



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.18 OF 2012

SAMMY K. KIRUI.....APPELLANT

VERSUS

REMMY K. KORIR.....RESPONDENT

R U L I N G.

1. This is the Notice of Motion dated 10th February, 2015 seeking an Order to strike out the appeal filed herein.
2. Several grounds have been set out on the face of the application as follows;
 1. *That the purported appeal was filed out of time without seeking leave as provided for Under Section 79G of the Civil Procedure Act (Cap 21) Laws of Kenya.*
 2. *That the appellant did not cause the matter to be placed before Judge for directions within thirty days as provided for under Rule 11 of the Civil Procedure Rules 2010.*
 3. *That the appellant did not serve the Respondent with the memorandum of appeal within seven days or at all as provided for under Rule 12 of the Civil Procedure Rules 2010, and the appellant did not cause the appeal to be listed for directions as provided for under Rule 13(1) of the said Rules.*
 4. *That the appeal was filed with the sole purpose of delaying execution proceedings in the lower court.*
 5. *That the appeal is mischievous, frivolous, vexatious, unlawful, contemptuous and an abuse and misuse of the judicial process.*
3. The Application is supported by the sworn affidavit of Respondent/Applicant. He sets out the history of the matter before the lower Court.
4. The Appellant/Respondent filed a Replying Affidavit opposing the application. He says the appeal filed herein is yet to be heard and there are stay orders issued by the Magistrate's Court.
5. It was Mr. Koskei's submission that the appeal herein was filed out of time and without leave of the Court.

6. A Misc. No. 13 of 2012 seeking leave to file appeal out of time was dismissed by the Court on 13th May, 2014. The lower Court file was then returned to Sotik Law Court for execution of the decree.
7. Mr. Nyaingiri for the Applicant/Respondent submitted admitting that there was no leave for filing appeal out of time.

He was therefore seeking leave to file the appeal out of time.

8. I have considered the application and the affidavits filed. I have also considered the submissions by both Counsel.
9. I will deal with the 1st ground in support of the application which states;

“That the purported appeal was filed out of time without seeking leave as provided for Under Section 79G of the Civil Procedure Act (Cap 21) Laws of Kenya.”

10. **Section 79 G of the Civil Procedure Act (Cap 21) Laws of Kenya** provides;

“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.”

11. Though the period of filing an appeal is 30 days from the date of judgment there is provision for leave to be sought where one is unable to meet that time limit.
12. The judgment the subject of this appeal was delivered on **21st October, 2009**. The Appeal herein was filed on 30th April, 2012 which was two and a half (2 ½) years after delivery of the judgment.
13. It is admitted that no leave was sought prior to the filing of this appeal.
14. It is further admitted that the Appellant/Respondent did file Kericho High Court Civil Misc. Application No.13 of 2012 seeking leave to file appeal out of time.
15. The said Application was never prosecuted and it was dismissed for want of attendance and Prosecution on 13th May, 2014 by Justice J. K. Sergon.

The lower Court file was then returned to Sotik Law Court.
16. The dismissal Orders by Justice Sergon have to date not been overturned or set aside. The Appellant/Respondent is now asking the Court to grant him leave to appeal out of time.
17. It would be an affront to justice and fair administration of justice to do so, as the Orders by Justice Sergon made on 13th May, 2014 still stand. It would amount to this Court sitting on an appeal of the said orders of 13th May, 2014.
18. What is clear is that the Appellant/Respondent filed this appeal out of time and without leave of the Court allowing him to do so.
19. The appeal is therefore incompetent and is hereby struck out with costs.

DELIVERED, SIGNED AND DATED THIS 21ST DAY OF DECEMBER, 2015.

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H.I.ONG'UDI

JUDGE