



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Appeal 86 of 2002

SOSPETER MWANGI MUCHINAAPPELLANT

VERSUS

LAWRENCE OKOTH.....RESPONDENT

RULING

This is an application by way of Notice of Motion brought by the Appellant under Section 3A and Section 79G of the Civil Procedure Act and Order XLIX Rule 5 and Order L Rules 1 and 2 of the Civil Procedure Rules seeking orders:-

- (1) That this Honourable Court be pleased to enlarge the time within which to file the Record of Appeal and the Record of Appeal filed herein be deemed to be properly on record.
- (2) That costs of this application be provided for.

In support of the application MORRIS INDAKWA BULUMA has sworn an affidavit giving grounds. The application is also supported by an affidavit sworn by the Applicant in which he avers; that his firm was instructed after Judgment had been entered against the Appellant/Applicant in the lower Court and an appeal to this Court filed; that after obtaining the instructions herein he proceeded with the necessary preparations to have the appeal set down for hearing; that after compiling and filing the record of appeal herein the Court file went missing; that all along he was waiting for a communication from the Court as to whether the appeal herein has been admitted to hearing or not; that upon location of the Court file he became aware that there was an order in the Court file that the Record of Appeal be filed within sixty (60) days from 10th January, 2003 which order was made by the Honourable Judge when the matter was placed before him in the absence of the parties; that the above order was never communicated to his office; that the delay to file the Record of Appeal herein was not premeditated; that in the premises it is just and equitable that the Appellant's Record of Appeal be admitted and the appeal set down for hearing if the ends of justice is to be met; and that what is deposed to herein above is all true to the best of his knowledge, information and belief.

The application is opposed by the Respondent who has filed a Replying affidavit sworn by ROSELINE A. ODEDE Counsel appearing for the Respondent on 10th August, 2005 in which she avers; that the grounds upon which the application is premised are devoid of merit in granting the orders sought; that a proper communication was done regarding the orders of this Court issued on the 10th January, 2003 to M/s. TOM MUTEI, Counsel then on record for the Applicant; that no evidence has been tendered by the said firm to show that the same was not received; that the said letter was written on the 10th January, 2003 and yet the Counsel for the Applicant made the first inquiry vide his letter dated 10th February, 2004

a period well in excess of one year; that the lapse occasioned there was inordinately long a fact which demonstrates indolence if not lack of interest to dispense with his matter; that it is trite canon of law that litigation must at one time come to an end to avoid uncalled for delays in the delivery of justice; that inaction on the part of the parties should not give a reason for a matter to be re-opened long after the lapse of the time frame provided in law; that this application filed before Court is an afterthought merely instituted to delay further the already too old a matter and should certainly be disallowed; and that whatever is stated hereinabove is true to the best of her knowledge, information and belief.

Having considered the application in light of the affidavit evidence on record and submissions by both Counsel I would state and rightly so that the order issued on 10th January, 2003 upon which this application is based on was contra the provisions of the statute. The law is very clear that a record of appeal cannot be prepared and filed before the appeal is admitted. Otherwise in the event the Judge rejects the appeal under Section 79 B of the Civil Procedure Act, the preparation of the record would be waste of resource and time.

I hereunder state the correct procedure to be followed:-

1. A party who is dissatisfied with the Judgment or order of the subordinate Court and who wishes to appeal shall file a Memorandum of Appeal accompanied with a certified copy of the decree or order appealed against. Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such time as the Court may order, and the Court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.

2. The file is placed before the Judge in Chambers for consideration whether to reject the appeal summarily under Section 79 B of the Act which provides:-

“Before an appeal from the 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 the decree or order appealed against, he may, notwithstanding Section 79 C, reject the appeal summarily.”

3. After the refusal of the Judge to reject the appeal under Section 79 B of the Act, the Registrar shall notify the Appellant who shall serve the Memorandum of Appeal on every Respondent.

4. The Registrar in compliance with Order XLI Rule 8 B on notice to the parties delivered not less than twenty one (21) days after the date of service of the Memorandum of Appeal shall list the appeal for directions by a Judge in Chambers.

5. The Judge in Chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate Court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

6. Before allowing the appeal to go for hearing the Judge shall be satisfied that the Court record complies with Order XLI Rule 8 B (4) of the Rules in respect of Record of Appeal.

7. In case of any delay in admitting the appeal, the appellant ought to write a letter directed to the Deputy Registrar requesting him to place the appeal before the Judge in Chambers for consideration under Section 79 B of the Civil Procedure Act.

The above is the proper procedure to be followed. That being the view the court has taken, the Applicant's application is not tenable and the same is disallowed.

I make no order as to costs.

The registry is directed to place the Appeal before the Judge in Chambers for consideration under Section 79 B of the Act immediately.

Those are the orders of this Court.

DELIVERED AND DATED AT ELDORET THIS 14TH DAY OF OCTOBER, 2009.

J. L. A. OSIEMO

JUDGE