



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 688 OF 2017

NEW AGE DEVELOPERS & CONSTRUCTION CO LTD.....APPELLANT

VERSUS

SAMUEL WAMBUGU KAHIGA.....RESPONDENT

RULING

1. The appellant, *New Age Developers & Construction Company Limited* being aggrieved by a ruling delivered on 20th March 2017 by *Hon. Mrs Obura (SPM)* in CMCC No. 7188 of 2015 filed an appeal to this court vide a memorandum of appeal dated on 21st March 2017. The appeal faulted the trial court's decision to dismiss with costs the appellant's application by way of a Notice of Motion dated 7th November 2018 seeking to have default judgment entered against it in favour of the respondent. The judgment had been entered in favour of the respondent after the appellant failed to file its defence within the prescribed time.

2. The court record shows that the appellant filed its record of appeal on 19th October 2018 and on 22nd October 2018, the appeal was admitted for hearing. Parties were directed by the court to take a hearing date for the appeal in the registry.

3. On 7th December 2018, the respondent filed a notice of preliminary objection which is the subject of this ruling. In his objection, the respondent attacked the competence of the appeal and prayed that the same be struck out with costs on grounds that the memorandum of appeal filed on 23rd March 2017 was not accompanied by a copy of the order appealed against and that the certified copy of the order dated 20th March 2017 had not been accompanied by a certificate of delay as required by the mandatory provisions of *Section 79 G* of the *Civil Procedure Act (the Act)*.

4. The preliminary objection was argued before me on 11th February 2019 by learned counsel *Ms Wanjiru* for the appellant and learned counsel *Mr. Gomba* for the respondent. In his submissions in support of the preliminary objection, *Mr. Gomba* insisted that the appeal violated the mandatory provisions of *Section 79 G* of the *Act* which in his view require that a memorandum of appeal and order appealed against be filed within 30 days of the date the order was issued; that the order subject matter of this appeal should have been filed together with the memorandum of appeal unless there was a certificate of delay; that the impugned order was not filed together with the memorandum of appeal and there was no certificate of delay; that the appeal was for this reason incompetent and ought to be struck out with costs to the respondent. In support of his submissions, he relied on the cases of *Kyuma V Kyema, [1988] KLR 185* and the persuasive authority of *Kulwant Singh Roopra V James Nzili Maswili, [2014] eKLR*.

5. On behalf of the appellant, *Ms Wanjiru* submitted that the appeal was competent as the memorandum of appeal was filed within the 30 days prescribed by *Section 79 G* of the *Act* and that *Section 79 G* does not specify which documents must accompany the memorandum of appeal; that the record of appeal which contained a certified copy of the order appealed against was filed within a reasonable time; that the preliminary objection lacks merit and should be dismissed.

6. I have considered the preliminary objection, the rival submissions made on behalf of the parties and the two authorities cited by the respondent. Having done so, although I agree with the submissions made by *Mr. Gomba* that *Section 79 G* of the *Act* is drafted in mandatory terms, I am unable to agree with his contention that the Section requires a party aggrieved by a decision of the subordinate court to file his appeal by filing a memorandum of appeal accompanied by a certified copy of the order or decree appealed against. I instead agree with *Ms Wanjiru's* submissions that the Section does not state which documents if any, must accompany a memorandum of appeal.

7. In my view, *Section 79 G* of the *Act* governs the period within which appeals from the subordinate court to the high court should be filed and how that time should be computed. It provides that such appeals should be filed within 30 days from the date on which the order or decree appealed from was issued and where an aggrieved party was unable to file an appeal within the prescribed time, the court is empowered to extend the time so prescribed if good and sufficient cause is shown why the appeal was not filed on time. In the computation of the 30 days period limited for filing of appeals, any period which the lower court certifies as having been necessary for the preparation and delivery of a copy of the decree or order appealed against should be taken into account. In other words, an appeal should be filed within 30

days of the order or decree appealed against or within the period extended by a certificate of delay.

8. My reading of *Section 79 G* of the *Act* does not lead me to conclude that for an appeal to be competent, the memorandum of appeal must be filed together with a certified copy of the order or decree appealed against. The Section in my view sanctions as valid or competent any appeal which is filed within 30 days of the date of issuance of the decree or order appealed against or one which is filed outside the prescribed 30 days period but with leave of the court.

9. My above findings are fortified by *Order 42 Rule 1* of the *Civil Procedure Rules* which sets out the manner in which appeals to the High Court should be filed. *Order 42 Rule 1* provides that appeals to the High Court should be filed through a memorandum of appeal signed in the same way as a pleading setting out in distinct heads the objection taken to the decree or order appealed against. *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. It provides as follows:

“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 79 B of the Act until such certified copy is filed.”

10. From the above provisions, it is clear that whileas there would be nothing wrong with an aggrieved party filing a memorandum of appeal together with a copy of the order or decree appealed against where the same was available, the law does not make it mandatory for the impugned order or decree to be filed together with the memorandum of appeal. A certified copy of the order or decree can be filed thereafter within a reasonable time or within such time as the court may order. A perusal of the record in this case does not show that any such order was made by the court. It however reveals that the order subject of this appeal is contained in the record of appeal filed on 19th October 2018.

11. I have read the two authorities cited by learned counsel for the respondent. It is my finding that the two authorities are not applicable to the respondent’s objection. The case of *Kyuma V Kyema (supra)* dealt with a situation where an appeal was filed out of time relying on a certificate of delay issued in respect of the supply of proceedings and judgment to the appellant. The Court of Appeal was tasked with the duty of interpreting whether in view of the certificate of delay, the appeal had been filed within the prescribed time. The court concluded that the certificate of delay which would have the effect of extending the time prescribed under *Section 79 G* of the *Act* was one which certified the time taken for the supply of the order or decree appealed against and not the supply of judgment or proceedings. The scenario in the other case namely *Kulwant Singh Roopra V James Nzili Maswili, (supra)* was completely different in that the appeal was prosecuted when the order or decree appealed against was not included in the record of appeal.

12. In this appeal, the record shows that the order appealed against was made on 20th March 2017. The memorandum of appeal was filed on 23rd March 2017 which was within the 30 day period prescribed by the law. Having found that the law does not require an aggrieved party to file a memorandum of appeal together with the order or decree appealed against, I am satisfied that the appeal as filed fully complies with the requirements of *Section 79 G* of the *Act* and is therefore competent. I consequently find no merit in the respondent’s preliminary objection and it is hereby dismissed with costs to the appellant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of May, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Gomba for the respondent

No appearance for the appellant

Mr. Salach: Court Assistant