



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

KILGORIS ELC APPEAL NO. 16 OF 2021

FORMERLY NAROK ELC APPEAL NO. 27 OF 2019

LETUTUI NKEDIANYE

CHARLES NKEDIANYE

MOSES KIPENO

FRANCIS KIPENO.....APPELLANTS

VERSUS

JOHN SAKAJA NTUKUSOI.....RESPONDENT

(Appeal from the Ruling and Order of Hon. D.K .Matutu (Principal Magistrate

dated and delivered on 24/9/1019, in the original KILGORIS

PMC ELC NO. 13 OF 2018)

BETWEEN

JOHN SAKAJA NTUKUSOI.....PLAINTIFF

VERSUS

LETUTUI NKEDIANYE

CHARLES NKENDIANYE

MOSES KIPENO

FRANCIS KIPENO.....DEFENDANTS

RULING

Before this court is a Notice of Motion dated 11/11/2019 filed by the Applicant/Respondent seeking the following Orders:-

1. That the Honourable court be pleased to strike out the Memorandum of Appeal filed in court on the 23/10/2019.
2. Costs of this application and of the appeal be borne by the Respondents.

The Application is premised on the grounds that the Memorandum of Appeal lacks a certified copy of the Order or Decree appealed against, that failure to include a certified copy of the Decree/Order is an omission as it comprises a primary document which must be filed together with the Memorandum of Appeal. Further, that the Appeal was filed out of the timelines and no leave of the Court was sought to file out of

time.

The Application is supported by the Affidavit of John Sakaja Ntukusoi sworn on 11/11/2019 in which he deposes that the Respondent filed the present Appeal on 23/10/2019 with the intent of interfering with the Hearing of Kilgoris Elc No. 13 of 2018.

The Applicant further contends that there exists an application for contempt dated 12/9/2019 which the Respondents are evading by hiding through this Appeal and should be compelled to purge the contempt in Kilgoris. That the Respondents have disobeyed the Orders of the Court issued on 10/5/2016 in which a copy is annexed as 'JSN-1' by constructing new houses in contravention thereof. That the ruling the subject of this Appeal was delivered on 24/9/2019 and the Appeal filed on 23/10/2019 and in any case the Appeal ought to have been filed on or before 21/10/2019 the same being out of time and without the leave of court and as such the Appeal ought to be struck out with costs.

The Application is opposed by the Replying Affidavit of Francis Kipeno sworn on 16/11/2019 in which he avers that the Application is baseless and devoid of merit for the reasons that his Counsel on record filed an application on 4/10/2019 seeking leave of the court to file an Appeal against the decision of the court. That on 8/10/2019, the honorable trial court granted the request and granted the Respondent 30 days within which to file the Appeal. The Respondent has attached a copy of the Court Order issued on 29/10/2019 and marked as 'FK 3'.

I have analysed the Application, Replying Affidavit and Submissions filed by both parties and the issue for determination is whether the present Appeal ought to be struck out for lack of a certified copy of the Order/Decree and having been filed out of time.

Order 42, rule 2 of the Civil Procedure Rules provides: - 'Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed'

Section 79B of the Civil Procedure Act provides that 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.

From the above cited provisions of the law, it is clear that the Appellant shall file a certified copy as soon as possible in the event that the same has not been filed with the Memorandum of Appeal. In the instant case, it is the Applicant's contention that a certified copy of Order or decree ought to be filed hand in hand with the Memorandum of Appeal. It is also the Applicant's contention that the Appeal has been filed out of the stipulated timelines. From the Submissions relied by the Applicant, he appears in my view to canvass new grounds of contention in which he avers that the Respondents have violated the orders of the court by constructing a new structure. The Authorities relied on by the Applicant's do also refer to a record of appeal containing a certified copy of the decree or Order and not a Memorandum of Appeal. In my view there is no mandatory provision of the law requiring a party to file a certified copy of the Decree or Order together with a Memorandum of Appeal. However, I wish to point out that a party must file a certified copy of decree within sufficient time and in the event that there is delay in obtaining such, then such delay ought to be brought before court at the earliest opportunity. In the case of *New Age Developers & Construction Co Ltd v Samuel Wambugu Kahiga [2019] eKLR*, the court observed that 'Order 42 rule 2 leaves no room for doubt that a copy of the decree or order appealed against need not be filed together with the memorandum of Appeal'.

On whether the Appeal was filed out of the stipulated timelines, the Respondents filed a Notice of Motion seeking leave to appeal out of time on 4/10/2019, the same was heard and the court granted the Respondents leave to file out of time on 8/10/2019. The said Order was issued on 29/10/2019. The Memorandum of Appeal was filed on 22/10/2019. It is quite evident that the Respondent has filed the Memorandum of Appeal within the stipulated period.

From the foregoing, I am satisfied that the Respondent has filed the Memorandum of Appeal within the stipulated time period and as such the Notice of Motion Application dated 11/11/2019 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAROK ON THIS 10TH DAY OF JUNE, 2021

Mohammed N. Kullow

Judge

10/6/2021

In the presence of:-

CA:Chuma

Mr Sorine holding brief for Applicant

N/A for the respondent