



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.117 OF 2012

GODFREY KARIUKI GATHINGI.....1ST APPELLANT

VERSUS

GLADYS NJERI KIRONGO.....1ST RESPONDENT

JOSEPH WANJOHI KIBUTA.....2ND RESPONDENT

FRANCIS MUCHIRI NGAGE.....3RD RESPONDENT

RULING

FACTS

The Appellant herein being dissatisfied with the judgment delivered on the 23rd June, 2010 by the Honourable P.M.Mulwa in SPMCC No.33 of 2009 sought redress by filing his Memorandum of Appeal on the 26th June, 2012.

The matter was set down for hearing of the appeal on the 24th February, 2015 when Counsel for the Respondents submitted that the Respondent's Notice of Preliminary Objection dated the 10th August, 2012 be determined first.

The Respondents have raised the Objection as to the legality of the Appeal and aver that the appeal is hopelessly time barred having been filed after two (2) years and that it was also filed without the leave of court for extension of time.

ISSUES FOR DETERMINATION

After perusing the Memorandum of Appeal and together with the Preliminary Objection and before going into the merits or demerits of the appeal it is incumbent for this court to address the issues raised in the Preliminary Objection. The following issues have been framed for determination;

- i. Whether failure to obtain leave to file the appeal out of time renders the appeal as being fatally incompetent; and that it be struck out
- ii. Whether the failure and delay was inexcusable.

ANALYSIS

The Judgment in PMCC No.33of 2009 (Naivasha) was delivered on the 3rd June 2010. The Memorandum of Appeal is dated the 4th July, 2012 and bears a court stamp dated the 6th July, 2012. The appeal ought to have been filed within a period of 30 days from the date of the judgment and the last day of filing would have been the 3rd July, 2010. Despite the expiry of this period the appeal was nevertheless filed and it was admitted as being ready for hearing on the 5th of December, 2012.

I have taken the liberty to peruse the court record and have sighted no application on the court record seeking the leave of the court for the extension of time in which to file the appeal.

The Preliminary Objection is raised by the Respondent is on a pure point of law and it is capable of disposing of the matter summarily. Refer to the case of **Mukisa Biscuits Manufacturing Company Limited V. West End Distributors Limited, (1969) EA 696.**

The provision of the law relating to the filing of appeals is set out under **Section 79G** of the **Civil Procedure Act** and is couched in mandatory terms and reads as follows;

“79G 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.”

It provides for the period within which an appeal ought to be filed and when this period expires the law provides that an extension of time shall be first had and obtained.

It is the court's considered view that the appeal has been filed and has been filed out of time and without the court's leave and it is therefore a nullity, *ab initio*. By setting down the appeal for hearing the Appellant is asking this court to remedy the illegality, to legitimise the appeal and thus proceed to hear and to proceed to make a determination.

The question that arises is should this court disregard procedural defaults and technicalities and invoke the provisions of **Sections 1A (1)** and **1B (1) (a)** in favour of the Appellant so as to facilitate a just determination of the appeal so as to render substantive justice. This can be done by granting the Appellant some indulgence by not looking too keenly at the Preliminary Objection.

Due to the fact that the appeal had been admitted as being ripe for hearing this Court will endeavour to do substantive justice and will therefore indulge the appellant and by proceeding to address the salient factors of delay and prejudice. This is done so that the court may satisfy itself that the delay may not have been inordinate and that by allowing the appeal to stand as it is, that there is a no likelihood of the Respondents being prejudiced.

In this instant case judgment was delivered on the 3rd June, 2010 and the appeal was filed on the 21st January, 2012 which translates to a period of two (2) years. The decisions are legion on what constitutes inordinate delay and it has been held that a period of four months is considered to be an inordinate delay.

Where the delay is found to be inordinate the saving grace is in the proviso to Section 79G (**supra**); that the party must give an explanation that is satisfactory to the court. No explanation exists on the court record to demonstrate that the delay in filing was not deliberate. I have also sighted no Certificate of Delay issued herein that could have been supportive of the delay and or could have offered an explanation for the delay.

This court concurs with counsel for the Respondent's submissions and is satisfied that the

prolonged delay of two (2) years is indeed inordinate.

In seeking to do justice this court must act with reasonableness and with fairness and take into consideration the factor of prejudice; whether the successful opponent in the initial suit, namely the Respondents in this instance likely to be prejudiced in any way if this court were to allow the appeal to stand.

The court record shows that the subject matter of the initial suit relates to land and that the successful parties namely the Respondents proceeded to exercise their right to absolute proprietorship by sub-dividing the suit land into several parcels; that during the period of the Appellant's inaction the parcels were disposed of to third and fourth parties who now hold valid titles to the parcels and that the nature of the suit land has since changed and is no longer identifiable.

The court opines that onus was upon the Appellant to file his appeal in a timely manner and the prolonged inaction with no reasonable explanation is inexcusable and in all fairness this court is satisfied that the Respondents will be greatly prejudiced due to the fact that the nature of the suit land has greatly changed and is no longer identifiable.

FINDINGS

This court finds that the failure and delay are both inexcusable

This court finds that the Appellant failed to obtain leave for extension of time in which to file the appeal out of time, that this procedural default without any explanation renders the appeal as being fatally incompetent and a nullity;

DETERMINATION

The appeal is therefore incompetent and is hereby struck out with costs to the Respondents.

Orders Accordingly.

Dated, Signed and Delivered at Nakuru this 26th day of June, 2015.

A. MSHILA

JUDGE