



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**Civil Appeal 33 of 2004**

**SOLOMON ONZERE TSISAGA ..... APPELLANT**

**V E R S U S**

**FLORENCE VULIMU KAHU..... 1<sup>ST</sup> RESPONDENT**

**EMMA AFANDI KIGUNGU ..... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

The application before me is brought pursuant to the provisions of Order 41 rule 1 B (2) of the Civil Procedure Rules. It seeks leave to amend the memorandum of appeal.

Essentially, the appellant seeks to abandon grounds 1, 2, 3, 4 and 5 from his memorandum of appeal dated 8/6/2004.

He says that when he first lodged the appeal, he was challenging both the ruling dated 26/5/2004, and the judgment dated 10/3/2004.

The appellant now seeks to abandon the challenge directed against the judgment, so that his appeal can then only be limited to challenging the ruling.

The respondents accuse the appellant of trying to bring a new appeal in roundabout manner, with a view to circumventing the express provisions of section 79 G of the Civil Procedure Act. Pursuant to that section, every appeal from a subordinate court to the High Court should be filed within 30 days from the date of the decree or order appealed against.

Therefore, if the appellant were to try and bring an appeal now, and if the appeal was against the ruling dated 26/5/2004, such an appeal would be hopelessly out of time.

However, in my considered opinion, an attempt to abandon a portion of an appeal which was already filed cannot be deemed to constitute the lodging of a new appeal.

The respondents did submit that the intended appeal did not arise as a matter of right. As far as they were concerned, the appeal did not fall within the exemptions to Order 42 of the Civil Procedure Rules. It was therefore submitted that the appellant would need to first seek leave of the court to lodge his appeal.

As I have already held, there is already an appeal on record. The memorandum of appeal was lodged

in the High Court on 14<sup>th</sup> June, 2004. And, in so far as the said memorandum of appeal relates to the ruling dated 26/5/2004, it was, prima facie, filed well within the 30 days' period stipulated by section 79 G of the Civil Procedure Act.

As there is an appeal already on record, there is no need for the appellant to seek leave to institute the appeal.

If the respondents believe that the appellant should have sought leave before filing the original appeal, and that the memorandum of appeal is thus irregularly on record, the respondents would need to make an appropriate application to this court, if they were minded to have the record of appeal struck out.

The respondents also submitted that even though the appellant was seeking to run away from the fact that he had lodged two appeals in one, the proposed amendment would still not cure the problem.

The respondents' reasoning was that provided the appeal was still challenging the regularity of the proceedings, that amounted to challenging the judgment.

In my considered view, "proceedings" and "judgment" are not synonymous. "Barron's Dictionary of Legal Terms" defines "proceedings" as;

***"1. the succession of events in the process of judicial action: 2. the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them; the mode of deciding them, of opposing and of executing judgments."***

On the other hand, the same dictionary gives the following definition for the word "judgment";

***"the determination of a court of competent jurisdiction upon matters submitted to it."***

Therefore, whilst judgments are the determination of cases, which occurs only once before any particular court in any one given case, proceedings are the actions undertaken by one or more of the parties to the case, when the case is before the judge or magistrate. When the court puts on record the said actions, such becomes a record of the proceedings, or of the events that took place before the court.

In my view, it is not right to argue, as the respondents herein did, that if the manner in which the proceedings were conducted is challenged, the person challenging the same was necessarily challenging the judgment.

Perhaps the best way of illustrating that point is by reference to judicial review. Lord Brightman expressed himself as follows, in the case of **Chief Constable of the North Wales Police Vs. Evans [1982] 1 WLR 1155;**

***"Judicial Review is not an appeal from a decision, but a review of the manner in which the decision was made."***

In a nutshell, one can challenge proceedings without necessarily challenging the judgment. As to whether or not in this case the appellant will be shown to be challenging not only the proceedings but the judgment, will have to await determination when the matter will have been substantively argued.

But, should the appellant be granted leave to amend his memorandum of appeal, or has he come to court after an unexplained period of inordinate delay?

Pursuant to Order 41 rule 1 B (1) of the Civil Procedure Rules, an appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 8B.

In this case, the court did give directions on 9/3/2006. Thereafter, Order 41 rule 1 B (2) came into play, so that any amendment could only be affected with leave of the court.

Whereas the application for leave to amend the memorandum of appeal was brought some 2 years after the memorandum was filed, I cannot see how that can prejudice the respondent, as the respondent will still have every opportunity to answer the appeal, when it comes up for hearing.

In the result, leave is granted to the appellant to amend his memorandum of appeal. The amended memorandum of appeal shall be filed within the next 14 days.

The costs of the application shall be borne by the appellant in any event, because there is no basis upon which he can seek to pass such costs to the respondents, whether or not the appeal ultimately succeeds.

*Dated, Signed and Delivered at Kakamega, this 26<sup>th</sup> .day of June, 2008*

**FRED A. OCHIENG**

**JUDGE**