



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL NO. 25 OF 1998

**ZEDEKIAH M.
MWALE:.....:APPELLANT**

VERSUS

BIKEKE FARM DIRECTORS

**SAMWEL S. CHEMEI :.....:
RESPONDENTS**

R U L I N G.

This appeal was fixed for hearing 9/6/2004. on that day, Mr. Kidiavai who appeared for the Respondent raised a preliminary objection.

The court heard the P/O but Mr. Kiarie for the applicant who had not been given notice of the nature of the P/O asked to be allowed time to prepare his reply. He replied on 14/6/2004 and the matter was reserved for ruling.

This is the ruling to that preliminary objection. The first issue raised was that this court has no jurisdiction to entertain the appeal as the same is asking the court to review and set aside the decree of 7/10/97.

This decree arose out of an application filed by the appellant herein asking the court to review an award of the Elders filed in court pursuant to sec. 7 of the Land Disputes Tribunal Act.

Mr. Kidiavai's argument is that no review is allowed against a judgment adopted by the court from the L.D. Tribunal.

Mr. Kiarie argues however that it is proper to seek a review on such a judgment.

In my view however, since this appeal has already been committed for hearing, it will not be in order for me at this preliminary stage to find that there are no triable issues. If were to uphold Mr. Kidiavai's submission at this stage I will be in effect vacating the earlier order admitting the appeal to hearing. I will not therefore make any finding on that point.

The other two issues raised were that there was no certified copy of the decree in the memorandum of Appeal as required by OXLI r. 1A. The said rule provides thus

*“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 if 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.”

My emphasis here will be on the words “decree or order”. I was addressed at length on this issue. We are all in agreement here that even the copy of the decree in the supplementary record of Appeal is not certified. I note that this supplementary record of Appeal was allowed to be put in by consent of both parties on 11/7/03. The respondent’s counsel must therefore be aware of its contents.

I agree that it is necessary that a certified copy of a decree be put in the memorandum of appeal at any time before the appeal is heard. If the appeal starts before the certified copy of the decree is made part of the record, then such an appeal must be struck out. This is the position in law as clearly spelt out in the case of

“Joseph Nderitu Githinji vs Esther Wanjiru Githinji – Civil Appeal No. 47/1998.

This position was adopted by Commission of Assize – Mr. P.K.K.A Birech in his ruling in civil appeal No. 47/97 – Michael Ngania vs Elphas Munyolmo.

If therefore this court were to find that there was no certified decree or order as at 9/6/2004 when the appeal came up for hearing then I would definitely strike out this appeal.

As stated earlier however OXLI r.1A refers to decree or order. Whereas we are all in agreement that the decree herein is not certified the supplementary record of Appeal has an order that is certified. This in my considered view does not flout the provisions of OXLI r1A. as it clearly refers to a certified copy of a ‘decree’ or order’.

Mr. Kidiavai did not unfortunately say anything about that order. His objection on that point must therefore fail.

This leaves us with the point that the appeal was filed out of time and without the leave of the court.

I have gone through the records herein. – I note that the ruling which aggrieved the appellant was delivered on 26/5/98 by the learned trial magistrate – Mrs. Mutende. The appeal against it as per the memorandum of appeal is dated 19/6/98 – although it is court stamped 18/6/98.

This was definitely within the appeal period prescribed by law.

Further, it is noted that although under OXLII r.1 (1) 99 only XLIV r.3 appears, this rule is the one under which applications made under OXLIV r.1 are made. r.3 is the one that deals with situations where applications for review under OXLIV r.1 are either granted or rejected.

The appellant herein did not therefore need to apply for leave to appeal either in the subordinate court or in this court.

From the foregoing, it is evident that this appeal is properly before the court. I consequently dismiss the preliminary objection with costs to the appellant.

WANJIRU KARANJA

AG. JUDGE

17/6/2004

DELIVERED, DATED AND SIGNED AT KITALE THIS DAY OF JUNE,
2004 IN PRESENCE OF: