



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CIVIL APPEAL NO. 197 OF 2011

**TANA TEACHERS CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED.....APPELLANT**

-VERSUS-

ANDRIANO MUCHILI.....RESPONDENT

RULING

1. The applicant herein is the respondent in the appeal. He is asking the Court vide his application dated 25th November 2014 to make an order that there is no competent appeal before this Court and the petition of appeal filed on 4.10.2011 should be struck out. He also prayed to be awarded the costs of this application. The motion is supported by the grounds on the face of it and the affidavit sworn by the applicant, one of the ground cited is that there is no certified decree of the Court from which the appeal is preferred. Secondly that form is wanting as what is filed is petition of appeal in place of memorandum. Further that the applicant has not been served with a memo of appeal and the appellant is guilty of inordinate delay.
2. The application is opposed by the appellant/respondent by way of a replying affidavit sworn by Mr Gekonde advocate on record. Mr Gekonde advocate deposes that the decree filed was used by the applicant. No directions have been given hence this application is bad in law and the record of appeal speaks by itself and is extremely meritorious. Lastly that the appeal papers were served upon the applicant's advocate on record. On 9th June 2015 responding on 23rd June 2015. The submissions highlighted what is already pleaded and I have considered them when writing this ruling.
3. The applicant submitted that what is filed is a petition instead of a memorandum of appeal. The applicant has however not submitted what prejudice he has suffered as a result of the change of form. Without much ado, I am inclined to disregard this objection as it merely touches on form rather than substance which goes against both the provisions of the overriding objectives of the Civil Procedure Act and article 159 of the Constitution 2010.
4. The second omission taken up by the applicant is failure to accompany the appeal with a certified decree as required under Order 42 (2) of the Civil Procedure Rules. A reading of this rule in it provides that, " the appellant shall file such certified copy as soon as possible and in any event within such time as the Court may order ". In this instance, the appellant filed a record of appeal on 7th February 2013. At

page 263 – 264 of the record is contained a signed copy of the decree. The application was filed after the record was already filed. I do make a finding that such objection is overtaken by events as there is a valid decree on record.

5. The last omission complained of by the applicant is the failure by the appellant to serve the memorandum of appeal and failure to list the appeal for disposal. On the first limb, in paragraph 11 and 15 of the replying affidavit, Mr Gekonde deposed that the appeal papers were served on the firm of S.K Kimani advocate and attached a document referred to as annex “G 4”. I have perused the said document but did not see any receiving stamp of the applicant's advocate. However since this matter was not contravened by the applicant and the circumstances of this case that the applicant was aware of the appeal filed going by the letters sent to the deputy registrar and on record, I am of the view such an omission if at all is not fatal. On the limb of fixing this appeal for directions, it is not clear from the deposition of the respondent on what their defence to this failure is. But this Court presumes from paragraphs 8 and 9 that it is the applicant's filed notice of appeal against the ruling extending time to file an appeal which has not been determined. Probably it would be premature to fix this appeal for hearing when such notice is still pending.

6. The applicant submits that it is an abuse of the Court process to file an appeal and fail to take requisite steps provided in law. I have considered the case laws cited by the parties herein i.e

1. *Karibu Timber Industries vs Nemchard Asard & Co (2004) eKLR*
2. *Ayub M. Kakai vs T.C Webuye County Council Nairobi civil application 107 of 2009.*
3. *Kenya Commercial Finance Co. Ltd vs Richard Onditi - Kisumu civil application No 329 of 2009.*

From the record, this appeal was initially summarily rejected by the Judge being filed out of time. Subsequently the appellant vide a letter dated 5th December 2012, the applicant's advocate forwarded a copy of the ruling which expanded time. Consequently the Presiding Judge on 13th March 2013 admitted the appeal to hearing. It is therefore incorrect to submit that since 2011 when this appeal was filed no steps have been taken. In my view the delay has been both on the appellant and the Court. It is not a clear case that inordinate delay can be specifically placed on the appellant.

7. In all, I am not satisfied this application has merit. I order it dismissed with costs to the appellant. The appellant is however warned to take necessary steps to have this appeal listed for directions within the next 45 days of this date.

Ruling dated and delivered at Mombasa this 18th day of September, 2015

A. OMOLLO

JUDGE