



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: PALL J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI.350 OF 1996

BETWEEN

EDITH WAGITHI CHIIRA.....APPLICANT

AND

REBECCA WANGUI GICHUHI.....RESPONDENT

**(Application for extension of time to file a record of appeal
from the ruling of the High court of Kenya (Justice
Githinji) dated 26th April, 1996**

in

H.C.C.C. NO.467 OF 1991

R U L I N G

Edith Wagithi Chiira (the applicant) has applied under rule 4 of the Rules of this Court for an order to extend time within which an intended appeal may be filed by her from the ruling of the High Court at Nairobi (Githinji, J.) dated 26 April, 1996 in Succession Cause No. 467 of 1991.

By her application dated 8.12.1995, Rebecca Wangui Mwangi (the respondent) claiming to be a beneficiary of the estate of Charles Mwangi Chiira (the deceased) who passed away on 25.1.1995 applied to the superior court for an injunction to restrain the applicant who is the administrator of the estate of the deceased from collecting rent of L.R.209/7705 belonging to the estate of the deceased. She also sought further orders that the applicant should render an account of the rental income received by her from the said building ever since the death of the deceased and that she, the respondent should be authorised to collect rent to the extent of 1/ 3 of the saidbuilding. The learned Judge by his aforesaid ruling dated 26 April, 1996 which is sought to be appealed from granted all the said prayers and authorised the respondent to collect the rental income of 8 rooms which are identified in his ruling as equivalent to one third of the total rental income of the said building.

When the application came up for hearing before me on 10.3.97 I asked Mr. Kamonde for the applicant to satisfy me that his client had the right of appeal. To enable him to carry out some research on

this issue, I adjourned the application to 11.3.1997.

At the adjourned hearing Mr Kamonde has argued that under s.66 of the Civil Procedure Act (the Act) there was an automatic right of appeal. Section 66 reads:

**"66. Except where otherwise expressly
provided in this Act and subject to such
provision as to the furnishing of security
as may be prescribed an appeal shall lie
from the decrees or any part of decrees
and from the orders of the High Court to the
Court of Appeal."**

To understand s.66 one has to go back to the definition of "decree" in the Act according to which "a decree means a formal expression of an adjudication which so far as the court expressing it conclusively determines the rights of parties with regard to all or any of the matters in the suit....."

A "suit" within the meaning of s.66, as defined in the Act "means all civil proceedings commenced in any manner prescribed. In other words the proceedings have to be the originating proceedings various modes whereof are authorised by law. For example it may either be by a plaint, or originating summons or petition but cannot be by way of chamber summons. Thus the application which was before the superior court cannot be termed as a suit. So the adjudication by the court on that application cannot be termed as a "decree". According to the Act any formal expression of a court which is not a decree means an "order".

However even an order is appealable as of right under s.66 of the Act unless it is otherwise provided in the Act. Section 75(1) which deals with orders from which appeal lies reads as follows:-

75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted.

- (a)an order superseding an arbitration;**
- (b)an order on an award in the form of a special case;**
- (c)an order modifying or correcting an award;**
- (d)an order staying or refusing to stay a suit; where there is an agreement to refer to arbitration.**
- (e)an order filing or refusing to file and award in an arbitration without the intervention of the court;**
- (f)an order under section 64 (which provides for compensation for arrest attachment or injunction on insufficient grounds);**
- (g)an order under any of the provisions of this Act imposing fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree.**

**(h)any order made under rules from which an appeal is expressly allowed by the rules.
("rules" means rules made by the Rules Committee under the Act).**

Thus the right given by s.66 has been qualified by s.75(1) of the Act. Moreover, under O.42 of the Civil Procedure Rules, the order or ruling intended to be appealed from is not an appealable order. Thus no appeal lies as of right either under the Act or under the Civil Procedure Rules. The Act applies to all proceedings in the High Court or a subordinate court acting in the exercise of its civil jurisdiction.

In my view therefore where a party intends to appeal where there is no right of appeal and has not obtained leave of the court to appeal, there is no point in extending the time to enable him to file the appeal out of time as it is bound to be incompetent. I therefore do not see any merit in the application and hereby dismiss it with no order as to costs.

Dated and delivered at Nairobi this 18th day of March 1997

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR