

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL APPEAL 25 OF 2006

JOHN MATUKUAPPELLANT

VERSUS

ALICE WAITHERARESPONDENT

RULING

This matter came up under Order XLI rule 31(2) which provides that “that within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the Registrar shall on notice to the parties list the appeal before the Judge in chambers for dismissal. Mr. Mouko for the appellant offered an explanation to the effect that although they had filed the memorandum of appeal and even compiled and filed a record of appeal, they inadvertently left out the decree, which was subsequently extracted and they would now wish to file a supplementary record. Mr. Mouko pointed out that, this was a matter touching on property on which the appellant had already built his house and is residing there. He further submitted that the appellant is willing to proceed with the appeal and that he (Mr. Mouko) was the one responsible for the error which he was apologetic about. Mr. Mouko undertook to take immediate steps to have the appeal heard.

Mr. Ole Kina for the respondent responded that counsel had failed to show cause in pointing out that judgment was read on 1-19-2006 and on 15-9-2006, counsel filed the memorandum of appeal.

On 19-9-07, the record of appeal was filed and it shows that page 81 that the decree was filed and is part of the record – even the index shows that the decree is part of the record and Mr. Ole Kina states that what Mr. Mouko is telling the court is not correct.

He also draws to the court’s attention the fact that the appeal is against a judgment given to a pauper and respondent’s counsel even wrote to appellant’s counsel on several occasions requesting him to take steps towards hearing of the appeal but they failed to do so.

In reply, Mr. Mouko admitted that respondent’s counsel had written to them once, shortly before he moved court to issue Notice to Show Cause about the appeal. So what was the reason for the inactivity? Mr. Mouko explains that he thought the decree had not been filed as it was extracted later and he still has the originals. So actually all steps had been taken and all that was left was for parties to take a hearing date. On 8-9-08 when the respondent’s advocate wrote to appellant’s counsel what appears to be a follow-up to an earlier letter dated 2-7-08 (which has not been filed in the court record), however there was a response by appellant’s counsel on 22-9-08 to the effect that they were waiting for lower court records so as to enable them have the file placed by the judge for directions. The Memorandum of Appeal and Record of Appeal were served on the respondent on 6 – 12- 2006 and 27-11-07 respectively – both were filed in court in September 2007.

It would seem Mr. Mouko was under the belief that the decree was not filed – I would like to believe it was a human error of judgment on his part, which should not be visited on the appellant.

To my mind, the ends of justice will be better served by giving appeal a chance to ventilate her appeal rather than dismissing it. I therefore direct that appellant’s counsel must take steps towards taking a date

for hearing of the appeal within the next twenty one (21) days in default of which the appeal will stand dismissed without further recourse to this court.

Dated and delivered this **11th** day of **June 2009**.

H. A. Omondi

JUDGE

Mr. Ole Kina for applicant

Mr. Gekanana holding brief for Mr. Mouko for respondent