on 20/09/2023 to confirm compliance with enforcement of the orders issued by the court. Summons to issue.
 - d. The applicant be at liberty to execute against the respondent and the 5th interested party for the release of the said generator.
 - e. Costs to the applicant.
 5. Aggrieved by the said ruling and orders of the subordinate court dated 9/8/2023, the applicants' filed an application dated 1/9/2023, seeking the following orders: -
 - a. A stay of the ruling and order of the subordinate court in Migori CMCC No. E215 of 2022 dated and delivered on 9/8/2023 pending the hearing and determination of this motion.
 - b. A stay of interim proceedings in Migori CMCC No. E215 of 2022 pending the hearing and the determination of this motion.
 - c. A stay of execution of the ruling and order in the subordinate court in Migori CMCC No. E215 of 2022 pending the hearing and determination of this appeal.
 - d. That there be stay of proceedings in Migori CMCC No. E215 of 2022 pending the hearing and determination of this appeal.
 - e. Any further orders.
 - f. Costs of this application.
 6. In response to the application, the 1st respondent filed grounds of opposition and a preliminary objection. The objection is on the following grounds:-
 1. Pursuant to section 75 of the [Civil Procedure Act](#) and order 43 rule 1 & 3 of the [Civil Procedure Rules](#) this appeal is incompetent as it was filed without leave of court.
 7. The objection was heard orally. Mr. Obiero, Counsel for the 1st respondent submitted that the objection is premised on section 75 of the [Civil Procedure Act](#) and order 43 of the [Civil Procedure Rules](#); that the applicants failed to seek leave of court to file an appeal; that leave is fundamental for the appeal to be admitted; that section 75 of the [Civil Procedure Act](#) lists instances where an appeal lies as of right; that disobedience of court orders is not one of them and to appeal, in regard to such orders, one needs leave of court.



8. It was further submitted that order 43 rule 1 of the *Civil Procedure Rules* deals with instances where an appeal is a matter of right but not in contempt of court matters. Counsel referred to the case of *Peter Nyaga Muvuke v Joseph Mutunga* Nairobi Civil Application No 86 of 2015 where the Court held that where there is no leave, there is no valid appeal. Further, reliance was placed on the case of *Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 others* (2013) eKLR where it was held that leave to appeal is not a mere technicality but the process has to be adhered to. Counsel further submitted that in *Mumo Matemba v Trusted Society Alliance & 5 others* (2013) eKLR the High Court held that the leave to appeal is a mandatory prerequisite under section 75 of the *Civil Procedure Act*. Counsel asked the court to dismiss the appeal with costs to the 1st respondent.
9. In opposing the appeal, Mr. Odero, Counsel for the applicants submitted that section 75 (1) of the *Civil Procedure Act* envisages scenarios where an appeal is as of right; that they are particularly interested in section 75 (i) - (h) which provides that appeals are of right to this court for orders from the subordinate court where right of appeal to this court is given by the Rules made under the Act in the *Civil Procedure Rules 2010*. Counsel submitted that order 43 rule (1) (1) - (4) of the *Civil Procedure Rules*, it lies as of right where orders are made under Order 40 Rule (1), (2), (3), (7) and (11) on temporary injunctions; that the ruling of the subordinate court is annexed as “OTL- 4” to the 1st applicant’s supporting affidavit sworn on 1/9/2023. Paragraph 16 in the ruling of the court, laid the basis for the order appealed against; that under order 40 (3) of the *Civil Procedure Rules* for instance attachment of property or one imprisoned.
10. Counsel further submitted that the court issued an injunction order under Order 40 Rules 1 and 2; that they breached the injunction orders and were punished under Rule 3; that paragraph 32 (b) of the ruling stated that the 1st appellant be arrested; that Order 43 of the *Civil Procedure Rules* and Section 75 of the *Civil Procedure Act* do not use the word contempt of court.
11. It was stated that order 43 rule I of the *Civil Procedure Rules* is fragmented and that appeals lay as of right; that no rule prohibits applicants from filing appeal; that for a preliminary objection to succeed, the threshold in Mukisa Biscuit is clear that it must be on a point of law which arise by express pleadings; that for the court to determine whether leave is needed or not, the court has to look at annexure “OTL4” in the supporting affidavit of the motion.
12. Counsel thus submitted that the court will be venturing into evidence; that the court will also need to look at the pleadings filed in the lower court; that the application for injunction was granted and it was disobeyed and they are not part of the pleadings; that in this case, it is the memorandum of appeal filed under order 42 rule 3 (1), rule 13 and order 43; that the court will have to look at the affidavits to see if the orders appealed against fall under order 43 Rule; that it court from the ambit of preliminary objections. Counsel urged the court to dismiss the preliminary objection and directions be taken for the application seeking stay of execution.
13. I have considered the notice of preliminary objection dated September 22, 2023 and both Counsel’s oral submissions. The issue for determination is whether the applicants’ ought to have sought leave before filing their appeal against the ruling and order of the trial court dated 9/8/2023.
14. It is not disputed that the applicants filed an application dated 1 /9/2023 challenging the orders arising from the ruling of Hon. A. Munyonyu dated and delivered on 9/8/2023. The orders were issued following an application dated 17/5/2023 by the 1st respondent asking the trial court to find that the applicants were in contempt of its orders issued on 26/4/2023. Aggrieved by those orders of 9/8/2023, the appellant/applicant filed this appeal and the application under consideration. The 1st respondent



contends that the instant appeal and therefore the application are incompetent as the appeal was filed without leave of court.

15. Section 75 (1) and (2) of the *Civil Procedure Act* provides: -

75. Orders from which appeal lies

- (1) 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-
 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) an order under section 64;
 - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) any order made under rules from which an appeal is Expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.

15. Order 43 rules (1), (2), (3) and (4) of the *Civil Procedure Rules* expounds on the provision of section 75 (1) (h) of the *Civil Procedure Act* on the orders which are appealable as a matter of right under the Civil Procedure Rules as follows: -

[Order 43, rule 1.] Appeals from Orders.

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—
 - (a) Order 1 (parties to suits);
 - (b) Order 2 (pleadings generally);
 - (c) Order 3 (frame and institution of suit);
 - (d) Order 4, rule 9 (return of plaint);
 - (e) Order 7, rule 12 (exclusion of counterclaim);
 - (f) Order 8 (amendment of pleadings);
 - (g) Order 10, rule 11 (setting aside judgment in default of appearance).
 - (h) Order 12, rule 7 (setting aside judgment or dismissal for non- attendance);
 - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);



- (j) Order 19 (affidavits);
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);
 - (n) Order 25, rule 5 (compromise of a suit);
 - (o) Order 26, rules 1 and 5(2) (security for costs);
 - (p) Order 27, rules 3 and 10 (payment into court and tender);
 - (q) Order 28, rule 4 (orders in proceedings against the Government);
 - (r) Order 34 (interpleader);
 - (s) Order 36, rules 5, 7 and 10 (summary procedure);
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);
 - (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
 - (v) Order 41, rules 1 and 4 (receivers);
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - (x) Order 45, rule 3 (application for review);
 - (y) Order 50, rule 6 (enlargement of time);
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
 - (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
- (3) An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
16. A reading of the above provisions reveals that appeals from orders issued in contempt proceedings do not lie as a matter of right. Rule 2 is couched in a mandatory terms by using the word “shall.” A person desirous to appeal from such orders which do not lie as of right, should in the first instance, make an application before the court which delivered the order either orally at the time when the order is made or within 14 days from the date of such order.
17. Counsel for the applicants submitted that its appeal relates to the injunctive orders issued by the trial court. However, the heading of the memorandum of appeal clearly states that the appeal is against the ruling and orders dated 9/8/2023. The orders of 9/8/2023 directed that the 1st applicant be committed to civil jail for being in contempt of the court orders issued on 26/4/2023. It is not the application dated 26/4/2023 in which injunctive orders were issued that is being challenged and where an appeal lies as a matter of right. It is the contempt orders which are being challenged where an automatic right of appeal does not lie.



18. In Sukari Industries Limited v Olale George Onyango (2020) eKLR Mrima J held: -

“I must state that in instances where the leave of the Court to lodge an appeal must first be sought and granted, there can be no competent appeal if such leave is not first sought and granted. It is the leave which grants the Courts, either appealed from or appealed to, the jurisdiction over the matter. Failure to obtain the prior leave renders the entire proceedings a nullity. The Courts must down their tools for want of jurisdiction (See *Owners of Motor Vessel ‘Lilian ‘S’ v. Caltex Oil (K) Limited* (1989) KLR 1).”

19. The Court of Appeal at Kisumu in Civil Appeal 96 of 2016 Rayleigh W. Wanyama v Lorna Mukhwana Wanyama & 3 others (2020) eKLR had the following to say on the issue of leave to appeal: -

“It is common ground that this appeal did not lie as of right. As such, it was trite that the appellant obtained leave of court before he could lodge it. Leave is a prerequisite to the assumption of jurisdiction by this Court. In the case of *Kenya Commercial Bank Limited v Esipeya* [2015] eKLR, this Court held that:-

...having chosen to raise the limitation point by way of a preliminary objection under no particular Order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the Superior Court which was neither sought nor obtained.”

20. Concurring with the decision of this court in *Sukari Industries Limited* (supra) and being bound and guided by the Court of Appeal decision in Rayleigh W. Wanyama (supra), this court finds that the instant appeal is premature for having been filed without leave of court as it does not lie as a matter of right.

21. The upshot is that there is no competent appeal before this court. On that basis, this court lacks jurisdiction to deal with the appeal and it is hereby struck out with costs to the 1st respondent being the only party which participated in these proceedings.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF OCTOBER 2023.

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Odera for the Appellants.

.....for the 1st Respondent.

.....for the 2nd Respondent.

.....for the 3rd Respondent.

.....for the 4th Respondent.

.....for the 5th Respondent.

.....for the 6th Respondent.

.....for the 7th Respondent.

Emma & Phelix Court Assistant.

