



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:TUNOI, LAKHA & PALL, JJ.A.)

(CIVIL APPEAL NO. 30 OF 1995)

BETWEEN

CARMELLA WATHUGU KARIGACA.....APPELLANT

AND

MARY NYOKABI KARIGACA..... RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi (Aluoch, J.) dated 18th day of November, 1993

IN

H.C.SUCC.C NO. 1421 OF 1991)

RULING OF THE COURT

This is an appeal against the order of the superior court (Aluoch, J.) given on 18th November, 1993 whereby she ordered one half share of land known as L. R. 1159/94 Karen be granted to the respondent absolutely. It was made pursuant to an application made by the respondent under section 26 of the Law of Succession Act and Rule 45(1) of the Probate and Administration Rules. An application for leave to appeal was made on 25th March 1994 and granted on 3rd June, 1994.

On 19th May, 1994 the respondent filed an application in this court by way of notice of motion seeking to strike out the appeal on ground that leave to file the same was obtained out of time. It is not in dispute that at the time of the hearing of this appeal such application had been neither abandoned nor heard but was still pending.

An appeal to this Court from the decision of the superior court in the instant case lies only with the leave of the superior court an application for which, the respondent contends, must be made informally at the time the decision is given or formally within 14 days of such decision as is provided in rule 39(a) of the Rules of this Court (the Rules). Mr. Le Pelly, for the appellant, relies on the decision of a single Judge of this Court delivered on 9th October, 1996 in this appeal on an application for enlargement of time for lodging memorandum of appeal whereby he held that rule 39 of the Rules cannot override section 75 of the Civil Procedure Act which fixes no time limit to apply for such leave which means it ought to be applied for within reasonable time.

Neither section 95 of the Civil Procedure Act nor Order XLIX rule 5 of the Civil Procedure Rules (dealing with enlargement of time) empower the superior court to extend time where any period is fixed or granted by the Rules of this Court. Whether leave to appeal to this Court has been validly granted or not is a matter of jurisdiction which cannot be conferred on this Court by consent or default. A question of jurisdiction is, however, a matter of which the court can and should take cognisance whether or not the matter is raised in argument.

We are of the view, with respect, that there is no conflict between section 75 of the Civil Procedure Act and rule 39(1) of the Rules of this Court as the former is silent of the period within which an application for leave should be made. Nor does the latter override the former. Nor could an extension be construed to have been given by the superior court by implication when granting leave, assuming it had such power so to do which, as indicated above, it does not have. A consideration of section 5 of the Appellate Jurisdiction Act (Cap. 9) makes it clear that the Rules of this Court may well provide, as Rule 39 does, for the procedure in the superior court in matter connected with an appeal to this Court.

As is stated in Sarkar's Law of Civil Procedure, 8th Edition, at p.89: -

“A question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of the court . If by an erroneous interpretation of the statute the court holds that it has no jurisdiction or assumes jurisdiction which it does not possess the decision cannot operate as res judicata between the same parties whether the cause of action in the subsequent litigation is the same or otherwise.”

We therefore are not bound by the decision of the single judge of this Court.

A party cannot rely on leave which is in plain defiance of the Rules. In the present case, the true position is that the appellants seek to appeal to this Court relying on leave to do so which she can only establish by relying upon leave declared by law to be invalid for lack of having been obtained within the prescribed time. In such a case the jurisdiction of this Court has not been validly invoked. We allow the Notice of Motion dated 19th May, 1994.

The appeal, therefore, must be as it hereby is, struck out with costs to the respondent.

Dated and delivered at Nairobi this 29th day of April, 1997

P. K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

