

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 31 of 2004

JOHN MUHORO MWANGI.....APPELLANT

VERSUS

JAMES KAMAU MWANGI.....1ST RESPONDENT

ELIJAH FANSON NJENGA.....2ND RESPONDENT

RULING

After a careful perusal of the entire record herein, I find myself in total agreement with counsel for the Respondent that there is no competent Appeal before me in this matter. I say so because an Appeal from the Ruling of the magistrate dated 11.06.04 does not lie as of right. The Appellant needed leave from that court before he could file this Appeal.

He did not have such leave as at 7.04.04 when he filed the Memorandum of Appeal herein. When the issue was raised before Judge Khaminwa on 9.06.08 (4 years after the Memorandum of Appeal was filed), she adjourned this matter to enable counsel for the Appellant to go back to the subordinate court for the said leave. Apparently the leave was obtained and counsel sought this court's leave to file a supplementary record to include the said leave. Leave to file the supplementary record was granted but the issue of the leave was not raised thereafter since the matter proceeded by way of written submissions. Counsel for the Respondent thus raised it in his submissions.

When I look at the leave granted it reads:-

1. *Time within which to file an Appeal out of the orders of Hon. P.T. Nditika Senior Resident Magistrate dated 11.06.04 be and is hereby enlarged.*

2. *Leave to lodge an appeal of orders dated 11.06.04 notwithstanding that time has expired be and is hereby granted.*

The Application seeking the above orders does not form part of the Record of Appeal and I do not therefore know what Orders/ Rules of the Civil Procedure Act/Rules it was based on. I may not have a quarrel with prayer 1, although a delay of 4 years would in my view be inordinate but clearly the learned trial magistrate cannot purport to enlarge time for a party to file an Appeal before the High Court out of time. Section 79G only relates to the High Court. Order No. 2 i.e. the purported leave to file the Appeal to this court out of time was given without jurisdiction. It is an illegal order. It is no order at all. It is a nullity. Counsel for the Appellant cannot therefore rely on the same to validate his Appeal which was already before this court. He should have either withdrawn the Appeal, sought this courts' leave to file a competent Appeal out of time, or alternatively ask the court to deem the appeal as having been duly filed. That was the only recourse and avenue to validate his Appeal after the magistrate gave him the 1st leave.

As matters stand now, this Appeal is hopelessly incompetent and it does not even give me the basis to determine it on its merits if any. The same is hereby dismissed with costs to the Respondent.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 20th day of July 2010.

In presence of:- Mr. Kahiga for Appellant and Mr. Muguku holding brief for Mr. Kiama for Respondent.