



The gist of the opposition is that the application is incompetent in view of the fact that the appeal has not been admitted to hearing.

The application was canvassed before me on 23/11/2010, by **Mr. Maruti**, learned counsel for the applicants and **Mr. Songok**, learned counsel for the appellant. Counsel reiterated the stand-points taken by their clients in their respective documents (affidavits and grounds of opposition).

I have considered the application, the supporting affidavit, and the grounds of position and the submissions of counsel. Having done so, I take the following view of the matter. The record shows that this appeal was lodged on 11/7/2006. It is against the judgment of Kapsabet Senior Resident Magistrate (**J.M. Njoroge SRM**) in Civil Case No. 350 of 2004 dated 13/6/2006. The learned Senior Resident Magistrate dismissed the appellant's case with costs against the applicants because, in his view, he (the appellant) had failed to prove the same on a balance of probabilities. There is no doubt that the appellant had the right to lodge his appeal and which right is guaranteed him by the law. There is also no doubt that the appeal was lodged in time as required under Section 79 G of the Civil Procedure Act. The appeal was then subject to the provisions of Order XLI Rules 8 A and B. The former provides as follows:-

**“8A. after the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent”.**

Section 79 B of the Civil Procedure Act referred to in Rule 8A reads as follows:-

**“ 79 B. Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may notwithstanding section 79 C reject the appeal summarily.”**

So in plain language, before an appeal can be heard, a Judge must peruse the same and determine whether or not it should be rejected summarily. I have perused the record of this appeal and have not been able to trace any order made pursuant to section 79 B of the Civil Procedure Act. The appeal has therefore not been admitted or summarily rejected. In those premises, the deputy registrar of this court could not notify the appellant to serve his memorandum of appeal upon the applicants. The criticism leveled against the appellant that he is not desirous of prosecuting his appeal has not therefore been well made and so are the complaints that the appeal is incompetent, frivolous, vexatious and an abuse of the process of the court. With all due respect to counsel for the applicants, the authorities he cited, did not advance their case. With regard to the prayer for the appellant to pay costs in the subordinate court and to furnish security for costs of the appeal, I am of the considered opinion that the applicants have not properly invoked the court's jurisdiction. Indeed the supporting affidavit does not mention these prayers.

For the above reasons, this application is dismissed. Costs shall however be in the appeal.

To expedite disposal of this appeal, I make an order under Section 79 B of the Civil Procedure Act that after perusing the appeal, I refuse to reject the same summarily. The Deputy Registrar of this court should now notify the appellant under Rule 8 A , Order XLI of the Civil Procedure Rules and subsequently list the appeal for directions under rule 8 B (1) of the same order.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> DAY OF JANUARY 2011.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

1. **Mr. Songok** holding brief for **Mr. Chumo** for the Respondent.

**F. AZANGALALA**

**JUDGE**

**25/1/2011.**