



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. E12 OF 2020

SALIM VERJEE....APPEALLANT/APPLICANT

-VERSUS-

- 1. THE ATTORNEY GENERAL**
- 2. MR. RONALD DE MELLO**
- 3. THE INSPECTOR GENERAL OF POLICE**
- 4. HAMISI BAKARI KODZA....RESPONDENTS**

RULING

1. By way of **Notice of Motion** dated **27th January, 2021**, the Appellant/ Applicant has moved this court seeking the following orders that:-
 - a. this matter be certified as urgent;**
 - b. the appeal filed herein be admitted; and**
 - c. a date for directions on the appeal be issued.**
2. The application is brought under **Sections 1A, 1B(1)(a), 3A** all of the **Civil Procedure Act, Order 42 Rules 12 and 13** and **Order 51 Rules 12 and 13** both of the **Civil Procedure Rules 2010** and all the other enabling provisions of the law.
3. The grounds adduced in support of the application are;
 - a. that the Appellant filed a memorandum of appeal on the 23/10/2020 and thereafter amended via the amended memorandum of appeal filed on the 6th January, 2021.**
 - b. that the applicant filed his record of appeal on the 15th January, 2021 and served the same on the 2nd and the 4th Respondents on the 18th January, 2021 and upon the 1st and 3rd Respondents on the 21st January, 2021.**
 - c. that I have tried to get the matter to be listed for directions but the same been unfruitful.**
 - d. that I hereby make this application without undue delay and it is in the interest of justice that the same be allowed.**
4. The application is further supported by the affidavit of **Salim Verjee**, the Applicant herein, sworn on **27th January, 2021**. In the said affidavit, **Mr. Verjee** elucidates the grounds as set out on the face of the application.
5. In opposing the application, on **2nd February, 2021**, the 2nd Respondent, **Mr. Roland de Mello**, filed Grounds of Opposition which are dated on even date. He argues that the application is frivolous, vexatious and lacks merit, hence an abuse of the court process. That the application is premature as the same is filed within the time in which the Honourable Judge is required to peruse the Record of Appeal and give directions with regard to hearing of the Appeal. The application therefore offends the provisions of **Order 42 Rule 11** of the **Civil Procedure Rules**. Further that this court should take judicial notice of the Applicants admission that he filed the instant application 13 days after filing the Record of Appeal.

6. According to the 2nd Respondent, admission of appeals is a discretion of the Judge as provided for under **Section 79 B** of the **Civil Procedure Act**, and as such the instant application contradicts the judicial principle and objectives of the court as provided for under **Sections 1A and B** of the **Civil Procedure Act, 2010**. Based on those grounds, the 2nd Respondent seeks the court to dismiss the application.

7. The application was canvassed by way of written submissions which were highlighted on **12th February, 2021**. **Mr. Mkan**, Counsel for the Applicant submitted that the appeal should be admitted since no ground has been adduced to challenge the admissibility of the Appeal. His view is that, the Applicant is vigilant to comply with timelines.

8. On the other hand, **Mr. Gathu** Counsel for the Respondent reiterated that the application offends the rules of procedure. Firstly, because under **Order 42 Rule 13(1)** of the **Civil Procedure rules, 2010**, it is the duty of the Deputy Registrar to cause the Appeal be listed for directions before the Honourable Judge but not the Appellant. Further, that before an Appeal is listed for directions, a Notice of not less than 21 days ought to be served upon the parties but in this case the Respondent avers that there was no Notice served at all.

9. Secondly, **Mr. Gathu** Counsel for the Respondent submitted that the 30 days period within which the Honourable Judge may issue directions as contemplated under **42 Rule 11** of **Civil Procedure Rules** have lapsed. In any event, the Applicant has not demonstrated any effort they have made in having the Appeal listed for directions or shown how his efforts have been rendered futile.

10. Thirdly, it is submitted that this Honourable Court has no jurisdiction to interfere with the administrative duty of the Deputy Registrar in listing Appeals for directions and as such the Applicant should be compelled to submit to the laid down procedure on admission of Appeals.

11. The application was canvassed by way of submissions with the Applicant having filed theirs on **9th February, 2021**, whilst the Respondents filed theirs on **2nd and 8th February, 2021** respectively. They highlighted the same on **10th February, 2021**.

ANALYSIS AND DETERMINATION

12. I have considered the Application filed herein, the grounds on its face and the Affidavit filed in support thereof and Grounds of Opposition thereto. I have also considered the oral submissions as well as the written submissions by the parties and the case law cited.

13. The main contention in the opposition of this application is that the Applicant acted in neglect of the laid down procedure in the admission of Appeals for hearing, mainly as laid out under **Order 42 Rule 11 and 13** of the **Civil Procedure Rules**. The Applicant on the other hand maintained that the prayers sought should be granted for expediency in the disposition of the Appeal.

14. The procedure for rejection and/or admission of Appeal and giving of directions is very well set out in the Civil Procedure Rules. The first step is laid out under **Section 79B** of the **Civil Procedure Act** which provides as follows:-

“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”.

15. What is evident from the provisions of **Section 79B** of **Civil Procedure Act** is that a Judge has to peruse the Appeal before he/she can summarily reject the same. These are the directions contemplated in **Order 42 Rule 11** of the **Civil Procedure Rules**, which states as follows:-

“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.

16. If the Appeal is not summarily dismissed under **Section 79B (supra)**, then the Deputy Registrar shall notify the Appellant who shall then serve the Memorandum of Appeal upon all the Respondents within seven (7) days of receipt of the Notice from the Registrar in accordance with **Order 42 Rule 11** of the **Civil Procedure Rules**. After service of the Memorandum of Appeal, the Appellant then shall, on notice to the parties delivered not less than twenty one (21) days, again cause the appeal to be listed before the Judge for directions as seen in the provisions of **Order 42 Rule 13** of the **Civil Procedure Rules**.

17. The said **Order 42 Rule 13** of **Civil Procedure Rules** provides as follows:-

1. On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.

2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- a. the memorandum of appeal;
- b. the pleadings;
- c. the notes of the trial magistrate made at the hearing;
- d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

18. Once directions have been given under **Order 42 Rule 13** of the **Civil Procedure Rules**, the Appellant can then proceed to fix the Appeal for hearing. But if he fails to, the Respondent may then fix the same for hearing and seek for dismissal of the Appeal for want of prosecution under **Order 42 Rule 35 (1)** of the **Civil Procedure Rules**.

19. Regrettably, this procedure does not seem to be strictly followed as elucidated in the rules. For example, in this station, the Deputy Registrar issues the notices for admission and directions of the Appeal after the High Court receives the file and lower court proceedings. In my view these notices are uniquely geared to informing the parties of the position of the Appeal. Of more importance, it is worth noting that an Appeal would not proceed as provided for under **Order 42 Rule 13(4)** of the **Civil Procedure Rules**, where the Record of Appeal is not duly filed.

20. In the instant Appeal, it is noteworthy that the Record of Appeal has been filed and nothing is remaining for the Applicant to file so that the Appeal can be regarded as competent to take directions. I have also pointed out that the notices issued by the Deputy Registrar before the file is placed before a Judge for directions are purposely to inform the parties of the position of the Appeal. In my view it serves no other purpose than informing the parties and I do not see any reason why I should send the instant Appeal back to the Deputy Registrar for him/her to issue notices when the parties are already informed of the Appeal. I am further guided by the provisions of **Article 159** of the **Constitution** which enjoin this Court to administer justice without undue regard to procedural technicalities.

21. I find that there will be no prejudice occasioned on the Respondent if directions on the hearing of the Appeal are issued in the instant circumstances. This will also avail the Respondents an opportunity to ventilate their case at the hearing of the Appeal. And this being an interlocutory appeal, it should be heard and concluded expeditiously.

22. In the upshot, I find merit in the application dated **27th January, 2021** and the same is hereby allowed with the following orders;

- a. **The Appeal herein is duly admitted and the same shall be canvassed by way of written submissions.**
- b. **Accordingly, the Appellant is granted 14 days leave to file and serve the written submissions within 14 days from the date hereof.**
- c. **The Respondents are equally granted corresponding leave to file and serve their written submissions within 14 days of being served with the Appellant's submissions.**
- d. **Mention on 11th May, 2021 for highlighting.**
- e. **Costs of this application shall lie in the outcome of the Appeal.**

IT IS HEREBY SO ORDERED.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 17TH DAY OF MARCH, 2021

D. O. CHEPKWONY

JUDGE

17/3/2021