



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 320 OF 2010

EVERLYNE ADHIAMBO KONGORO.....APPELLANT

AKUMU KONGORO

NAHASHON KONGORO (Suing as co-administrators of the Estate of

GRACE LUMUMBA ONGONGE (DECEASED)

VERSUS

TRANSEAST LIMITED.....1ST RESPONDENT

STEPHE MBUVI MUTHUI2ND RESPONDENT

JUDGEMENT

1. **On the 27th November 2012**, the court (Honourable R.P.V. Wendo, Judge) allowed the appellant upon application 90 days within which to serve the Memorandum of Appeal and comply with all requirements under **Order 42 of Civil Procedure Rules**, take directions and set down the appeal for hearing, and in default the appeal would stand dismissed.

2. By an application dtd **10th January 2014** brought under **Order 51 Civil Procedure Rule and Section 3A of the Act**, the respondents sought orders that the **appeal having been dismissed costs of the appeal be awarded to the Respondents. The basis of the application was that the ruling of 27th November 2012 was not complied with and therefore the appeal stood dismissed, 90 days therefrom.**

3. The appellant opposed the application by a Replying Affidavit sworn on the 28th March 2017, being a reply to a preliminary issue dated 13th March 2017 filed by the respondents.

4. The issues raised in the preliminary objection are stated as:

1. Pursuant to this Honourable courts ruling delivered by Lady Justice R.P.V. Wendo on 27th November 2012 the appeal stands dismissed.

2. The Appeal was not set down for taking directions within the 90 days.

3. The appeal was not listed for hearing within 90 days.

4. That it will be unjust on the Respondent to defend an appeal after lapse of 5 years since the 90 days had expired on 26th February 2013 and the appeal stood dismissed.

5. George Brian Akello advocate for the Appellant in the replying Affidavit deponed that the appellant did comply with **Order 42 of Civil Procedure Rules** and invited the Deputy Registrar to place the appeal before a Judge for taking directions by a letter dated 15th February 2013, that at that time the trial court file had not been forwarded and therefore it would not have been possible to take directions without the trial court file being forwarded to the High Court. The last such letter was dated 25th January 2017.

6. Mr. Mahinda Advocate for the applicant confirms that the Record of appeal was served within the 90 days and no other step was taken and therefore the appeal stood dismissed and that this court cannot vary an order of the Court, unless it is invited to do so.

7. On the other hand, Mr. Akello Advocate for the Appellant re-iterated that this court file was traced in 2017 after several letters to the Deputy Registrar and a hearing date for the appeal taken for the 15th March 2017. It is his submission that the appellant should not be punished for matters beyond his control and citing **Article 159 of the 2010 Constitution** urged the court to disregard procedural technicalities.

8. I have considered arguments by both counsel.

For an appeal to be ready for hearing several procedural steps have to be taken under **Order 42 of Civil Procedure Rules**.

I have stated above that the trial court file being **Nakuru CMCC No. 890 of 2009** has not been availed. Without that file, the Deputy Registrar cannot be able to confirm that all necessary documents have been filed nor would the appeal be placed before a Judge to admit or reject the appeal under **Section 78B of the Civil Procedure Act**. It would be an academic exercise to even move the court for directions under **Order 42 rule 13 of Civil Procedure Rules** or the the hearing of an appeal before it is admitted.

9. I have considered authorities cited by the Appellants. I do not see any relevance to the present situation. There is no dispute that the appellant has not complied with the ruling dated 27th November 2012 and strictly the appeal stood dismissed on the 91st day thereafter, that is on the 26th February 2013.

10. Mr. Mahinda Advocate submitted that this court cannot vary the court's ruling dated the 27th November 2012 on its own motion. It has to be moved to do so upon excusable explanations, to either set aside the said orders, or vary the same.

11. The appellant faced with the problems as explained in its affidavit and in the oral arguments ought, to have moved the court before the expiry of the period of 90 days, and not to wait until it was awoken by the respondents application dated 10th January 2014 and the Preliminary Objection filed on the 13th March 2017 in objection to the hearing of the appeal scheduled for the 15th March 2017.

12. In the **Case Mukisa Biscuits Co. -vs- Westend Distributors Ltd (1969) EA 701** it was held that:

“A preliminary objection raises a pure point of law which if argued, on the presumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion---”

13. This court is satisfied that the Preliminary Objection is well founded as it raises a point of law that the appeal stood dismissed on the expiry of the 90 days and hence there is no appeal to be heard. The appellant did not urge the court otherwise but took a tour of explanation as to why the appeal could not be listed for hearing within the 90 days.

14. I have stated, in my view what the appellant ought to have done. The court's discretion has not been sought as the facts leading to the preliminary objection are pure points of law, requiring no calling of evidence. See **Janet Syokau Kaswii -vs- Kathonzweni Financial Services Association (2014) e KLR.**

15. In the matter of **Kenya Union of commercial, Food and Allied Workers -vs- Water Resource Management Authority & Another (2015) e KLR** the court was of the view that

“-----a preliminary objection if not properly applied is a dangerous tool of operation, that it can lock out deserving litigants out of their causes, but on the other hand it could condemn deserving respondents to undue pressure and costs in pursuing undue litigation.”

16. Much as the Court sympathises with the Appellants circumstances, its hands are tied as an appeal that is dismissed cannot be fixed for hearing unless by a court order setting aside the dismissal order or varying any such order, for out of nothing comes nothing. For those reasons the application dated 10th January 2014 by the Respondent is allowed. The appeal stood dismissed after the expiry of 90 days from the 26th November 2012. There is no valid appeal on record.

17. As costs follow the event and there being no special circumstances to vary that principle stated under **Section 25 of the Civil Procedure Act**, the costs of the appeal shall be borne by the appellant.

Dated, Signed and Delivered this 27th Day of April 2017.

J.N. MULWA

JUDGE