

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 45 of 2006

SAMUEL K. KARANJA.....APPELLANT

VERSUS

RUTH NJERI KAMAU.....1ST RESPONDENT

JOSEPH CHEGE MUIGAI.....2ND RESPONDENT

RULING

The appellant filed a memorandum of appeal dated 15th March 2006. The memorandum that is in the court file was signed by an undisclosed advocate for and on behalf of Susan Kahoya & Company, Advocates for the respondent. The appellant also filed an application by way of a notice of motion seeking stay of execution of the judgment that was passed in **SRMCC No. 69 of 2004** at Nyahururu which gave rise to the appeal herein. The said application was listed for hearing on 20th September 2006. On that day, Mr. Njogu, Advocate for the respondents, raised a preliminary objection in terms of a notice which he had filed on 13th September 2006. The same contained four grounds which are as follows:-

1. The Memorandum of Appeal dated 15th March 2006 and filed on 16th March 2006 was not signed by the appellant's advocates at the time of filing and is therefore not a valid Memorandum of Appeal.
2. The Memorandum of Appeal dated 15th March 2006 as filed and served upon the respondent's advocate is a nullity and the same should be struck out as an abuse of the process of the court.
3. The application dated 16th June 2006 which is based on the said Memorandum of Appeal should also be struck out.
4. Both the Memorandum of Appeal dated 15th March 2006 and the application dated 16th June 2006 should be struck out with costs to the respondent.

Mr. Njogu argued all the above grounds together. He submitted that under **Order VI rule 14** all pleadings are supposed to be signed by an advocate or a recognized agent or by the party if he sues or defends in person and therefore the Memorandum of Appeal that was served upon him on behalf of the respondent violated the aforesaid provision of the law since it was unsigned. When his attention was drawn to the fact that the Memorandum of Appeal that was in the court file was duly signed, he stated that it must have been signed after the notice of preliminary objection was filed. He urged the court to strike out both the appeal and the application dated 16th June 2006. He relied on two authorities which are as follows:- **MUTUKU AND 3 OTHERS VS UNITED INSURANCE COMPANY LTD [2002]1 KLR 250**, where it was held that an unsigned pleading cannot be valid in law. In **JANE W. KAMAU VS KENYA PORTS AUTHORITY** Milimani Commercial Court Civil Case No. 1575 of 1999 (unreported) the court struck out a plaint which was unsigned.

Mr. Mungai for the appellant told the court that the Memorandum of Appeal was signed by one Alice Mugo, an Advocate who was at the time employed by the firm of Susan Kahoya and Company which was on record for the appellant. He denied Mr. Njogu's assertion that the Memorandum was signed after the

notice of preliminary objection was filed. He further submitted that the preliminary objection was improper and did not conform to the requirements of a preliminary objection as stated in **MUKISA BISCUIT MANUFACTURING COMPANY LTD VS WEST END DISTRIBUTORS LTD [1969] EA 696**. In his view, the authorities cited by Mr. Njogu were distinguishable from the position in this case because the Memorandum of Appeal that was in the court file was duly signed, just as the copy that he had retained.

I have considered the submissions that were raised by both counsel as above stated. It is not in dispute that the Memorandum of Appeal that is in the court file is duly signed for and on behalf of the appellant's advocate. It is also not in dispute that the Memorandum of Appeal that was served upon the respondent's advocate was unsigned. However, I do not agree with Mr. Njogu that the Memorandum of Appeal in the court file was signed after he filed the notice of preliminary objection. I say so for two reasons. First, when the appellant's application dated 16th June 2006 was brought before this court on the 19th June 2006 so that the same could be certified as urgent and be given an early hearing date, it was clear to me that the Memorandum of Appeal was already signed. That was long before the application was served upon the respondent. Secondly, a copy of the Memorandum of Appeal was annexed to an application dated 4th September 2006 that was filed by counsel for the appellant. The copy of the Memorandum of Appeal that was annexed was duly signed. The counsel for the respondent filed his notice of preliminary objection on 13th September 2006 and it is therefore inconceivable how the Memorandum of Appeal could have been signed after the filing of the preliminary objection. It was unfortunate that the appellant's counsel was not diligent enough to ensure that the Memorandum of Appeal that was served upon the respondent's counsel was signed. That omission cannot invalidate an otherwise valid Memorandum of Appeal as the one on record. If the Memorandum of Appeal that was filed had not been signed, I would have no hesitation in striking out both the appeal and the application for stay of execution as prayed by the respondent's counsel. The mistake by the appellant's counsel can be compensated by an award of costs payable to the respondent's counsel. I therefore overrule the preliminary objection and order the appellant to pay costs of Kshs.2,000/- to the respondent's advocate before the application dated 16th June 2006 is heard.

DATED, SIGNED and DELIVERED at Nakuru this 11th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Kahiga holding brief for Mr. Njogu for the respondent and Mr. Nyamwange holding brief for Susan Kahoya for the appellant.

D. MUSINGA

JUDGE