



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC CIVIL APPEAL CASE NO. 04 OF 2018**

**JOHN KAMAKIA NTHATU.....PLAINTIFF**

**VERSUS**

**FESTUS KITHINJI NJAGI.....DEFENDANT**

**RULING**

1. This application is dated **4<sup>th</sup> February, 2019**. It has stated on its face that it has been brought to court under sections 80 and 3A of the Civil Procedure Act, Order 51 and 12, Rule 7 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders:

1. That this honourable court be pleased to set aside the dismissal order made and reinstate of the Appeal herein for hearing and determination.
2. That the costs of this application be provided for.

2. The application has the following grounds:

- a) That no notice of dismissal of appeal was served upon the applicant.
- b) That the appellant/applicant has been keen in prosecuting this suit from the time it was filed.
- c) That the Marimanti Law Courts registry mistakenly sent their file to Marimanti Law Courts and caused it to be registered as a new file in the magistrates' court.
- d) That the court has an unfettered discretion to vary or set aside such orders of dismissal "upon such terms as may be just".
- e) That the applicant stands to suffer irreparable loss and damage if the suit is not reinstated for hearing and determination.

3. The application is supported by the affidavit of the applicant which states as follows:

**I, John Kamakia Nthaatu of P. O. Box 46 Marimanti in Tharaka Nithi County** do hereby make oath and state as follows:-

1. That I am the applicant and therefore competent to make and swear this affidavit.
2. That I was the plaintiff in Marimanti Principal Magistrates Court E.L.C. No. 45 of 2017 where the respondent herein was the defendant.
3. That judgment was entered against me in the said Marimanti Principal Magistrates Court E.L.C. No. 45 of 2017 on the 23<sup>rd</sup> March, 2018. (Annexed herein and marked "JKN1" is a copy of the said judgment).
4. That being dissatisfied with the decision, I lodged an appeal in Chuka E.L.C. Appeal No. 4 of 2018 within the stipulated period of time (Annexed herein and marked "JKN2" is a copy of the said Notice of appeal).
5. That I also requested for the proceedings to be typed in Marimanti Principal Magistrates Court E.L.C No. 45 of 2017. (Annexed

herein and marked "JKN3" is a copy of the said request).

6. That as we were awaiting for the appeal to be admitted, we learnt that Marimanti Law Courts registry had mistakenly sent their file i.e. E.L.C. Case No. 45 of 2017 and caused it to be registered as a fresh suit at Chuka and assigned a new number which is Chuka CMCC No. 192 of 2018. (Annexed herein and marked "JKN4" is a copy of communication between the Executive Officer Chuka Law Courts and the Principal Magistrate Marimanti Law Courts).

7. That due to the said miscommunication between Marimanti Law Courts and Chuka Law Courts, our appeal was dismissed.

8. That I was never informed with any hearing date of this appeal.

9. That at the time that I learnt of this mistake our appeal had already been dismissed against me and I had no audience before this honourable court.

10. That I believe my appeal had great chances of success if given an opportunity to be heard on merit.

11. That no prejudice will be suffered by the respondent if the dismissed appeal proceeds for full hearing.

12. That the plaintiff will not suffer any prejudice if this application is allowed and the suit proceeds for full hearing.

13. That it is in the interest of justice and fairness that this application be allowed.

14. That whatever is deponed to herein is true to the best of my knowledge, information and belief.

4. The application has been opposed by the proposed respondent through his affidavit sworn on **19<sup>th</sup> June, 2019**, which states as follows:

I, **FESTUS KITHINJI NJAGI** of P.O BOX 386-60400 CHUKA, do hereby make oath and state as follows.

1. **THAT** I am an adult male person of sound mind the Respondent herein well versed with facts of this appeal hence competent to swear this appeal.

2. **THAT** there is no appeal on record to be reinstated by this court. The appellant filed a notice of appeal dated 05<sup>th</sup> April 2018 and he has never filed any memorandum of appeal.

3. **THAT** the appellant is an indolent person and this court should not aid the indolent but the vigilant.

4. **THAT** without a memorandum of appeal being filed this court has nothing to reinstate.

5. **THAT** the appellant is a vexatious litigant who should not be allowed to abuse this court process.

6. **THAT** despite being served with a notice the applicant failed to appear in court for directions thereby provoking dismissal.

7. **THAT** this application has been brought a year after the dismissal and therefore the delay is inordinate.

8. **THAT** what is deponed to herein is true and best of my knowledge and understanding.

5. On **22<sup>nd</sup> May, 2019** the parties were directed to file written submissions and to come to court for directions on **24<sup>th</sup> July, 2019**. On **24<sup>th</sup> July, 2019**, only the respondent had filed his written submissions. Mr. Kijaru asked the court to dismiss the application as no appeal existed that could be reinstated.

6. The respondent's submissions are reproduced herebelow:-

#### **RESPONDENTS SUBMISSIONS**

Your Lordship,

The Appellant filed a notice of Appeal dated 5<sup>th</sup> April 2018.

Notice of appeal is not an appeal. According to order 42 Rule1 of the Civil Procedure Rules any appeal before this court shall be by way of a Memorandum of Appeal.

It is our submission that there is no appeal to be reinstated by this court.

The application dated 4<sup>th</sup> February 2019 should be dismissed for being an abuse of court process. In fact it is a mockery to this court.

DATED AT CHUKA THIS. 24<sup>TH</sup> DAY OF JULY, 2019

FOR: KIJARU, NJERU & CO.

**ADVOCATES FOR THE RESPONDENT**

7. To put matters into their proper perspective, the ruling of this court delivered on 24<sup>th</sup> July, 2018 which has spawned this application is reproduced herebelow:

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JOHN KAMAKIA NTHATU.....PLAINTIFF

VERSUS

FESTUS KITHINJI NJAGI.....DEFENDANT

**RULING**

1. The plaintiff in this matter, on 6<sup>th</sup> April, 2018, filed a Notice of Appeal which is in the following format:

**NOTICE OF APPEAL**

Take notice that John Kamakia Nthatu the appellant herein being dissatisfied with the judgment of Hon. Messa, Principal Magistrate at Marimanti Law Courts in Civil Case No. 45 of 2018 on the 23.3.2018 intends to appeal to the high court of Kenya at Chuka against the whole of the said decision.

The address of service for the appellant shall be M/S Kevin Nyenyire & Co. Advocates P. O. Box 2702-60200 Meru, Murerwa House 1<sup>st</sup> Floor Suite 12B.

**IT IS INTENDED TO SERVE COPIES OF THIS NOTICE UPON:**

Kijaru Njeru & Co. Advocates

DATED AT MERU THIS 5<sup>TH</sup> DAY OF APRIL, 2018

.....

KEVIN NYENYIRE & CO.

**ADVOCATES FOR THE APPELLANT**

2. Section 79 G of the Civil Procedure Act gives the timeline within which an appeal should be filed before this court. It says:

“79 G. Time for filing appeals from subordinate courts

“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.”

3. In this matter the Notice of Appeal was filed on 6<sup>th</sup> April, 2018 and no other action was taken. On 13<sup>th</sup> July, 2018, through registered post the appellant and his advocate were given notice to come to court for directions on 24<sup>th</sup> July, 2018. They did not come to court.

4. It seems to me that a Notice of Appeal does not constitute an appeal. It also seems to me that the spirit of the law envisaged by the Civil Procedure Rules is that an appeal is deemed as filed when the appellant files a Memorandum of Appeal. It is only in the Court of Appeal that an appeal is deemed to have been filed under rules of that court when a Notice of Appeal has been given.

5. I find that the plaintiff has not properly filed an appeal. This court is required through the understanding between it and the judiciary that appeals should be heard and determined within 360 days of their being filed. It is about three and a half months since the apposite Notice of Appeal was filed. As I have found that no appeal exists in this matter, the Notice of Appeal filed in this matter is deemed to be of no useful purpose and of no consequence.

6. In the circumstances, this file should be marked as closed and I order that this matter be removed from the register of pending appeals at Chuka ELC Court.

7. It is so ordered.

**Delivered in open Court at Chuka this 24<sup>th</sup> day of July, 2018 in the presence of:**

**CA: Ndegwa**

**P.M. NJOROGE**

**JUDGE**

8. I do note that the intended appellant and his advocate did not come to court. They also ignored this court's order issued on **9<sup>th</sup> July, 2019** that they do file written submissions.

9. Having considered, the party's pleadings and the submissions filed by the intended respondent, I find that there is no appeal that exists which can be reinstated.

10. The following orders are issued:

a) This application is dismissed.

b) Costs are awarded to Festus Kithinji Njagi, the intended respondent.

**Delivered in open court at Chuka this 24<sup>th</sup> day of July, 2019**

in the presence of:

CA: Ndegwa

Kijaru for the Intended Appellant

**P. M. NJOROGE,**

**JUDGE.**