



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 57 OF 2015

JOHNSTONE NYAGA T/A GERISH HOTELS.....APPELLANT

VERSUS

PURITY NJAGI.....RESPONDENT

RULING

1. The respondent has raised a preliminary objection to the appellant's appeal. She has applied for the dismissal of the appeal on the grounds that it was filed out of time, that the order or decree appealed from was not attached to the memorandum of appeal and that the grounds of appeal are not concisely set out as required by the 2010 Civil Procedure Rules.
2. The respondent submitted a number of grounds in support of her preliminary objection as to why the appeal should be struck out and be dismissed. Firstly she contends that the appeal contravenes the provisions of section 79G of the Civil Procedure Act. The provisions of that section require that an appeal from a decree or order of a subordinate court should be filed within 30 days from the date of the decree or order appealed against. Secondly she also submitted that the amended memorandum of appeal is undated which is contrary to Order 42 rule (1) of the 2010 Civil Procedure Rules which require that every pleading must be dated and signed by the complainant (the plaintiff or appellant). It was also her contention that the introduction to the amended appeal is in relation to a ruling dated 9th November 2015 but the prayer is in relation to the setting aside of a judgement delivered on 4th February 2015.
3. Counsel for the respondent further submitted that the appeal offends section 79G in that it was filed out of time and without prior leave of the court. She also contends that there is no prayer in relation to the ruling of 9th November 2015. Prayer C in the memorandum of appeal is not in relation to this appeal. That prayer is in relation to proceedings that were filed in the magisterial subordinate court. According to her section 79G is coached in mandatory terms. And for that reason this appeal was not properly before this court.
4. Furthermore, counsel for the respondent has also submitted that the amended memorandum of appeal offends Order 42 Rule 1 (2) of the 2010 Civil Procedure Rules. The provisions of that Order require that the grounds in the memorandum of appeal must be concisely set out. It is also her contention that the decree or order appealed against was not been annexed to the memorandum of appeal. This she says is in breach of Order 42 Rule 2 of the 2010 Civil Procedure Rules.
5. In particular, she has submitted that ground 4 of the memorandum of appeal is in relation to an *ex-parte* judgement that was delivered on 4th February 2015. She relied on the case of Kulwant Singh Roopra v. James Nzili Maswili Civil Appeal No. 85 of 2013 (High Court of Kenya at Muranga), which cited with approval the provisions of **section 79G** of the Civil Procedure Act. Those provisions state that:

“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 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”

6. Additionally in terms of Order 42 rule 13 (4) before an appeal is set down for hearing the judge must be satisfied that the following documents are on the court record having been filed and served on the opposite party:
 - a. *The memorandum of appeal*
 - b. *The pleadings*
 - c. *The notes of the trial magistrate made during the hearing*
 - d. *The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing*
 - e. *All affidavits, maps and other documents whatsoever put in evidence before the magistrate*
 - f. *The judgement, the order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*

Provided that:

I. A translation into English shall be provided of any document not in that language

II. The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

7. Counsel for the appellant opposed the preliminary objection. According to him the preliminary objection is premature because the appeal has not been admitted into hearing under section 79B of the Civil Procedure Act. According to counsel the amended memorandum of appeal is illegally in the possession of the respondent. He has submitted that under Order 42 Rule 3, the appellant has still an opportunity to amend the memorandum of appeal in regard to which there is no requirement that leave of the court be obtained.
8. He further submitted that if the amended memorandum of appeal is defective, the original memorandum of appeal of **9th December 2015** is still valid. He further submitted that there is no requirement or decree appealed against should be annexed to the memorandum of appeal to which he made reference to Order 42 Rule 2. It is also his submission that the memorandum of appeal dated **9th December 2015** was filed within time. He based his submission on the fact that the ruling sought to be appealed against was delivered on **9th November 2015**.
9. His further submission was that under Order 50 Rule 8, the first day of delivery of the ruling is not counted for appeal purposes. It is his further contention that the last day of appeal for purposes of appeal was 10th December 2015. It follows according to him that appeal was filed within time. The invocation of section 79G of the Civil Procedure Act does not apply to this appeal because the appeal is within time and therefore there was not need to apply for extension of time within which to lodge the appeal.
10. Counsel maintained that the appeal is against the order of the court delivered on **9th November 2015**. He also says that they have set out concisely the grounds of appeal as required by the Rules. He has further submitted that Article 159 (2) (d) should be relied upon to cure any defects in his memorandum of appeal at the time within which the appeal was filed. Finally, he has submitted that a court is only allowed to strike out an appeal under Order 42 Rule 35 (for want of prosecution), to summarily dismiss the appeal (under section 79B Civil Procedure Act) and where the appellant is in default when the appeal is called for hearing (under Order 42 Rule 20 (1) of the 2010 Civil Procedure Rules).
11. In reply counsel for the respondent submitted that if the preliminary objection is upheld and the appeal is dismissed, the appellant may still seek leave to extend time within which the appeal may be filed. According to her the invocation of Article 159 (2) (d) of the Constitution only applies in grey areas which may lead to miscarriage of justice and does not apply to the instant appeal. She

finally submitted that section 79G and Order 42 Rule 1 (2) are coached in mandatory terms and are crystal clear and for that reason the preliminary objection should be upheld. The appeal should therefore be dismissed.

12. The issues for determination in this appeal are as follows:

- a. Whether or not the appeal was filed within time as authorized by section 79G Civil Procedure Act
- b. Whether or not the amended memorandum of appeal dated 18th December 2015 effectively replaced that of 9th December 2015.
- c. Whether or not the provisions of Article 159 of the 2010 Constitution are applicable to this appeal.
- d. Who should bear the costs of this application.

13. I have considered the submissions in respect of the preliminary objection. I find that the original memorandum of appeal was filed within the time authorized by section 79G Civil Procedure Act. I also find that the amended memorandum of appeal which was filed on 18th December 2015 was filed outside the authorized period. The amended memorandum of appeal did not invalidate the original memorandum of appeal which was filed within the time permitted by law. I accept Mr. Mugambi Njeru's submission that he has not prepared the record of appeal and he may amend the memorandum of appeal once the record of appeal is fully prepared.

14. I accept the submission of Ms Fatuma that pleadings may be amended for the purpose of effectively resolving the issues in dispute. In the circumstances, I take the view that the amended petition of appeal was an oversight on the part of Mr Mugambi Njeru. This is a proper appeal in which I invoke the provisions of section 1A (1) and (2) and section 1B (1) of the Civil Procedure Act which requires the court to ensure that there is a just determination, that is efficient, expeditious, proportionate and affordable of the proceedings before it .

15. In the circumstances, I find that the preliminary objection cannot be sustained and I therefore dismiss it. Costs of this preliminary objection will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 18th day of **2016**

In the absence of both counsel

Court clerk Njue

J.M. BWONWONGA

JUDGE

18/02/ 2016