



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CIVIL APPEAL CASE NO. 656 OF 2009
KIAMUMBI FARMERS CO-OPERATIVE
SOCIETY LIMITED..... APPELLANT

VERSUS

JOHN KAHIGI MUGAI.....1ST RESPONDENT

SUSAN WAIRIMU NGUGI.....2ND RESPONDENT

(Being an Appeal from the Ruling/Order of the Chairman Co-operative Societies Tribunal

(Mr. J. L. Ole Kipury) delivered on 22nd October in Tribunal Case No. 213 of 2007 at Nairobi.)

RULING

1. The Respondents have filed a Notice of Motion dated 4th December, 2012 seeking the striking out or dismissal of the appeal. The motion is expressed to be brought under **Order 17 Rule 2(3), Order L Rule 1 (2) of the Civil Procedure Rule and Sections 79G, 1A, 1B and 3A of the Civil Procedure Act.**
2. The Motion is premised on the grounds on the face of the application and the Supporting Affidavit of John Kahigi Muigai sworn on 4th December, 2012. He averred that this appeal was filed thirty six (36) days after the decision of the Tribunal in **Nairobi Tribunal case No. 213 of 2007** delivered on 22nd October, 2009. That, since the filing of the Record of Appeal on 18th November, 2010, no steps have been taken to prosecute the appeal. He averred that the Appellant has remained defiant and has refused to comply with the Tribunal's order and should not be allowed to abuse the court process.
3. In their written submissions, the Respondents submitted that the Memorandum of Appeal was filed on 26th November, 2009 whilst the Ruling appealed against was delivered on 22nd October, 2009; that the appeal was therefore clearly filed out of time; that the Memorandum of Appeal should have been filed at the tribunal and not in this court; they challenged a receipt dated 20/11/09 relied on by the Appellants. It was further submitted that ever since the Memorandum of Appeal was filed on 26/11/09, no step had been taken to prosecute the same. It was finally submitted that the appeal was incompetent as the order appealed against has not been extracted; that the appeal was against an order of dismissal of application dated 30/05/09 and not against the decree of 12th June, 2008 and that the appeal will therefore serve no purpose.
4. The application was opposed vide the Replying Affidavit of Joseph Waithaka Kahari sworn on

- 14th March, 2014. It was contended that the Memorandum of Appeal was filed on 20th November, 2009 which was within time; that the stamp of 26th November, 2009 was that of the tribunal when the Memorandum was lodged thereat; that the record of appeal was filed on 18th November, 2010 and the present application one year thereafter. The Appellant prayed that it should be allowed to prosecute its appeal.
5. It was further contended for the Appellant that the application was fatally defective as it was brought under **Order 17 Rule 2 of the Civil Procedure Rules** instead of **Order 42** of those Rules. The Appellant urged that the application be dismissed.
 6. I have carefully considered the Affidavits on record and the submissions of Counsel. The law as to the filing of appeals from the Lower Courts and Tribunals is clear. Such appeals must be lodged with this court within 30 days of the order appealed against. If that time lapses, the Appellant must seek extension of that time. In the present case, I have carefully perused the record. I have seen the Memorandum of Appeal that commenced these proceedings. The same was filed on 20th November, 2009. A receipt No. 1784481 dated the same day was issued. That Memorandum was followed by a letter from the Deputy Registrar dated 25th November, 2009 addressed to the tribunal calling for the latter's original record amongst other documents. In this regard, the Respondent's contention that the appeal was filed on 26th November, 2009 is not correct.
 7. As to whether it was filed out of time, the order appealed against is dated 22nd October 2009. The appeal having been filed on 20th November 2009, I find that the same was within the time provided for by the law. The contention that the Memorandum of Appeal is supposed to be filed at the tribunal and not in this court is a strange argument. An appeal is being pursued in this court and not before the tribunal. How then can the Memorandum of Appeal be lodged before the Tribunal? I find the first ground to be without merit.
 8. The other ground was that no step has been taken since the appeal was filed. I note that after the Memorandum of Appeal was filed, the parties engaged themselves in the protracted application for stay of execution. A decision on that application was delivered on 27th May, 2010. The Record of Appeal was lodged on 18th November 2010. What followed was the filing of the present application on 4th December, 2012 and to date nothing has been undertaken towards the prosecution of the appeal. Can the Appellant be blamed, I do not think so. Firstly, the appeal has to date not been admitted in accordance with **Section 79B of the Civil Procedure Act**. Without being admitted as such, no step can be undertaken in the appeal. Even directions under **Order 42** cannot be made.
 9. For the foregoing reasons, I find the application for dismissal for want of prosecution to be premature. Such an application can only be made after directions have been taken under Order 42 rule 1 of the Civil Procedure Rules.
 10. On the contention that the appeal will serve no purpose as the orders appealed against is the one that dismisses the application for setting aside and not the decree. I do not agree with that. There is no way the Appellant can challenge the decree except by way of the application that was dismissed on 23rd October, 2010. That ground therefore holds no water.
 11. As regards the competency of the application itself, I agree with the Appellant that the same is fatally defective. It was brought under the wrong provisions of the law. Appeals are governed by **Order 42 of the Civil Procedure Rules**. The Principles applicable under **Order 17 Rule 2 and Order 42 of the Civil Procedure Rules** may not be the same as there are pre-requisites under Order 42 Rule 35 which must be undertaken before an appeal can be dismissed for want of prosecution. In the circumstances, the application was a non-starter.
 12. In the circumstances the application is hereby dismissed with costs.
 13. Considering the time taken since the Record was lodged. I direct that the file be forthwith placed before the head of the division or duty Judge for admission of the appeal and for further directions.

Dated and delivered at Nairobi this 20th day of February, 2015.

A MABEYA

JUDGE