



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 327 of 2007**

**PETER KAMONDIA NJUGUNA.....APPELLANT/RESPONDENT**

**VERSUS**

**PAUL NGANGA GACHIE.....APPLICANT/RESPONDENT**

**R U L I N G**

1. The application before me is the Notice of Motion dated 16/02/2009 filed by the Respondent in this appeal. The Applicant prays that the appeal herein be struck out and that costs of the application which is expressed to be brought under Order L of the Civil Procedure Rules and Sections 78(2) and 3A of the Civil Procedure Act is grounded on the grounds that (a) No steps have been taken by the Appellant since the institution of the appeal to prosecute the appeal and (b) that the Appellant has failed and/or neglected to comply with the provisions of the Law despite notice. The Applicant, Paul Nganga Gachie, has sworn the affidavit in support of the application and says that he seeks the orders herein on grounds that the Appellant has taken no steps since filing of the appeal to prosecute the appeal. He also says that the appeal ought not to have been filed against him since he was not a party to Kiambu Senior Resident Magistrate's Court in land case No. 76 of 1982.

2. The application is opposed. The Replying Affidavit dated 16/07/2009 is sworn by Peter Kamondia Njuguna, in which he says that he has already served a Memorandum of Appeal upon the Applicant's counsel on 17/12/07. He also says that directions in the appeal are yet to be taken and therefore the appeal is not ready for hearing. The Respondent however admits that the Respondent herein was not a party in Kiambu SRM CC No. 76 of 1982, but that nonetheless the Applicant still presented himself in the Kiambu Case during the hearing of the boundary dispute by the Land Registrar Kiambu East. The Respondent/Appellant wants the application dismissed with costs to himself.

3. At the hearing of this application on 22/07/2009, Mr. F.M. Kinyanjui advocate appeared for the Applicant while the Respondent/Appellant appeared in person. Mr. Kinyanjui submitted that the Amended Memorandum of Appeal filed in court in 2007 was incompetent on grounds that the Appellant did not seek leave of the court. Mr. Kinyanjui also submitted that on 6/12/2007, the Appellant/Respondent was notified that the appeal could not be admitted for non-compliance with Order XLI Rule 1(A) of the Civil Procedure Rules which provides –

*“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.”*

Mr. Kinyanjui submitted that the Appellant/Respondent has not complied with the Deputy Registrar's

letter.

4. Sections 78 and 79 of the Civil Procedure Act deal with powers of the court relating to appeals and the procedure to be followed in appeals from Appellate decrees and orders. Section 79B of the Civil Procedure Act provides –

*“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it and if he considers that there is sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”*

5. Section 79C on the other hand provides for the hearing of appeals either by a single judge or two judges where the Hon. the Chief Justice otherwise orders.

6. What then is the main argument brought out by the Respondent/Applicant herein. The Applicant’s main contention is that this appeal must be struck out on grounds that the Appellant has been indolent. The Applicant also says that the Appellant amended his Memorandum of Appeal without leave of the court. Rule 13(1) of Order XLI of the Civil Procedure Rules provides as follows:-

*“The Appellant may amend his memorandum of appeal without leave at anytime before the court gives directions under Rule 8B.”*

Rule 8B provides –

*“8B(1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal, the registrar shall list the appeal for the giving of directions by a judge in chambers.”*

7. The anticipated directions are provided for under Rule 8B(3) of Order XLI concerning the appeal generally and ***“in particular directions as to the manner in which the evidence and exhibits provided to the court below shall be put before the Appellate Court”***. And before the judge allows the appeal to proceed to hearing, the judge shall be satisfied that the following documents are on the court record, and that such of them as are in possession of either party have been served on that party, that is to say –

*(a) the memorandum of appeal*

*(b) the pleadings*

*(c) the notes of the trial magistrate made at the hearing*

*(d) the transcript of any official shorthand or palantypist notes made at the hearing*

*(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate*

*(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.*

*(g) where the appeal is from a decision of a subordinate court given in the exercise of its appellate jurisdiction, the documents corresponding to those specified in paragraphs (a) to (f) inclusive in so far as they relate to the appeal to such subordinate court:*

Provided that –

*(i) a translation into English shall be provided of any document not in that language,*

*(ii) the judge may dispense with the production of any document or part of a document which is not relevant other than those specified in paragraphs (a), (b) and (f).*

8. From the evidence available on record, the directions in this appeal have not been taken. That being the case, the Appellant did not need leave of the court to amend his Memorandum of Appeal. Secondly, since directions in the appeal have not been taken in accordance with the rules, this appeal is not ready for hearing. In the premises, I decline to grant the orders sought by the application dated 16/02/2009.

9. I however direct that the Appellant should do everything possible to take directions in the appeal. He should do so within the next 60(sixty) days from the date of this ruling failing which he will be deemed to have withdrawn the appeal. Costs of this application shall abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of October, 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:

Mr. Rutto for Kinyanjui (present) for the Appellant/Respondent

P/P – Peter Kamondia Njuguna for the Respondent/Applicant

Weche – court clerk