

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL 229 OF 2004

DELAMERE ESTATES LIMITED.....APPELLANT

VERSUS

BONIFACE KARIUKI MACHARIA.....RESPONDENT

JUDGMENT

The respondent, Boniface Kariuki Macharia filed suit against the appellant, Delamere` Estates Ltd seeking to be paid damages on account of the injuries that he alleged to have sustained on the 31st of March, 2001 in the course of his employment. The respondent averred that he was injured due to the negligence of the appellant who failed to provide him with a safe working environment and therefore unnecessarily exposed him to risk of injury. The appellant denied the plaintiff's averments in his plaint that he was injured due to the negligence of the appellant.

The appellant averred that the respondent was injured due to his own negligence in that he failed to perform his duties with due care and attention. After hearing the case, the trial Magistrate found the appellant 100% liable for the injuries that the respondent had sustained. The trial court awarded the respondent Kshs.400,000/=, general damages and Kshs.2000/= special damages. The judgment was delivered on the 29th June, 2004.

The appellant was aggrieved by the decision of the trial Magistrate and appealed to this court. The appeal was filed on the 2nd September, 2004. Mr. Juma for the respondent submitted that the appeal herein was incompetent as it was filed out of time without the leave of this court being sought. On his part, Mr. Mongeri submitted that the appellant had filed the appeal pursuant to a consent order that was entered between the parties that the appeal ought to be filed within twenty one (21) days as from the 18th of August, 2004.

I have considered the rival arguments made by the parties to this appeal on this point. **Section 79(G)** of the **Civil Procedure Act** provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order; provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

In the present appeal, it is clear that that the appellant filed the appeal more than thirty (30) days after the time which he ought to have filed the appeal had expired. The appellant did not seek leave of this court to file appeal out of time. The excuse given by the appellant for filing the appeal out of time cannot stand. Parties to a suit cannot by consent agree to circumvent the established procedure of the court that grants this court exclusive jurisdiction to extend time by which an appellant can appeal out of time. From the foregoing, it is evident that the appeal herein is incompetent. It was filed out of time without the leave of this court. The appeal is consequently struck out with costs to the respondent.

The appellant shall be at liberty to file an appropriate application for leave to appeal out of time.

DATED at NAKURU this 18th day of October, 2007.

L. KIMARU

JUDGE