



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Appeal 5 of 2010

AMA.....APPELLANT

VERSUS

SBMRESPONDENT

RULING

Mr. Michira (counsel for the respondent) has raised a preliminary objection on points of law based on the following grounds;

- (1) The appeal is scandalous, frivolous or vexatious.
- (2) The appeal is an abuse of court process.
- (3) The appeal is time barred as the decree appealed against was issued on 25th November 2009 and appeal was filed after a period of 75 days.
- (4) The appellant did not file any application seeking extensions or enlargement of time before instituting the present appeal.

Mr. Michira submitted the appellant obtained decree on 25th November 2009, then appeal was filed on 16th March 2010.

He invited this court to consider the provisions of section 65(1) (c) of the Civil Procedure Act which allows appeals from the Kadhi's court, subject to compliance with section 79(g) i.e that the appeal must be filed within 30 days, and in the event of appellant being late, then the court's leave must be sought so as to file the appeal out of time – in the present case 75 days had lapsed before the appeal was filed.

The Preliminary Objection is opposed, and Mr. Abdallah (for appellant) terms it as being misconceived and frivolous as the appeal is preferred against the decision by the Kadhi which is dated 26-01-2010 and that this is clearly indicated in the memorandum of appeal filed and dated 08-02-10. He explains that they are not appealing against the decision dated 25-11-09 but against Order which was for committal of appellant to civil jail, and so the appeal is within time, and the Preliminary objection is misconceived and should be struck off.

In reply, Mr. Michira argues that there is a Notice to Show Cause dated December 2009, why execution shouldn't issue, and that it was after the appellant failed to show cause, that he was committed to civil jail, on the basis of the Notice to Show Cause – so the order was based on the decree and appellant cannot select to appeal only against the order for committal without addressing the decree based on the judgment by the Kadhi

The issue here is very simple – what is the subject of the appeal? Once an answer is obtained to that question then it will be possible to determine whether the appeal offends the provisions of section 79(g) of the Civil Procedure Act. The notice of appeal refers to the decision of 26-01-10. The draft memorandum of appeal does not restrict itself to the issue of committal to civil jail only – it challenges the content of the Kadhi's findings regarding orders that the parties were to live separately without divorce and ordered for maintenance for the respondent while the marriage had broken down irretrievably.

Unfortunately, the proceedings before the Kadhi on 26-01-10 are not part of the record submitted to this court, only the order is annexed, without which it is very difficult for me to know whether the question of the couple living separately was addressed by the Kadhi on 26-01-10 or whether it impacts the decision given on 25-11-09 in an attempt to challenge the entire decision.

But quite apart from that, I think Mr. Michira has derailed what was coming up and the Preliminary Objection raised here is with all due respect misplaced. I say this because what was coming up for interpartes hearing was the application dated 8th February 2010 which was certified urgent – the same sought for stay of orders by the Kadhi committing appellant to civil jail and also stay of proceedings in respect of proceedings pending before the Kadhi, it was not for hearing of the appeal – which this Preliminary Objection was eager to address. My finding is that the Preliminary Objection at this stage is misconceived and should not be a bar to hearing of the Chamber Summons dated 08-02-10.

I therefore dismiss the Preliminary Objection without going into its merits and direct that the Chamber Summons dated 08-02-10 do proceed to hearing.

Delivered and dated this 22nd day of **June 2010** at Malindi.

H. A. Omondi
JUDGE