



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 120 OF 2019

BEATRICE AWINO MAHULO.....APPELLANT

VERSUS

SHERA OKOTH OCHIENG.....RESPONDENT

(Being an appeal from the Ruling and order of Hon Beryl M.A. Omollo, (RM) delivered at Kisumu in Chief Magistrate's Court in Case No 254 of 2017 on 14th May 2019)

JUDGMENT

INTRODUCTION

1. In her decision of 14th May 2019, the Learned Trial Magistrate, Hon Beryl M.A. Omollo, Resident Magistrate allowed the Respondent's Notice of Motion application in which he had sought to settle the decretal sum by way of instalments.
2. Being aggrieved by the said decision, on 23rd October 2019, the Appellant filed a Memorandum of Appeal dated 23rd September 2019. He relied on thirteen (13) grounds of appeal. Notably, the Learned Magistrate granted the Appellant leave to file an appeal out of time in her Ruling of 17th September 2019.
3. The Appellant's Written Submissions were dated 7th August 2021 and filed on 10th August 2021. Despite having been given ample opportunity to file Written Submissions, the Respondent did not do so. The Ruling herein is therefore based on the Appellant's Written Submissions which she relied upon in their entirety.

LEGAL ANALYSIS

4. Right out the outset, this court deemed it prudent to address itself to the competence of the Appeal herein. This court looked at Ruling of the Learned Magistrate that was dated 17th September 2019 and noted that she correctly held that Order 75 of the Civil Procedure Act Cap 21(Laws of Kenya) sets out the orders from which an appeal would lie as a matter of right, further orders from which an appeal would lie but with leave of the court and orders to which an appeal would lie if leave were granted.
5. The said Order 75 of the Civil Procedure Act stipulates as follows:-

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.

6. She also held correctly that leave to file an appeal where an appeal is not as a matter of right must in the first instance be sought in the court that granted the said order as provided in Order 43 of the Civil Procedure Rules, 2010. The said Order 43 (3) of the Civil Procedure Rules states 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 is made, or within fourteen days from the date of such order.”

7. She had found that there was no delay in the filing of the Appellant’s Notice of Motion application dated 22nd May 2019 and filed on 23rd May 2019 as it was filed two (2) weeks after delivery of her Ruling herein.

8. Having said so, the Appellant was required to seek leave to file her Appeal out of time having failed to lodge her Memorandum of Appeal by 17th June 2019 for the reason that 1st June 2019 was a Public Holiday and 15th June 2019 fell on a Saturday. The Appellant ought to have sought leave to file the Appeal herein out of time before lodging the Memorandum of Appeal on 23rd October 2019.

9. Notably, Section 79G of the Civil Procedure Act provides that:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

10. If the Appellant obtained such leave to file the Appeal out of time, then the same was not alluded to in the Record of Appeal. What was attached was the order granting leave to appeal against the decision of the Learned Magistrate that was delivered on 14th May 2019. Indeed, granting leave to appeal was totally distinct from granting of leave to file an appeal out of time. On this ground alone, this court found and held that the Appeal herein was incompetent and defective *ab initio*.

11. This court would have downed its tools at this point. However, as the Appellant had submitted on the merits of the Appeal, this court was of the view that considering the same would expedite the determination of the matter herein and provide closure to the same without any further delay.

12. This court considered the Appellant’s Written Submissions and the cases of Selle & Another vs Associated Motor Boat Co Ltd & Others (1968) EA, Mbogo vs Shah [1968] eKLR, Keshwal Jethabhai & Brothers vs Sleh Abdul (1959) EA 260, Hildegard Ndelut vs Letkina Dairies Ltd & Another [2005] eKLR, KTK Advocates vs Baringo County Government [2018] eKLR and Diamond Star General Trading LLC vs Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates[2018] eKLR and noted that her issue of contention was in the manner the Learned Magistrate exercised her discretion.

13. This court found and held that she considered and set out the circumstances under which the debt was contracted, the conduct of the debtor, his financial position and his bona fides in offering to pay a fair portion of the debt at once as was held in the case of Diamond Star General Trading LLC vs Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates (Supra) before exercising her discretion.

14. She acknowledged that the Respondent had made the first payment, though not colossal as she had indicated and proposed to pay the rest of the amounts in instalments of Kshs 16,000/= - Kshs 20,000/=. As she exercised her discretion **“in the interest of justice and to be fair to both parties”**), this court could not fault her in her decision and found no reason to interfere with her decision.

15. Having analysed the Appellant’s Written Submissions, this court came to the firm conclusion that her Appeal had failed both on technical and substantive aspects as demonstrated hereinabove.

DISPOSITION

16. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 23rd October 2019 was not merited and the same be and is hereby dismissed. As the Respondent did not actively participate in the Appeal herein, this court deviated from the general principal that costs follow the events and hereby directs that each party will bear its own costs.

17. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY 2022

J. KAMAU

JUDGE