



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 243 OF 2014

JOSEPH KABAIKO KIRII 1ST APPELLANT

JOSEPH NJOROGE NGIGE. 2ND APPELLANT

VERSUS

PETER MWAURA KARIUKI. RESPONDENT/APPLICANT

R U L I N G

The Respondent/Applicant has moved this court by way of a Notice of Motion dated 9th December, 2014 and filed in court on the 11th December, 2014. It is expressed to be brought under Section 79(B) (C), Section 3, 3A of the Civil Procedure Act and order 2 Rule 15(d) (c) and (d) of the Civil Procedure Rules.

The Applicant/Respondent has sought the following orders: -

- 1) That the Memorandum of Appeal filed in court on 19th June, 2014 be struck out with costs.
- 2) That the costs of the Appeal and this application be assessed and be borne by the Appellants.

The Applicant has brought the application on the grounds that the Memorandum of Appeal was filed out of time and therefore, it's an abuse of the court process. He avers that judgment in the subordinate court matter was delivered on the 26th March, 2014 and the appeal was filed on 18th June, 2014 without the leave of the court. The Applicant further avers that the Appellants were ordered to deposit a sum of Ksh.80,000/- as a condition for stay of execution which order they failed to comply with. He has urged this court to dismiss the appeal as the same is incurably defective, incompetent and an abuse of the court process.

In opposing the application, the Appellants filed a replying affidavit on 9th December, 2015 sworn by their advocate on record M/s Robert Mugo Mutito in which he depones that he conducted Civil Case No. 322 of 2012 before the Chief Magistrate's Court at Thika on their behalf and that he is also on record in the appeal herein.

That he applied for a certified copy of the proceedings and the judgments for the purposes of filing the appeal. A decree was issued on 11th April, 2014, following which he applied for a stay of execution of the decree and a ruling to that application was delivered on the 25th June, 2014. In the said ruling, the court ordered the Appellants to file an appeal within 15 days from the 25th June, 2014.

They further aver that the 15 days period given by the court within which to file the appeal had not yet

expired by the time the Appellants filed the Appeal. According to the Appellants, the period which the lower court certified as having been requisite for the preparation of the proceedings and the judgment should be excluded from the 30 days.

This court has considered the material before it, including the submissions filed by the parties herein. Section 79G of the Civil Procedure Act provides: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

Section 79G talks of a decree or an order appealed against. It is important at this stage to consider what a decree is.

Section 2 of the Civil Procedure Act defines a decree as follows: -

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91, but does not include—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”

The Appellant herein has appealed against a judgment and not against an order and this being an appeal the proviso to Section 2 applies which then means the date of the judgment is the date of the decree. The Judgment in the lower court matter was delivered on the 26th March, 2014 and the appellant filed appeal on 18th June, 2014. The decree herein is dated 11th April, 2014 which was within the 30 days for filing of the appeal in any event and going by the provisions of Section 79G.

Under Section 2 of the Civil Procedure Act, a party who intends to file an appeal against a judgment does not require a decree to be able to do so. It was, therefore, not necessary for the appellant to await the drawing of the decree for him to file an appeal. The stage at which the decree is required is when compiling the record of appeal which comes much later in the proceedings. Section 79G, either way, cannot be of assistance to their case considering that the formal decree was issued within the statutory period provided for the filing of the appeal.

The appeal herein ought to have been filed within 30 days from the 26th March, 2014 and the decree having been issued before the expiry of the 30 days, the Appellate does not have any excuse for failure to file the appeal on time.

The Appellants have also argued that in the ruling delivered on the 25th June, 2014, following their application for stay of execution, the learned magistrate ordered that the appeal be filed within 15 days. With all due respect to the learned magistrate, this was erroneous considering that by this time, the period within which to lodge the appeal had expired and there was no application before her for extension of

time within which to file the appeal.

In the premises foregoing, I find that the appeal as filed is incompetent for having been filed out of time. The same is struck out with costs to the Respondent.

Dated, signed and delivered at Nairobi this 6th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for 1st and 2nd Appellant*

..... *For the Respondent*