



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. 25 OF 2012

J G W.....APPELLANT

VERSUS

T W.....RESPONDENT

RULING

1. The Applicant J G W by a Notice of Motion dated 4th January, 2017 brought under **Order 45 rule 1(a) Civil Procedure Act**, seeks the following orders:

(i) That the honourable court be pleased to review and/or set aside the order of summary dismissal of the appeal allegedly made on 7th March, 2016.

(ii) That the honourable court be pleased to give such further or better reliefs as it may deem just and expedient.

(iii) That costs of this application be provided for.

2. The application is based on the affidavits of J G W the applicant and Joshua Magee Wa Magee Maina and the following grounds;

(a) That there are errors apparent on the face of the record.

(b) That there are sufficient reasons to warrant a review of the said order.

(c) That it is in the interest of justice that the application herein be allowed.

(d) That the respondent will not suffer any prejudice should the application be allowed.

3. The applicant's case is that he had filed Kerugoya SPMCC No. 136/2011 seeking the dissolution of the marriage between him and the respondent herein T W who had deserted the matrimonial home for more than 15 years. The suit was dismissed whereupon he instructed his advocate to file an appeal on his behalf. The appeal was filed being Kerugoya H.C.C.A. 25/2012 on 30th November, 2012. The advocate paid a deposit of Ksh.500/- for proceedings and judgment on 16th November, 2012. Thereafter he was informed by his advocate that the file for the lower court and the High Court could not be traced. The advocate wrote to the Deputy Registrar to seek assistance vide letter dated 13th September, 2016. On 7th November, 2016 the advocate was informed that the files had been traced. Upon perusing the file the advocate found a printed form with no handwritten notes purporting to be an order dismissing the appeal under **Section 79B of the Civil Procedure Act** dated 7th March, 2016, annexure JGW -1-.

4. According to the applicant the purported order does not indicate when the lower court file was forwarded to this Court. The date on the order had been altered from 7th August, 2016 to 7th March, 2016 and there was no counter signature. The name of the judge was not indicated. There were no reasons given for dismissal. The order was not served on the advocate of the applicant. That it is clear that in the interests of justice the application be allowed.

5. The advocate Joshua Wa Magee Maina reiterates the averments deposed by the applicant. He annexed the Memorandum of Appeal annexure JMM-2, the letter he wrote seeking assistance from the deputy registrar, JMM-3, letter applying for certified copies of proceedings and judgment annexure JMM-4 and the certified copies of proceedings and judgment annexure JMM-5.

6. The Respondent filed grounds of opposition dated 7th February, 2017 contending that the application is vexatious and an abuse of court process. It is filed out of time. That the orders sought are incapable of being executed.

7. The issue for determination is whether the application has merits. The application is brought under **Order 45 rules 1 (a) Civil Procedure rules** which provides:

“Any person considering himself aggrieved-

By a decree or order from which an appeal is allowed but from which no appeal has been preferred”

And who from the discovery of new and important matter or evidence....., or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.”

8. According to the applicant, there is an error apparent on the face of the record as he had filed the appeal in time but the files for High Court and Lower Court could not be traced. Eventually when the files were traced the appeal had been dismissed under Section 79B of the Civil procedure Act. There was no indication as to when the lower court file was brought to this Court. The appeal had been filed within time. **Section 79B Civil Procedure Act** provides that:

“Before an appeal from a sub-ordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with a decree, part of a decree or order appealed against, notwithstanding section 79C, reject the appeal summarily.”

9. From the record, the appeal was filed on 30th November, 2012. The appeal was filed within time as judgment was entered on 1st November, 2012. Annexure ‘JMM6’ the printed document showing the appeal was summarily rejected does not show the date when the lower court record was received. It indicates that the file was submitted for perusal on 7th March, 2016. The same date the appeal was summarily rejected. The date when the judge is alleged to have signed the order bears two dates. One is cancelled and not signed against. There are no hand written proceedings by the judge.

10. It is my considered view that the proceedings are marred with irregularities, that is delay, files could not be traced, it is not clear who is the judge who signed the order as there are no handwritten proceedings in the file, and the order was not served on the applicant.

The order could not have been issued without the record of the lower court file.

11. There are errors apparent on the face of the record upon which the court should order a review of the order in favour of the applicant. The court has discretion to order a review.

12. According to the applicant he has an arguable appeal which the judge was supposed to hear and determine on merits. The applicant relies on the case of **Timsales Ltd -V- Stanley Njihia Macharia H.C. Nakuru C.A. No. 148/2005** where it was held;

“the court can entertain the application for review of the order for summary rejection.

“That the power of summary dismissal should be used sparingly and only in the clearest cases such an appeal based entirely on points of facts raising no questions of law and not as the case was here where the memorandum of appeal raised substantial grounds of law such as of adverse possession.”

13. In the case of **Philip Ochilo -V- Ambrose Seko C.A. Kisumu C.A. No. 53/1984** it was held:

“Section 79B of the Civil Procedure Act empowers a judge of the High Court to peruse the record of an appeal from the sub-ordinate court and if he considers that there is no sufficient ground for interfering with the decree or order appealed against he may reject the appeal summarily. The power should be used most carefully and as was stated in Peter Nzioki & Kivilu Musimi –V- Kitusa C.A. no. 54/1982 (unreported) only in the clearest case such as an appeal based wholly on matters of fact upon which proper findings will have been made.....The summary rejection of the appeal was erroneous.”

The court went on to hold that the case falls within **Section 80(a)** of the **Civil Procedure Act**. In this case there was no appeal against the order of summary dismissal as the order was not served on him or his advocate. From the above holding, the party is empowered to file application for review under **Section 80 Civil Procedure Act**.

14. The applicant’s contention is that there was an error apparent on the face of the record. This he has proved. **Section 80 supra** deals with review. **Order 45 rule 1(a)** provides for review on various grounds as stated above. The two provisions confers the discretion on the court to review the judgment.

15. There were no reasons given as to why the appeal was summarily rejected if at all it was made by the judge. I have perused the memorandum of appeal and the judgment of the lower court. I am of the view that there were sufficient grounds to allow the appeal to go to hearing. The applicant has submitted that the judgment was against the weight of the evidence and the magistrate erred both in law and in fact. It was the right of the applicant to know why the appeal was summarily rejected. There were irregularities as the files could not be traced and when they were traced the appeal had been dismissed without giving any reasons.

16. In the case of **Michael A. O. Mashere -V- Rotas Makotha Walubala, Court of Appeal Kisumu C.A. No. 95/85** it was held:

“But the essence of the observations is that power to summarily reject appeals must be sparingly used and only in the clearest cases. A sparing use can indeed only refer to rejection in the clearest of cases of fact and law. So the spectrum is narrow. In this case during an interlocutory ruling, this court said that the power to reject is a power which should be sparingly exercised. That then is the basis on which this court has already approached this problem, and it would be insidious now to depart from that standard.”

The memorandum of appeal has raised issues of law and facts which can be determined upon hearing of the appeal.

17. The applicant filed this application without undue delay upon realizing that the appeal was summarily dismissed. As held in the above authority, the power in **Section 79B** is not to be exercised to oust the appellants’ constitutional right of appeal.

18. Though the respondent had filed grounds of opposition, she conceded at the time of hearing that she

has no objection to the appeal being heard. I am of the considered view that the application has merits. I allow the application and order that the order dated 7th March, 2016 is reviewed and set aside. It is substituted with an order admitting the appeal for hearing. The appeal will be listed for hearing. The costs to abide the outcome of the appeal.

Dated and delivered at Kerugoya this 10th day of March, 2017.

L. W. GITARI

JUDGE

17.3.2017

Coram: L. W. Gitari J.

Mr. Magee for Applicant

Respondent present

Court Assistant Naomi Murage

ORDER: The Court was not sitting on 10th March, 2017. The ruling has been read out in open court in the presence of Mr. Magee advocate for the applicant, the respondent and court assistant Naomi Murage.

L. W. GITARI

JUDGE

17.3.2017