



**Aroma Developers Limited & another v Gilbert Ongidi Ondis t/a Boya Technical Services
(Civil Appeal E014 of 2021) [2024] KEHC 692 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E014 OF 2021
RE ABURILI, J
JANUARY 25, 2024**

BETWEEN

AROMA DEVELOPERS LIMITED 1ST APPELLANT

NINA PETRONIVA AKINYI OWINO 2ND APPELLANT

AND

**ENG. GILBERT ONGIDI ONDIS T/A BOYA TECHNICAL
SERVICES RESPONDENT**

*(An appeal arising out of the Ruling of the Honourable R.K. Ondiek in the Chief
Magistrate's Court delivered on the 22nd February 2021 in Kisumu CMCC No. 27 of 2020)*

JUDGMENT

Introduction

1. The respondent herein vide an application dated the 12th day of June 2020 filed in the lower court sought orders that the 2nd Appellant be found guilty of contempt and further that a sum of Kshs. 1,900,000 be released to the Respondent from bank accounts belonging to the 1st Appellant and held by Family Bank. In the end, the trial court granted the said orders.
2. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 24th February 2021 raising the following grounds of appeal:
 - a. That the learned magistrate erred in law by making findings of fact not based on any evidence presented before him.
 - b. That the learned trial magistrate erred in law to find that the appellant was in contempt of the order dated 24.1.2020, yet there was no proof of service of the same on the said 24.1.2020 or on any other day subsequent thereto.



- c. That the learned trial magistrate erred in law by considering extraneous issues thereby making wrong conclusions.
 - d. That the finds of the trial magistrate are not supported by the law of contempt as designed and implemented.
 - e. That the learned trial magistrate erred in finding the 2nd appellant to be in contempt, when she was not made a party to the suit before being hauled up for contempt.
 - f. That to the extent that law of contempt designates the High Court as having jurisdiction to hear and determine matters contempt, Order 40 rule 3 is subsidiary rule and is not the main Act, the learned magistrate thus lacked jurisdiction to hear and determine the contempt application filed before him.
 - g. That the decision arrived at was contrary to the law.
3. The parties canvassed the appeal via written submissions.

The Appellants' Submissions

4. On behalf of the appellants, it was submitted that no evidence was led to suggest that the existence of the order was brought to the attention of the 2nd Appellant before she effected the withdrawal that is complained of by the Respondent and that the said withdrawal was done on the very day upon which the order was issued and that there was no conceivable way in which the 2nd Appellant could have known of the existence of the suit, let alone the order.
5. It was submitted that the Learned trial magistrate was thus wrong in his analysis of the evidence presented before him to support the application for contempt as there was no service and even the service upon Family Bank was effected on 27th January 2020, a clear 3 days after the order was issued and also after the withdrawal was made.
6. The appellants submitted that it was also a misdirection on the part of the Learned trial magistrate to state that merely because Family Bank's Legal department were served, then the 2nd Appellant must have known about the order as there was no nexus established from the 2nd Appellant and the said family Bank beyond the mere fact that the 2nd Appellant was a director of a company which is a customer of the said bank.

The Respondent's Submissions

7. It was submitted by counsel for the respondents that at the time of withdrawal of the money, both the Bank and the appellant had knowledge of the Court Order served upon them as the order was served at 10am and the Appellant withdraw the money at 11. 30am and thus the Honorable Trial Magistrate was correct both in Law and in fact in finding so.
8. The respondent submitted that even after appointing the Firm of Olel Onyango and Ingutia to Defend her, the 2nd appellant had not bothered to refund the money back to the account and that the action of refunding the money would have gone a long way in mitigating her malevolent actions.
9. It was submitted that the trial court had powers to punish for contempt.
10. The respondent further submitted that the instant appeal was incompetent and ought to be dismissed as it was filed without leave of the trial court as contemplated under Order 43 Rule 3 of the [Civil Procedure Rules](#).



11. The Respondent submitted that the threshold to invoke contempt proceeding has been met. That the Appellant was duly served and subsequently had knowledge of the order but has continued with this impunity.
12. It was submitted that the orders for contempt were made on the 29th of June 2020, three and a half years ago but the 2nd appellant had not made attempts to comply with the orders of the Court.

Analysis and Determination

13. I have considered the grounds of appeal, the submissions for and against and the matters as canvassed before the trial court between the parties hereto.
14. This court is confronted with a preliminary issue of whether it has jurisdiction to entertain the instant appeal on account of the appellants' failure to obtain leave of the trial court prior to filing this appeal.

15. Section 75(1) of the *Civil Procedure Act* provides that:

“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.”

16. On the other hand, Order 43 rule 3 of the *Civil Procedure Rules* provides that:

“An applications (sic) 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 was made, or within fourteen days from the date of such order.” (emphasis added).

17. The *Contempt of Court Act* of 2016 was on 9th November 2018 in *Kenya Human Rights Commission v Attorney General & Another [2018]* eKLR declared unconstitutional and invalid for lack of public participation as required by Articles 10 and 118(b) of *the Constitution*, and for encroaching on the



independence of the Judiciary. Following this holding, Section 5 of the *Judicature Act* was the next resort conferring jurisdiction on the superior courts to punish for contempt.

18. As for the lower courts, section 10(1) and (3) of the *Magistrates Court Act* 2015 granted the courts power to punish for contempt. Indeed, in *Ramadhan Salim v Evans M. Maabi T/a Murphy Auctioneers and Winfred Wanjiku Gaitho [2016]* eKLR, the Court of Appeal observed that:

“... the *Magistrates’ Courts Act*, 2015 which came into force on 2nd January 2016 now gives the magistrates’ courts unlimited jurisdiction to punish for contempt...”

19. Accordingly, then, the trial court was well versed with powers to punish for contempt. However, there is no automatic right of appeal from the ruling which declared the appellants to be in contempt of court orders whereby they withdrew the money after they were allegedly served with the court order. That being the case, following the order finding the 2nd appellant in contempt of court, it was upon the appellants to seek leave of the trial court prior to lodging of this appeal.

20. The provisions of Order 43 rule (3) of the *Civil Procedure Rules* are very clear on the procedure to be followed in a case of this nature. The said provisions are also in mandatory terms.

21. This court finds that the appellants should have followed the procedure laid out under Order 43 rule 3 of the *Civil Procedure Rules*. If each and every litigant was allowed to blatantly ignore the laid down procedures, the *Civil Procedure Rules* would be rendered worthless. Furthermore, it is the leave to appeal that would cloth this court as an appellate court to hear and determine this appeal. Nothing short of that requirement. A legal requirement affecting jurisdiction of the court cannot be a procedural technicality curable by application of Article 159 of *the Constitution*.

22. In *Nyutu Agrovet Limited v Airtel Networks Ltd [2015]* eKLR, the Court of Appeal in a 5 Judge bench held that-

“Where there was no automatic right of appeal stipulated under Section 75 of the *Civil Procedure Act* and order 43 of the *Civil Procedure Rules*, then the appellate court has no jurisdiction to hear and determine an appeal unless leave of the court from which the order was made is sought and obtained. (emphasis added).

23. In *Peter Nyaga Muvake v Joseph Mutunga [2015]* eKLR, where, while referring on failure to seek leave to appeal from an order, the Court of Appeal expressed itself thus:

“Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

24. In *Stephen Nyasani Menge v Rispan Onase [2018]* eKLR, the Court stated thus

“Under Order 43 rule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek



and obtain leave is fatal and consequently, no competent appeal can be lodged against such an order.”

25. Bearing in mind the doctrine of stare decisis, I hold that I have no jurisdiction to determine the instant appeal. The said appeal is found to be incompetently filed and the same is hereby dismissed with an order that the appellant pays costs of the appeal assessed at Kshs 20,000 to the respondents within 30 days of today and in default, execution to issue. I so order.

DATED. SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

