



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 90 OF 2004

POSTAL CORPORATION OF KENYA APPLICANT

VERSUS

JOB GACHENGE NJAGI RESPONDENT

RULING

This is an application brought under Order L Rule 1 of the Civil Procedure Rules, Section 3A and 79G of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of Law and Procedure; in which the Applicant/Respondent seeks:

“(a) That this appeal be struck out with costs to the Respondent

(b) That Kenya Commercial Bank Ltd be ordered to pay a sum of Kshs.2,000,000/= to the Respondent in terms of the bank guarantee dated 7 th June, 2004 and filed in court on 10 th June, 2004.

(c) That the costs of this application be borne by the Appellant.”

The application was supported by the affidavit of the Respondent sworn on the 11th August, 2004. Mr Ombati, Counsel for the Respondent, submitted that the appeal herein was filed out of time, without leave, and without any explanation of the delay.

Counsel for the Appellant explained that the reason for the delay was caused by the lower court to produce certified copies of the proceedings. It is evident that Judgment was delivered on the 4th of November, 2003 and the Appellant filed a “Notice of Appeal” on 6th November, 2003, and then applied for the decree and order of the court on 5th December, 2003. The Memorandum of Appeal was filed in court only on 16th February, 2004, more than two months past its due date, and without leave of this Court.

Section 79 G of Cap 21 under which the application is made provides as follows:

“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.”

Clearly, the appeal was filed out of time, on 16th February, 2004. The “notice of appeal” is an invalid

document, as the only way in which an appeal is commenced in the High Court, is by way of a Memorandum of Appeal [See Order 41 Rule 1 (1)].

There has been no application made to have the appeal admitted out of time, hence, there is no competent appeal before this Court. The Appellant's argument for not filing the Memorandum of Appeal in time is that it had applied for, and was awaiting, certified copies of proceedings.

The Appellant did not require copies of the proceedings to lodge his appeal. All he required was a certified copy of the decree or order sought to be appealed from. Even in that case, Order XLI Rule 1 A of the Civil Procedure Rules provides that the certified copy of the decree or order may be filed later.

Accordingly, the appeal herein being incompetently before this Court, is hereby struck out, with costs to the Respondent.

Dated and delivered at Nairobi this 1st day of November, 2004.

ALNASHIR VISRAM

JUDGE