



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

**CIVIL APPEAL NO.97 OF 2002**

**ELYASA ARAP MUTWOL ..... APPELLANT**

**-VERSUS-**

**HENRY CHEPNYONYEI KIMWEI..... RESPONDENT**

**RULING**

At the hearing of the appeal on 12th April 2005 Mr. Ngala raised objections that he was served with a hearing notice for the appeal while he is not a party to the appeal. That he received the hearing notice under protest. He submitted that as the third party in the lower court was not joined as a party in the appeal, no orders can be validly made by the court against him. In addition, any appeal against the third party should have been filed within 30 days as provided for under section 9G of the Civil Procedure Act (Cap.21). There was no compliance with that requirement. Thirdly, both the appellant and respondent know that on 23rd July 2002, the third party was discharged from the proceedings in the lower court. No appeal was filed from the court's order either by the appellant or respondent.

Mr. Mwetich opposed the objections. He submitted that the appeal was filed within 30 days. The appeal was against the judgement of the lower court which was given on 10th September 2002 and which touched on the third party. He is therefore a party to this appeal. He also submitted that he can amend the memorandum to include the third party as a party in the appeal. He therefore asked for leave from the court to amend the memorandum of appeal and include Mr. Ngala as a respondent.

I have considered the arguments on both sides. I have also perused the documents in the record of appeal. The memorandum of appeal lists Elyasa Arap Mutwol as the appellant and Henry Chepnyonyei Kimwei as the respondent. The third party in the lower court David K. Ngala is not listed as a party. However, the grounds of appeal attack the magistrate's decision with respect to the order discharging Mr. Ngala who was the third party in the lower court. From the proceedings in the lower court Mr. Ngala was discharged on 23rd July 2002. No appeal was filed in respect of the magistrates order. This appeal is specifically on the judgement that was delivered by the court on 10th September 2002, and not the ruling of 23rd July 2002.

Now, was it right for the applicant to summon Mr. Ngala to appear in court as a party at the hearing of the appeal? In my view, proceedings in court are between parties. The parties in the appeal are Elyasa Arap Mutwol as appellant and Henry Chepnyonyei Kimwei as respondent. Mr. Ngala was not listed as a party and he cannot be presumed by counsel for the appellant to be a party by the mere fact that he was involved as a third party in the proceedings in the magistrate's court. If the appellant wanted Mr. Ngala to be a party to the appeal, he should have listed him as a party in the appeal. Probably the appellant did not list Mr. Ngala as a party in the appeal because at the time that the judgement was delivered on 10th September 2002, Mr. Ngala was no longer a party as he had been discharged on 23rd July 2002. No appeal was filed against that order by either the plaintiff or the defendant. No appeal has been filed to date

against that order. Mr. Ngala should therefore not have been served with notice for the hearing of the appeal. In this regard I rely on the provisions of Order 41 rule 11 Civil Procedure Rules which provides as follows –

“11. Notice of the day fixed for hearing of the appeal shall be served on the respondent or on his advocate in the manner provided for the service on a defendant of a summons to enter appearance; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.”

It is apparent from the contents of the memorandum of appeal that Mr. Ngala was served because the contents of the memorandum of appeal seek orders against him. In my view, it would be wrong for a court to issue orders against a person who is not a party to proceedings. The law recognizes the parties and who have legal audience to be heard and pursue their cause in court. Mr. Ngala has come to court in person. But suppose he appointed an advocate to appear for him, which party would that advocate be representing in the appeal as Mr. Ngala is not a party. It is apparent from the memorandum that the appellant is appealing against the orders of the court of 23rd July 2002, without specifically stating so. Those orders were not appealed from within the 30 days as require by law. No leave to appeal out of time was obtained. Secondly, Mr. Ngala is not a party to this appeal. In my view, any orders sought against Mr. Ngala who is not a party to the appeal cannot be granted in the appeal. I agree with Mr. Ngala’s submissions that no orders should be made affecting him.

Counsel for the appellant has requested that he be allowed to amend the memorandum of appeal and join Mr. Ngala as a party in the appeal. I am aware of the provisions of Order 6A rule 8 Civil Procedure Rules that the court may hear and determine an oral application for amendment of pleadings. However, it has taken from 2002 to come and make the application for amendment on 12th April 2005 when the appeal had actually come for hearing. Secondly, and more importantly, any appeal against the order discharging Mr. Ngala as third party on 23rd July 2002 is statute barred. The amendments allowed under Order 6A of the Civil Procedure Rules are required to be done within the framework of the law and in the interests of justice. Allowing the joining of Mr. Ngala as a respondent will be tantamount to allowing an appeal out of time for the lower court’s ruling of 23rd July 2002, while no leave has been sought and obtained for appealing against that order out of time. That would be contrary to law and also not in the interests of justice and cannot be allowed by this court.

In the result I uphold the objections of Mr. Ngala and order as follows: -

1. That Mr. Ngala is not a party to the appeal and should therefore not have been served to appear in court in the appeal.
2. That as Mr. Ngala is not a party to the appeal, no orders can be made in this appeal against him.
3. That the request to amend the memorandum of appeal to include Mr. Ngala as a party in the appeal is declined.
4. That the appellant will pay Mr. Ngala costs of the appeal, which if not agreed will be determined by the Deputy Registrar.

**Dated and Delivered at Eldoret this 10th Day of May 2005**

**George Dulu**

**Ag. Judge**

**In the Presence of:**

**M/S. Wambua for respondent**

**N/A for appellant**

**N/A for Ngala**