



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 394 OF 1999

DANIEL CHEGE MWANGI APPELLANT

VERSUS

DEL MONTE KENYA LTDRESPONDENT

RULING

When this appeal came up for hearing on 28th January, 2002, counsel for the respondent raised an objection to its hearing submitting that there was no formal order extracted of the decision intended to be appealed from as required under Order XLI rule 1(a), 8(b)(4) and 28 of the Civil Procedure Rules.

According to counsel, upto the date of the submissions, no decree had been filed and that the order of 2nd September, 1999 had not been extracted in this appeal.

Counsel submitted that appeals to court are on orders and not rulings and that a ruling alone does not form an order and is incapable of being appealed against.

Counsel submitted that the record was incompetent and should be struck out with costs.

Counsel for the respondent replied that this objection to the record was too late and that all that was required to be done was so done in form of a supplementary appeal.

According to counsel and objections must be raised at the right time otherwise, they should be raised at hearing of the substantive appeal.

He replied that there is no provision for extraction of an order under Order XLI (1)(a) of the Civil Procedure Rules.

Counsel said the appellant was appealing against the ruling of the Magistrate and the court should reject the objection raised.

The appeal arose from the ruling of Mrs. Ougo, Senior Resident Magistrate delivered on 2nd September, 1999 wherein she made a conditional order setting aside an exparte judgement entered for the respondent against the appellant on 25th November, 1997.

The condition the learned Magistrate included were that the appellant files a defence within 15 days of the order and that he deposits half of the decretal amount in court in a joint account in names of both counsels within 21 days from the date of ruling.

She added that if the defendant failed to comply with the orders the same to lapse and to be vacated.

The appeal is against that ruling. Perusing through the court file, there is an order dated 23rd January, 2001 wherein directions were taken to the effect that the appeal was to be heard at Nairobi before one Judge and for one day. That the appeal was to be listed for hearing at the next call over.

I am quite sure by that time the record of appeal had been prepared filed and served upon the respondent.

What counsel for the respondent raises in this so called objection, where no notice was given, could as well have been raised at the directions stage other than wait when the appeal has been called on for hearing to raise them.

On the other hand, these issues could as well have been raised during the submissions on the merits of the appeal so as to be considered alongside other submissions made therein other than considering the issues piecemeal.

I am not convinced I should end this appeal so prematurely or the submissions made on this objection and would rather have the appeal heard on merit and full and exhaustive submissions made thereon.

That there is or no order or decree extracted from the ruling of the Magistrate now in dispute in this appeal is neither here nor there as the appeal makes sense in its present form.

Relevant documents relating to the ruling in dispute are on the file and make sense such that the appellate court can decide the appeal without much difficulty.

I dismiss this objection with costs.

Delivered this 19th day of February, 2002.

D.K.S AGANYANYA

JUDGE