



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCA NO 130 OF 2017**

**ABEDNEGO KATELO KYAU.....APPELLANT**

**-VERSUS-**

**BERNARD MUTUA NDOLO.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon. M.M. Nafula (SRM) in the Senior Resident Magistrate's Court at Tawa, Civil Case No.137 of 2013, delivered on 4<sup>th</sup> July 2010).*

**JUDGEMENT**

**INTRODUCTION**

1. The Respondent filed a suit in the lower Court seeking payment of Ksh.100,000/=, Special Damages, Costs of the suit and Interest at commercial rates. His case was that he had purchased some timber from one Jacob Kilonzo and after sawing them, the appellant confiscated the timber without color of right.
2. The Appellant filed his defense and made a counter claim of Kshs.50,000/=. The matter was eventually slated for hearing.
3. Judgment was eventually entered in favor of the Plaintiff for the payment of Kshs.80,000/= plus costs and interest.
4. Aggrieved by the judgment, the Appellant filed this appeal and listed 6 grounds which I have paraphrased and condensed to the following 3 grounds;

a) ***THAT the Learned Magistrate erred in law and misdirected herself on the facts by failing to consider that there was no binding agreement between the Appellant and Respondent for payment of any money and that indeed the respondent was a witness to the agreement dated 24<sup>th</sup> May 2012 and thus lacks capacity to sue the Appellant.***

b) ***THAT the Learned Magistrate erred in law by failing to consider that the Respondent did not produce any document to prove ownership of land parcel No Makueni/Uvuu/869 and thus lacked capacity to benefit from the said land. That trees were cut from the aforesaid land parcel but not from Uvuu adjudication 6... which belongs to Jacob Kilonzo.***

c) ***THAT the judgment is against the weight of the evidence, contrary to the law of contract and a travesty of justice.***

5. Directions were given that the appeal be canvassed by way of Written Submissions. The parties complied and filed their respective submissions.

**SUBMISSIONS**

6. The Appellant submits that he was not a party to the agreement dated 24<sup>th</sup> May 2012 and as such, it was not binding on him.
7. That the Respondent bought pieces of timber from a third party but the timber was on his land. That the Respondent was out to extort money from him.
8. In opposing the appeal, the Respondent was represented by learned Counsel Mr. Muema. He submits that the appeal is incompetent for want of leave to file it out of time. That judgment was delivered on 27/04/2017 and the appeal was lodged on 02/06/2017, thirty five days after delivery of judgment.

9. He relied on **Patrick Kirunja Kithinji –Vs- Victoria Mugira Martete CA 48/2014 (2018) eKLR** where the Supreme Court’s decision in **Hon. Lemanken Aramant-Vs-Harun Mutembei Lempaka & 2 Others** was cited with approval.

10. The Supreme Court held that time prescribed for lodging appeals is substantive and goes to jurisdiction and cannot be cured by Article 159(2) of the Constitution as it is not a technicality.

11. The same position, it was submitted, was taken by the Court of Appeal in **Ramji Devji Vekaria –Vs- Joseph Oyula Eldoret CA No. 154/2010.**

12. Further, he submits that just in case the Court entertains the appeal, the issue in the lower Court was a liquidated claim on an agreement and that the Appellant was not the owner of the subject land.

13. That the owners of parcel No. 869 Uvuu adjudication were Mule Kitoo Kinguta and Musau Kitoo Kinguta. That Jacob Kilonzo had purchased a portion from the aforesaid owners and had planted trees which he eventually sold to the Respondent. He urged the Court to dismiss the appeal

14. Before taking one more step, I will interrogate the competence of this appeal.

#### **COMPETENCE OF THE APPEAL**

15. I have confirmed from the record that indeed the appeal was filed 35 days after delivery of judgment and no leave was ever sought to admit it out of time.

16. Section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya provides that appeals from decrees or orders of the lower Court to the High Court should be done within 30 days from the date of the decision or order.

17. The proviso thereof permits admission of the appeal out of the statutory period where there is sufficient or good cause as to why there was delay in such filing.

18. My interpretation of the proviso is that a party intending to appeal out of time must move the Court and place sufficient material before it to demonstrate why such leave should be granted.

19. There is therefore no room for the Court to grant such leave *suo motu* regardless of the length of delay like in this case where the delay was only for 5 days.

20. I took the liberty of going through the entire record and my considered view is that the appeal has no chances of success. The forgoing plus the binding decision of the Supreme Court in the **Harun Mutembei case (supra)** leads to the inevitable conclusion that the appeal herein is incompetent and cannot stand. The prior admission was erroneous and inconsequential.

#### **CONCLUSION**

21. The court holds that the appeal was filed out of time thus cannot stand.

22. The court therefore makes the following orders:-

**i. The appeal is struck out for being incompetent.**

**ii. Costs to the Respondent.**

**SIGNED, DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF NOVEMBER 2018, IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**