



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 6 OF 2015

RICHFIELD ENGINEERING LTD.....APPELLANT/RESPONDENT

VERSUS

LITHE M WIKALI WAMBUA

(Suing as the personal representative of the estate of

AMOS MUTHIANI WAMBUA (Deceased).....APPLICANT

RULING

1. The Applicant herein filed the Application by way of Notice of Motion dated 20.1.2019 and filed in Court on 31.1.2019. The application is made under **Order 42 Rule 35 (1)** of the Civil Procedure Rules, 2010 and Section 79G of the Civil Procedure Act, Laws of Kenya. The Application seeks the following Orders:

- a. That the memorandum of appeal be struck out for being defective and filed out of time and without leave of court**
- b. In the alternative, this appeal be dismissed for want of prosecution.**
- c. The costs of the application be borne by the appellant.**

2. The Application is based on the following grounds:-

- (a) That the memorandum of appeal was filed on 16.1.2015 and since the filing of the same, the appellant has not caused the same to be placed before the judge for directions on the appeal.**
- (b) The appellant has completely lost interest in this case and is not keen to have it heard and determined.**
- (c) The appellant has never filed a record of appeal and a certified copy of the decree and order and the appeal ought to be struck out for failure to comply with mandatory provisions of the law on filing of appeals.**

3. The application is supported by an affidavit deponed by the advocate on record for the applicant.

4. The Appellant/Respondent opposed the application vide a replying affidavit deponed by Newton M. Mwangi, from the firm of advocates on record for the respondent on 8.5.2019. It was deponed that the court is estopped under Order 42 from considering whether or not the appeal should be dismissed for want of prosecution until the appeal is admitted for hearing. Counsel submitted that in this matter judgement of the trial court was delivered on 4.12.2014 and the appeal was filed on 16.1.2015 and taking into account the days excluded from computation of time by reason of the High Court vacation, the memorandum of appeal was filed within time. It was deponed that the appellant is anxious to prosecute the appeal.

5. The Application was canvassed by way of written submissions.

6. In submissions filed on behalf of the Respondent/Applicant, it was submitted that it is the duty of the appellant to fix the appeal for directions. Reliance was placed on the case of **Elam Investment Limited v Makora Otwoma (2015) eKLR**. Counsel submitted that the appeal had been filed out of time without the requisite leave and ought to be dismissed.

7. In submissions filed on behalf of the Appellant/Respondent it was submitted that before the appeal is dismissed, directions ought to have been issued under Order 42 Rules 11 and 13. It was submitted that the applicant could not raise a preliminary objection in a replying affidavit.

Counsel explained away the delay in filing an appeal within the requisite time provided for by the Civil Procedure Act.

8. Having considered the pleadings and the respective submissions of parties, the issues for determination are whether the appeal is properly before the court; whether the court may grant the orders sought. It is not in dispute that the appeal herein was filed on 16th January, 2014 to challenge a decision that was made on 4.12.2014. It is patently clear that the appeal was filed well over 30 days from the date of the decision and contrary to section 79G of the Civil Procedure Act. The section grants the court discretion to admit an appeal out of time for sufficient cause. The appellant ought to have sought leave to extend the time within which to file the appeal so that the appeal may be deemed to be properly on record. Section 79G of the Civil Procedure Act 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 their 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.”

9. Looking at the replying affidavit of the appellant/respondent I note that it has given a plausible explanation regarding the efforts made at securing the copies of the decree and lower court record. Already the appellant has filed a record of appeal and is now waiting for the admission of the appeal. I have noted that the memorandum of appeal was filed on 5.1.2015 one day shy of the 30 days provided for appeal. I find that was not inordinate by any standards and the same ought to be admitted. There will be no prejudice suffered by the respondent if the application lodged by the respondent is declined as she can be cushioned by an award of costs. It will be unjust to deny the appellant an opportunity to ventilate the appeal.

10. In the result it is my finding that the application dated 22nd January 2019 ought to be declined. However I proceed to make the following orders:

a) *The Appellant’s memorandum of appeal dated 5.1.2015 is deemed as duly filed.*

b) *The Deputy Registrar do proceed to organize the admission of the appeal.*

c) *The Respondent/Applicant is awarded the costs of the application.*

It is so ordered.

Dated and delivered at **Machakos** this **19th** day of **December, 2019.**

D. K. Kemei

Judge