



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 95 OF 2018

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST APPELLANT

LEAKEY'S AUCTIONEERS.....2ND APPELLANT

-VERSUS-

BONIFACE K. MWEGA.....1ST RESPONDENT

SARAH BONIFACE.....2ND RESPONDENT

RULING

1) The subject matter of this ruling is the Notice of Preliminary objection dated 24th January 2019 in which the respondents sought for the appeal to be struck out on the following grounds

i. THAT the appeal is bad in law as the appellants failed to file a Notice of Appeal.

ii. THAT this appeal is an abuse of the court process and an afterthought by the appellants and it offends the requirements of the appellant to file a record of appeal within the stipulated time therefore offending Section 79G and Order 50 rule 6 of the Civil Procedure Rules.

iii. THAT the appellants appeal is brought in bad faith as they filed their record of appeal on 11th May 2018 which is over ninety (90) days since the honourable court delivered its ruling on the subject matter of the suit contrary to Section 79G of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules.

iv. THAT the appellants failed to move the court for the extension of time after the lapse of the time or to seek leave to file the record of appeal out of time at the same time of filing the Record of Appeal and only produce a certificate of delay.

v. THAT there has been inordinate delay in filing the record of appeal and a lot of time has passed since the issuance with the certified copies of proceedings and ruling on the 17th April 2018.

vi. THAT the appellants have not accorded this honourable court with an explanation as to the reason that they waited until 11th May 2018 to file the record of appeal after obtaining the typed record on the 17th day of April 2018.

vii. THAT the appellants failed to act zealously in complying with the law of filing a notice of appeal within the stipulated time and have neglected and/or refused to file the said notice of appeal till to date.

viii. THAT the actions of the appellants are inexcusable and the respondents will suffer prejudice if the appellants record of appeal is admitted having been filed out of time.

ix. THAT the delay moreover provides further evidence of the appellants casual, cavalier and leisurely manner in handling the matter.

x. THAT the appeal filed by the appellants is incurably defective and incompetent and should be struck out with costs.

2) When the Preliminary Objection came up for hearing, learned counsels appearing in this matter recorded a consent order to have the same

disposed of by written submissions.

3) I have considered the grounds stated on the face of the Notice of Preliminary and the rival written submissions. The background of this matter is largely straightforward. On 23rd January 2018, Hon. Mburu, learned Principal Magistrate issued an order of injunction to restrain the appellant herein from transferring, selling off through an auction or other means **L.R. No. Ngong/Ngong/43218 Emmanuel Area-Kiserian-Kajiado** pending the hearing and determination of Nairobi C.M.C.C.C. no. 41 of 2018. The same court also restrained the appellants from treating the sum of kshs.600,000/= as a loan and or bank overdraft and from charging interest. The appellants were aggrieved hence they preferred this appeal by filing the Memorandum of Appeal dated 20.2.2018.

4) Having set out in brief, the background of this appeal, let me now determine the merits or otherwise of the Preliminary Objection. Though the respondents have put forward a total of 10 grounds in their Preliminary Objection, those grounds may be summarized to two main grounds. **First** is whether the appellants ought to have filed a notice of appeal.

Secondly, whether the appellants' record of appeal was filed out of time and whether the appellants ought to have sought for leave to file the same out of time.

5) On the first issue, the respondents are of the submission that

the appellants failed to file a notice of appeal hence their appeal should not be deemed as properly filed hence, this court lacks jurisdiction to entertain the appeal.

6) The appellants are of the submission that there is no

requirement for an appellant to lodge a notice of appeal before filing an appeal before the High Court. I have carefully perused the provisions of Order 42 rule 1(1) of the Civil Procedure Rules, 2010, and it is clear that an appeal to the High Court shall be in the form of a memorandum of appeal.

7) The appellants herein filed a memorandum of appeal hence this appeal is properly before this court. The first ground therefore lacks merit.

8) The second ground is to the effect that the appellants filed a record of appeal out of time. The respondents urged this court to find that the appellants having failed to seek for leave to file the record of appeal out of time, the appeal is incompetent. The respondent cited the provision of 79G of the Civil Procedure Act. They pointed out that the appeal was filed on 11.5.2018, more than 90 days from the date of delivery of the ruling.

9) The appellants urged this court to reject the respondents'

submissions to be without any foundation arguing that the memorandum of appeal was filed within the statutory time therefore there was no need to seek for leave to file an appeal out of time. The appellants further pointed out that no time limit was fixed for a party to file a record of appeal.

10) I have considered the rival arguments and with respect, I agree with the appellants' submission that there is no time limit for a party to file a record of appeal. It is clear from the record that the memorandum of appeal was filed within a period of 30 days prescribed under section 79G of the Civil Procedure Act.

11) In the end, I find no merit in the Notice of Preliminary objection.

The same is ordered dismissed with costs to the appellants.

Dated, Signed and Delivered at Nairobi this 18th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent