



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 59 OF 2017

(Formerly Machakos HCCA No. 211 of 2012)

TERESIAH KAMENE KYENZE.....APPELLANT

-VERSUS-

ANNA MUMBUA MUNGUTI.....RESPONDENT

RULING

1. The Appellant was the Plaintiff while the Respondent was the Defendant in Makindu PMCC No. 87 of 2007. They were respectively represented by the firms of Martin M. Muithya & Co. Advocates and Andrew Makundi & Co. Advocates. On 17th March 2011, a judgment by Mr. B. Ochieng Principal Magistrate dated 26th January, 2011 was delivered by Mr. N.M Njagi Principal Magistrate.

2. On 13th December 2012, the Appellant filed Machakos HCCA No. 211 of 2012 in person. The same was later transferred to Makueni High Court and registered as Makueni HCCA No. 59/2017, which is the present appeal.

3. Another appeal against the judgment in the same (Makindu PMCC No. 87 of 2007) was filed by the firm of Martin. M. Muithya & Co. Advocates (*herein after 'the firm'*) on 20/12/2012. It was registered as Machakos HCCA No. 216B of 2012 and dismissed with costs on 15/07/2015 for want of prosecution. The said appeal was never reinstated.

It was however erroneously transferred to this court and allocated a new number HCCA No. 272 of 2017. It was again dismissed on 6th July 2018, for want of prosecution.

4. On 21st February 2019, the current appeal came up for directions and the Respondent's Counsel raised the issue of the dismissed appeal. The court directed the parties to file written submissions on the competence of the present appeal. That is the subject of this ruling.

5. The Appellant, through the firm of Thomas Geoffrey Onyancha & Co. Advocates, submits that she did not participate in HCCA 272 of 2017 and that the firm of Martin Maithya Advocates had written to her indicating that they would not be participating in the said appeal. That they also advised her to proceed with the appeal which she had filed in person. She exhibited a letter dated 15/02/2013 from the firm.

6. Relying on the case of **Ngitimbe Hudson Nyanumba –vs- Thomas Ongodo (2018) Eklr** counsel argued that the provisions of Order 9 Rule 9 of the Civil Procedure Rules (CPR) are meant to safeguard their fees from their clients. He added that there had been no miscarriage of justice and no party would be prejudiced if the appeal is allowed. Counsel contended that the issue of legal representation being raised herein is a procedural technicality which can be cured by the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution.

7. Mr. Makundi for the Respondent submitted that the 'Advocate's appeal' that was dismissed was the only legitimate appeal. He further submitted that the current appeal is a non-starter for want of compliance with Order 9 Rule 9 of the Civil Procedure Rules. He stated that the record is silent on whether leave to appeal out of time, as sought by the firm, was ever granted, since the subordinate court had no jurisdiction to grant such leave.

Determination

8. Having considered the entire record and the rival submissions, it is my considered view that the only issue for determination is whether the current appeal is competently before this court.

9. First, there is the question of whether the appeals were filed within the prescribed time.

10. Section 79G of the Civil Procedure Act (CPA) provides as follows;

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.

11. There was an application filed by Martin Muithya advocates in the lower Court seeking leave to file the appeal out of time and through a ruling delivered on 21/11/2012, the learned trial magistrate granted the leave and directed that the appeal be filed within 30 days from the ruling date. In the brief ruling, the learned trial magistrate observed that the application was unopposed as the defendant had neither filed a reply nor grounds of opposition.

12. The appeal was subsequently filed by the firm on 20/12/2012 which was evidently within the period given by the learned magistrate. The application seeking the said leave was never challenged, and there was no appeal against the ruling. The appeal was admitted for hearing and eventually dismissed. It is clear from the proviso to Section 79G CPA that it is the court handling the appeal that deals with the issue of leave to file appeal out of time. The magistrates' court was not the appeal court. I won't say more as that is not the issue at hand.

13. There is also the question of whether the Appellant had the capacity to file the appeal in person. Order 9 Rule 5 of the Civil Procedure Rule, 2010 provides as follows: -

“A Party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in court in which such cause or matter is proceeding and served in accordance with Rule 5, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

14. I find the import of this provision well captured by Okwengu J. (*as she then was*) in **Aggrey Ndombi & Another –vs- Grace Ombara [2008] eKLR** where she stated as follows;

“My understanding of this rule is that where an appeal has been filed, it is a continuation of the cause or matter filed in the lower Court and the advocate on record in the lower Court is deemed to be the advocate for the parties until conclusion of the appeal, unless a notice of change of advocates has been filed and leave has been granted for change of advocate under Order III Rule 9A of the Civil Procedure Rules.”

15. I also agree with the sentiments of Korir. J in **Simon Barasa Obiero –vs- Jackson Onyango Obiero [2016] eKLR** where he stated that;

“Unless and until a notice of change of advocate is filed and duly served, an advocate on record for a party remains the advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the advocate under Rule 13 of the same Order.”

16. In this case, the firm of Martin Muithya and Co. advocates was on record for the Appellant in the lower court and it was not removed under Order 9 Rule 12 neither did it withdraw under Rule 13 of the same Order. Further and in light of the fact that judgment had already been delivered, the appellant's 'acting in person' was not compliant with Order 9 Rule 9 of the CPR which provides that;

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

17. I have read the letter dated 15/02/2013 which was addressed to the Appellant by the said firm. Its contents are as follows;

Re: Makindu PMCC No. 87 of 2007

Yourselves –vs- Anne Mumbua Munguti

“We refer to the above matter and to your instructions to us that we halt proceeding with the appeal which we had filed pursuant to your instructions to us and let you proceed with the one you filed in person.

Enclosed herewith, and as instructed by you, is the copy of your memorandum of appeal handed over to us by your husband. Kindly acknowledge safe receipt.

We thank you for giving us an opportunity to serve you thus far, and wish you all the best ahead.”

18. One would argue that there is an implied consent in the letter for the Appellant to proceed with the matter in person. However, the letter was never filed in Court and was never copied to the opposing Counsel. It therefore falls short of the requirements in Order 9 Rule 5 which is clearly couched in mandatory terms. Furthermore, the letter was supposed to precede the appeal filed in person.

19. It is therefore my considered view that the said firm was on record for the Appellant throughout and was the only one which could competently file an appeal. As for Order 9 Rule 9 CPR, I agree with the Appellant that it is actually meant to safeguard the interests of the outgoing Advocate and where such interests have been taken care of, there is usually no prejudice to be suffered by the other party. However, non-compliance with the rule should be looked at on a case by case basis.

20. In the present scenario the appeal filed by the Appellant in person was incompetent abinitio and should never have been admitted. This is in light of the fact that on a week after its being filed, the Appellant's counsel whose instructions had not been withdrawn filed a competent appeal over the same judgment. It was not legally tenable to have two parallel appeals challenging the same judgment and filed by the same party.

21. Worse still the appeal filed by the Appellant's advocate which was the legitimate one was dismissed twice by the court.

The bitter truth is that there is no appeal against the judgment of Hon Mr. B. Ochieng.

22. In conclusion, I find the present appeal to lack competence and I dismiss it with costs.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 23RD DAY OF MAY, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE