



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 142 of 2009

Editorial Summary

1. *Civil Appeal*
2. *Civil Practice & Procedure*
3. *Subject of main subordinate court case*

TORT

- 3.1 *Cow electrocuted and died.*
- 3.2 *Claim for damages.*
- 3.3 *Claim for special damages Ksh. 283,200/-*
- 3.4 *Suit not prosecuted between 2007 and 2008.*
- 3.5 *Application to have suit dismissed allowed.*

Ruling 20th February 2009.

- 3.6 *Plaintiff files appeal 20th March 2009.*
- 3.7 *Admission of appeal 18th June 2012*
- 3.8 *Directions*

13th July 2012

- i) *Issue of jurisdiction of court*
Order 42 r 13(2) Civil Procedure Rules.
- ii) *Appeal filed without leave of the court*
under Order 43 1(h) and Section 75.

4. Submissions

By respondent/applicant

- 4.1 *That this court has no jurisdiction to hear appeal. Appeal filed without leave of court.*

By appellant/respondent

- 4.2 *That the matter was indeed filed without leave of court but Section 159 of the Constitution would cover this.*

5. Findings:

- 5.1 *The appeal was filed under the former 1948 rules.*
5.2 *No leave was required to appeal.*
5.3 *Objection dismissed.*

6. Case Law:

Nil.

7. Advocates :

- i) *E.N. Gicheru instructed by M/s Judy Thongori & Co Advocates for appellant.*
ii) *E.A. Ouma instructed by M/s Miller & Co Advocates for respondent*

MARGARET NJAMBI NJONGO APPELLANT/ORIGINAL PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD 1ST RESPONDENT/ORIGINAL 1ST DEFENDANT

UAP INSURANCE CO. LTD 2ND RESPONDENT/ORIGINAL 2ND DEFENDANT

RULING

I. INTRODUCTION

1. Margaret Njambi Njonjo filed appeal to this High Court of Kenya on the 20th March 2009. She had sued the respondents original defendants, the Kenya Power and Lighting Company Ltd in tort seeking compensation in damages, when her cow and calf had been electrocuted by a live wire. She asked for a sum of Ksh. 283,200/-

2. Her suit was dismissed for lack of prosecution upon application by the respondent due to the matter being inactive between the year 2007 to 2008, (on 20th February 2009.)

3. Whereas the appeal was filed on the 20th March 2009; Whereas there was admission to the High Court for hearing of the appeal on

18th June 2012, the parties, as required by law, came for directions on the 13th July 2012.

II PROCEDURE

4. The procedure requires the court to confirm when the memorandum of appeal was served upon the respondent. It was confirmed that the memorandum had been served on the 20th March 2009.

5. The court then called upon the parties to raise any objection if any, as to the court's jurisdiction to hear the appeal, at this stage, under

Order 42 r 13(2) Civil Procedure Rules.

6. An objection was raised as to this court's jurisdiction by the respondent. Parties were given time to prepare their submissions on this point.

7. None of the parties filed written submissions but they did address the court on 16th October 2012.

III SUBMISSIONS

8. The advocate for the respondent stated that the appeal is not competent before court. That it be dismissed with costs.

9. The law requires that after a ruling for dismissal of appeal for "want of prosecution", no appeal lies to the High Court, without the leave of the court. Before filing her appeal, the appellant ought to have sought the leave of the court to file appeal to the High Court. This was never sought.

10. As no leave was sought therefore, the High Court is incompetent to hear the said appeal.

11. The respondent/original defendant prayed the appeal be struck out.

12. In reply, the advocate for the appellant stated that the appeal had originally been filed by another advocate. Unfortunately when their new law firm took over the matter on 10th January 2011, the matter could not be properly be rectified.

13. She relied now on Section 159 of the Constitution. That the appellant was aged 85 years old and

should not have her matter dismissed, due to the court lacking jurisdiction to hear the same, on grounds that have leave had not been sought from the original court to file an appeal.

14. Should the appeal be struck out?

III OPINION

15. The magistrate's court case had never been heard in a full trial. The suit was dismissed for want of prosecution for one year's inactiveness.

16. Whereas an appeal had been filed, leave to appeal was required by the court, as the ruling did not fall under Order 43 r (1) (1), argued the respondent, being appeals from orders under the provisions of Section 75 (1) (h).

17. The lists of rules of the orders that may be appealed, as of right, must be looked into under the former 1948 Civil Procedure Act. This is because the suit and appeal was filed during the said period prior to 2010.

18. Upon looking at **Section 75 (h) Civil Procedure Act** that reads:-

(1) An appeal shall be as of right from the following orders and shall also be from any other order with leave of the court making such order or of the court to which an appeal would be if leave were granted.

- a) _____
- b) _____
- c) _____
- d) _____
- e) _____
- f) _____
- g) _____
- k) _____

h) any order made under rules from which an appeal is expressly allowed by rules.

2) No appeal shall be from any order passed in appeal under this section.

19. The rules to my mind are the rules as stated earlier, for 1948 Civil Procedure Act. These rules indeed were those in force at the time the original case was being dealt with.

20. The 2010 Civil Procedure Act would not apply or act retrospectively.

21. The 1948 Civil Procedure Rules are under Order XLII r 1(1) stating:-

“An appeal shall be as of right from the following orders and rules under the provisions of Section 75(1)(h) of the Act.

- a) _____
- b) _____
- c) _____
- d) _____
- e) _____
- f) _____
- g) _____
- h) _____
- i) _____

- j) _____
- k) _____
- l) _____

l) Order XVI r 5 (dismissal for want of prosecution)

m) – (z) _____

(aa) – (ee) _____”

22. This means under the 1948 Civil Appeal Rules, there was indeed a right of appeal to the High Court without leave of the court.

23. It is the 2010 rules of the Civil Procedure, now in force, that has omitted this right to automatically appeal to the High Court, as such, leave requires to now be applied for.

24. I would therefore hold that the appellant did indeed have a right to appeal to this High Court.

25. I nonetheless also noted in the file that the appeal had been filed on the 20th March 2009. The original ruling was made on 26th February 2009. The appeal was filed within time, as February has 28 days in a month.

26. Accordingly, I would dismiss the objections made by the respondent with costs to the appellant.

DATED THIS 17TH DAY OF OCTOBER 2012 AT NAIROBI

M.A. ANG’AWA

JUDGE

Advocates :

iii) *E.N. Gicheru instructed by M/s Judy Thongori & Co Advocates for appellant.*

iv) *E.A. Ouma instructed by M/s Miller & Co Advocates for respondent*