



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

CIVIL APPEAL NO. 61 OF 2010

(An appeal from the Judgment of the Senior Resident Magistrate, Embu

in CMCC No. 162 of 2006 dated 3/6/2010)

ANTHONY MUGENDI KIMANI.....APPELLANT

VERSUS

FRANCISCA MWINGI STEPHEN.....RESPONDENT

R U L I N G

This is a ruling on a preliminary objection raised by the respondent against this appeal lodged on 29/4/2013 against the judgment of the Senior Resident Magistrate in CMCC 162 of 2006 delivered on 3/6/2010.

The parties argued the preliminary objection by way of written submissions. The counsels for the parties were Njeru Ithiga for the appellant and Oyon Opini & Gachuba for the respondents.

The respondent argues that the appeal is time barred contrary to the provisions of Section 79(G) of the Civil Procedure Act. The appeal was filed without leave of the court as stipulated by the law and should therefore be dismissed. The decree was issued 24/4/2013 but no certificate of delay was obtained. The respondent has been denied the fruits of his judgment due to the incompetent appeal. The appellant relied on the following cases:-

- 1. Marine Diving and Technical Services Ltd Vs Southern Engineering Co. Ltd. [2990] eKLR.*
- 2. Andrew Nganga Ndungu Vs Godfrey Karuri & Another [2006] eKLR*

The appellant opposes the objection on the grounds that the delay in filing the appeal is not inordinately high since it was filed only 2 days after the expiry of time. He urges the court to administer justice without undue regard to technicalities. It was further argued that the overriding objectives of the Civil Procedure Act should be applied to facilitate expeditious resolutions of dispute and administer justice to the parties. The appellant relied on the case of **WARIBU CHONGO VS BENSON MAINA GATHITHI [2013] eKLR** where the court applied Section 159 of the Constitution in disregard of technicalities.

Section 79(G) 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.

On perusal of the appeal record, I note that the judgment was delivered on the 3/6/2010 and the decree issued on 16/7/2010. [This appeal was filed on 29/4/2013 which is a delay of over two years from the date the decree was issued. It is not in dispute that the appellant did not seek leave of the court to file his appeal out of time as provided for by the law. In the case of **PATRICK KIRUNJA KITHINJI VS VICTOR MUGIRA MARETE [2015] eKLR** the court in dealing with an appeal that was filed out of time held that whether or not an appeal is filed out of time goes to the jurisdiction of the court. It is trite law that the court has jurisdiction to entertain an appeal file out of time with leave of the court and that an appeal is not curable under Article 159 where leave was not obtained.

In the Court of Appeal case of **NICHOLAS KIPTOO ARAP KORIR SALAT VS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013] eKLR** the court rejected an invitation by counsel to invoke its discretion under Section 3A and 3B to save an incompetent appeal as follows:-

“To invoke the provisions of Sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the court, even when they have been violated with impunity. Sections 3A and 3B were not meant for that”.

In view of the above decisions, the appellant’s argument that Article 159 would cure this appeal is not acceptable. It is admitted that there was delay in filing the appeal and that the leave of the court was not obtained. In the circumstances, the appellant cannot hide under the overriding objectives of the Civil Procedure Rules and neither can he use Article 159 of the Constitution.

I find that the preliminary objection merited and it is hereby upheld.

This appeal is hereby declared incompetent and is accordingly struck out with costs.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Ithiga for the Appellant