



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: GICHERU, KWACH & SHAH, J.J.A.)
CIVIL APPEAL NO. 105 OF 1998**

**BETWEEN
KENYA COMMERCIAL BANK LIMITED APPELLANT
AND**

**TONY MANASEH ESIPEYA RESPONDENT
(Appeal from the ruling and order of the High Court
of Kenya at Eldoret (Nambuye, J) dated 5th November,
1997 and delivered on 11th November, 1997**

**in
H.C.C.C. NO. 4 OF 1992)**

RULING OF THE COURT

Tony Esipeya, the respondent in this appeal, (hereinafter called "the plaintiff") sued Kenya Commercial Bank Ltd, the appellant (hereinafter called "the defendant"), in the superior court claiming damages for alleged wrongful exercise of statutory power of sale by the defendant. The defendant sold a piece of land which the plaintiff had given as security for a loan, on 28th October, 1981. The suit was filed on 9th January, 1992. In a defence filed on 11th March, 1992 the defendant denied the plaintiff's claim and pleaded in paragraph 12 that -

"(12) Further to the above the defendant avers that all matters complained of occurred more than 6 years ago and the claim is therefore statute barred."

The defendant did not make a formal application to strike out the plaint but instead raised a preliminary objection at the trial that the plaintiff's claim was time-barred. The learned Judge dismissed the preliminary objection and it is against that decision that the defendant has now appealed to this Court.

Following the ruling and order of the learned Judge, the defendant's Advocates extracted what they called a PRELIMINARY DECREE. They did not ask the superior court for leave to appeal because they thought the learned Judge's ruling gave rise to a preliminary decree from which an appeal lies to this Court as of right. Mr. Khawaja, for the appellant, submitted that the ruling resulted in a preliminary decree and leave to appeal was not required. Mrs. Chumba, for the respondent, on the other hand, submitted that the ruling gave rise to an order appealable only with leave which leave was neither sought nor obtained. We decided to deal with this point first before going into the merits of the appeal.

It is explained in section 2 of the Civil Procedure Act (Cap 21) that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. The ruling of the Judge on the preliminary objection did not give rise to a preliminary decree because it did not conclusively determine the rights of the parties with regard to any of the matters in controversy in the suit. The point taken in paragraph 12 of the defence was that the claim was time-barred, a clear limitation point, which could have been made the subject of an application under Order 6 rule 13 of the Civil

Procedure Rules. An order on an application under Order 6 rule 13 is appealable as of right under Order 42 rule 1 of the Civil Procedure Rules. But having chosen to raise the limitation point by way of a preliminary objection under no particular Order under the Civil Procedure Rules, an appeal lay to this Court only with the leave of the superior court which was neither sought nor obtained.

In the case of *G R Mandavia v Rattan Singh [1965] EA 118*, the appellant, as defendant in a civil suit, pleaded that the suit was barred as res judicata. This was taken as a preliminary issue and the trial judge ruled that res judicata had not been made out. The appellant, without obtaining leave to appeal, lodged an appeal against this decision and at the hearing a preliminary objection was taken that the decision did not amount to a "decree" or "preliminary decree" within the meaning of section 2 of the Civil Procedure Act (K), as it did not conclusively determine the rights of the parties with regard to any of the matters in controversy between them; alternatively it was submitted that if the judge's decision was an "order" as defined in that section it was not appealable as of right and, as leave to appeal had not been obtained, the appeal was incompetent.

It was held, inter alia, that where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave. In the course of his judgment Law JA said at page 124:

"The position is, in my opinion, clear: when a suit is disposed of on a preliminary point, an appeal will lie from the decree dismissing the suit, and where an issue such as liability is tried as a preliminary issue and finally disposed of at first instance, a preliminary *decree* arises from which an appeal lies; but where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails, no preliminary decree arises from which the unsuccessful party has a right of appeal."

In the present case the limitation point was taken as a preliminary issue and it failed. What arose was not a preliminary *decree* but merely an order from which an appeal only lay with leave. The defendant as the unsuccessful party had no right of appeal except with leave. Leave to appeal was not obtained. The consequence of this is that this appeal is incompetent and it is hereby struck out.

In view of the considerable assistance given to this Court by Mr. Khawaja in bringing out the authorities on this novel point, some of which were against him, we make no order as to costs. Dated and delivered at Nairobi this 26th day of March, 1999.

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JUDGE OF APPEAL
R. O. KWACH

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JUDGE OF APPEAL
A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR