



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL APPEAL NO. 12 OF 2019

PAUL GITAU MUCHINA.....APPELLANT/RESPONDENT

(Suing on behalf of the Estate of Regina Muthoni Gitau (Deceased))

VERSUS

HON. ATTORNEY GENERAL 1ST RESPONDENT

JOSEPHINE KABURA GICHUHI 2ND RESPONDENT/APPLICANT

(Being an Appeal from the judgment of the Chief Magistrate's court at Thika Hon. M. W WANJALA delivered on 8th February 2019)

PAUL GITAU MUCHINA PLAINTIFF

(Suing on behalf of the Estate of Regina Muthoni Gitau (Deceased))

VERSUS

HON. ATTORNEY GENERAL 1ST DEFENDANT

JOSEPHINE KABURA GICHUHI2ND DEFENDANT

RULING

This Appeal was filed by the Appellant herein **Paul Gitau Muchina** on **14th February 2019**. The Appellant being dissatisfied with the Judgment and subsequent orders of **Learned Principal Magistrate M. W. Wanjala** delivered on **8th February 2019** in **Thika Civil Case No. 687 of 2010**, appealed to this Honourable Court against the whole decision on 12 grounds as set out in the Memorandum of Appeal.

The Respondent herein filed this instant Notice of Motion application dated **18th July 2019**. The Application is brought under the provisions of **Section 79B, 1A(3), 1B(d)** of the Civil Procedure Act, **Order 42 Rule 11** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**.

The said Notice of Application is seeking for Orders:-

- a) That this Honourable court be pleased to summarily reject the Appeal herein under Section 79B of the Civil Procedure Act as read together with Order 42 Rule 11 of the Civil Procedure Rule.***
- b) That ALTERNATIVELY this Honourable court be pleased to dismiss the Appeal for want of prosecution.***
- c) That the cost of this application and the entire Appeal as well as the lower court be awarded to the applicant.***

The application was based on several grounds:-

- 1) That at all material times the applicant owned plot LR No. Ruiru/Mugutha Block 1/T559.***
- 2) That the same property was claimed by the Respondent who alleged that the said property was allocated to his deceased wife by Nyakinyua Investment Limited.***

- 3) That on 15th June 2010, the Respondent filed Thika CMCC No. 687 of 2010 asking the Court to declare that the suit property belonged to the Estate of the Respondent's wife one Regina Muthoni Gitau (deceased) and that the name of the applicant be cancelled from the register.
- 4) That the suit property was registered in the name of the applicant and she had a genuine title document to the property.
- 5) That the Respondent also held a title which was in his deceased wife's name.
- 6) That the court found that the document leading to the issuance of the title to the Respondent wanting as the ballot paper produced by the Respondent was for one acre plot and not for one quarter of an acre plot.
- 7) That on 8th February 2019, the court dismissed the Respondent's suit and allowed the Defendants counter-claim.
- 8) That on 14th February 2019, the Respondent filed the present Appeal.
- 9) That it is now four months and the Respondent has not moved the court for directions as required under Order 42 Rules 11, 13 (1) as read together with Section 79B of the Civil Procedure Act.
- 10) That 30 days are long gone since the Appeal was filed and it is now clear that the Respondent has no intentions of prosecuting the Appeal.
- 11) That it is fair that the Appeal should be dismissed.

The application was supported by the Affidavit of the **Josephine Kabura Gichuhi**. She reiterates the contents of the Application and urged the court to dismiss the Appeal.

The Application is opposed and **Paul Gitau Muchina**, filed a Replying Affidavit on 18th September 2019, and averred that the application herein is baseless, has no merits and it is an abuse of the court process. He further stated that it was only the **Memorandum of Appeal** that had been filed and was awaiting issuance of typed certified proceedings, Judgment and certified copy of the decree so as to enable the filing of the Record of Appeal. The Appellant herein further averred that the instant application can only be brought after the requirements of **Order 42** of the Civil Procedure Rules, 2010 has been complied with. He stated that the delay in filing the Record of Appeal was occasioned by the Registry issuing the decree. He stated that the Advocate representing him is awaiting for a certified copy of the decree to enable them file the Record of Appeal.

He further averred that **Section 79B of the Civil Procedure Act** in which the instant application has been brought under cannot stand since **Order 42 Rule 2** is clear that where a certified copy of decree has not been filed, the court cannot consider summarily dismissing the Appeal under **Section 79B of the Civil Procedure Act**. It was his contention that that the requirements of **Order 42 Rule 11** of the Civil Procedure Rules are only applicable where an Appeal has been filed. He stated that on their case, the Appeal is not complete as the requirements under **Order 42 Rule 13(4)** of the **Civil Procedure Rules 2010** have not been met and or filed.

He averred that his Advocate on record was awaiting issuance of a certified copy of decree to enable him file its record of appeal. He produced in court a letter dated 24th July 2019, addressed to the **Chief Magistrate**, Thika following up on the issuance of decree. It was his contention that **Section 79 G of the Civil Procedure Act, 2010** does allow enlargement of time for filing a Record of Appeal where it is no fault of the Appellant not to file the appeal in time, which was the case herein.

It was his contention that the instant application is premature, an abuse of court process and should be dismissed with costs to the Respondent (Appellant).

The Application was canvassed by way of written submissions which the Court has carefully read and considered and makes the following findings;

The Application is brought under **section 79B** of the Civil Procedure Act which states;

“Summary rejection of the appeal

Before an appeal from the subordinate Court to the High Court is heard, a judge of the High Court shall review it and if he considers that there is no sufficient ground for interfering with the Decree part of a decree or order appealed against, he may notwithstanding Section 79C reject the appeal summarily.”

In his submissions, the Applicant has urged the Court to reject the appeal summarily as it his contention that there are no sufficient grounds to warrant interfering with the lower's Court's decree,

Further the Application is anchored under **Order 42 Rule 11** which provides that;

“Upon filing of the appeal, the appellant shall within thirty days cause the matter to be listed before a Judge for directions under Section 79B of the Act.”

It is clear that **Section 79B of Civil Procedure Act**, gives the Court discretion to summarily dismiss an appeal where it considers that there are no sufficient grounds to interfere with the Decree or Order appealed against. However the said discretion must be sparingly used and can only be applied in the clearest of cases. See the case of **Harbas Singh Soor...Vs... Fatima Ah Mohamed Court if Appeal No.120 of 2005(2016) 1EA** where the Court held that;

“In normal circumstances when an appeal is filed , it is the duty of the High Court under section 79C of the Civil Procedure Act to hear the parties allowing the appellant to exercise his constitutional right of appeal....However section 79B will operate when the grounds of appeal cannot possibly and in this regard the appellant is not entitled to use his constitutional right of appeal and abuse the process of the Court by wasting the time of the Court which would have been more profitably spent on worthwhile matters.....but the power to summarily reject appeals must be sparingly used and only in the clearest of cases. A sparing use can indeed only refer to rejection in the clearest cases of facts and law.”

The Appellant/ Respondent filed the Memorandum of Appeal on **14th February 2019** . This Application was filed on **19th July 2019**. The Respondent/Appellant has argued that this application should be dismissed with costs because the appellant had not filed a complete appeal by the time this instant Application was filed and therefore there was nothing for this Court to consider under **Section 79B** of the Civil Procedure Act.

The Appellant argued that an appeal becomes complete once a Memorandum of Appeal together with the certified copy of the Decree appealed against and the record of appeal are filed. That after the filing of the above documents, that is when an appeal can be deemed to be a complete Appeal and can be referred to the Judge for perusal.

In the case of **Manases Kuria & Others ...Vs...Njoroge, Civil appeal No. 153 of 1994** the Court of Appeal held that;

“the record of appeal must have a certified copy of Order and Decree appealed against.”

It is evident from the above holding that the record of appeal must contain a certified copy of the Decree, otherwise the appeal is defective. From the Court’s record, it is clear that by **19th July 2019**, what the Appellant/ Respondent had filed was only a Memorandum of Appeal. He had not filed the Record of Appeal and certified copy of the **Decree** appealed against. Therefore the matter could not have been listed before a Judge for Directions under **Section 79B** of the Civil Procedure Act. Further even this Court did not have the full appeal to consider under Section 79B in determining this Application.

It is evident under **Order 42 Rule 13** that a complete Appeal consists of a Memorandum of Appeal, Full record of Appeal and a Decree appealed against. For the Court to consider whether there are no sufficient reasons to interfere with the Decree appealed against, then it needed to look at the above stated documents;- that is the, Memorandum of Appeal and Decree appealed against.

At the time of filing the instant Application, the said documents had not been filed and since there was no complete appeal as stipulated by **Order 42 Rule 13**, the Court cannot summarily reject the instant Appeal as sought by the Applicant herein. See the case of **Kamau t/a Sideview Garage....Vs...Fredrick Isuka Kalumbo(2016) eklr** where the Court held that;

“ it is clear from the provision of law that a Decree or order appealed from is a pertinent and inextricable part of an appeal filed in the High Court against a decision from the subordinate Court. without the Decree an order appealed from there is in effect no appeal.”

Since this Court has found and held that by the time this Application was filed there was no complete appeal filed, the Court cannot summarily reject the said incomplete appeal under **Section 79B of the Civil Procedure Act**.

On the second prayer, the Applicant sought for dismissal of the appeal for want of prosecution.

Proceedings are dismissed for want of prosecution if the parties have taken inordinately too long to prosecute the suit. The Memorandum of Appeal was filed on **14th February 2019**, the instant Application was filed in **July 2019**, The Appellant/ Respondent has explained that he had not filed a complete Appeal because he had not been supplied with typed copies of proceedings and Decree from the subordinate court. He attached letters showing that he had sought for the said proceedings. He has now filed the Record of Appeal with certified copy of the Decree. There is a complete Appeal now on record.

Section 79G grants an Appellant an opportunity to seek for enlargement of time for filing of the appeal. This Court cannot hold and find that the appellant herein has taken inordinately too long to prosecute this appeal. Infact these kind of interlocutory Applications seek to delay the matter more,

For the above reasons this Court finds that the instant Application is not merited and consequently the said Application dated **18th July 2019** is not merited and the same is dismissed entirely with costs to the Appellant/ Respondent.

The Court has considered the Record of Appeal filed in Court on **17th October 2019**. The Court finds no reason to summarily reject the same and is admitted under **section 79B** of the Civil Procedure Act Directions will be taken on how the appeal shall be canvassed and thereafter the Appeal shall be determined on merit.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of June 2020.

L. GACHERU

JUDGE

15/6/2020

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By consent of:

None for the Appellant/Respondent

None for the 1st Respondent

None for the 2nd Respondent/Applicant

L. GACHERU

JUDGE

15/6/2020