



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, J.J.A)

NAKURU CIVIL APPEAL NO. 110 OF 2017

BETWEEN

DANIEL NGANGA WANYOIKE.....APPELLANT

AND

INVESCO ASSURANCE CO. LTD.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (H. A. Omondi, J.) dated 18th December, 2014 and delivered on 28th January, 2015 by Hon. J. Mulwa

in

HCCA NO. 30 OF 2011)

JUDGMENT OF THE COURT

1. **Daniel Nganga Wanyoike (the appellant)** filed Civil Case No. 34 of 2008 before the Resident Magistrate's Court at Nyahururu seeking several reliefs against **Invesco Assurance Co. Ltd (the respondent)**. The suit was dismissed vide a judgment delivered on 9th February, 2011 prompting the appellant to appeal to the High Court sitting at Nakuru in Civil Appeal No. 30 of 2011.
2. In the course of the hearing before the High Court, learned counsel for the respondent raised the issue that the appeal had been filed out of time without leave of the court, hence there was no competent appeal before the court. Counsel contended that the appeal was filed more than one year after delivery of the Ruling.
3. The appellant however, maintained that the appeal was competent as it had been filed ten days after the decision was rendered. In determining the said issue, the learned Judge (Omondi, J) found that the Ruling appealed from was delivered on 9th February, 2011 and the appeal was filed on 19th February 2012, more than one year later. The learned Judge found that no extension of time had been sought or granted and the appeal was therefore filed in contravention of **Section 79(a)** of the Civil Procedure Act. The learned Judge held, and rightly so in our view, that violation of **Section 79(a)** of the Civil Procedure Act was not a procedural violation which could be overlooked. The appeal was found to be fatally defective and it was dismissed with costs to the respondent.
4. That is the finding that has given rise to this appeal in which the appellant has proffered four grounds of appeal. The gist of those grounds is that the learned Judge erred in finding that the memorandum of appeal was filed out of time while indeed, the same was filed on 7th March, 2011 which was within the time allowed under **Section 79(a)** of the Civil Procedure Act. The appellant contends that the memorandum of appeal was filed on time and it was the Record of Appeal that was filed on 19th February, 2012. He therefore prays that his appeal be allowed, the impugned ruling be set aside and the appeal before the High Court be heard and determined on its merit.
5. The appellant filed written submissions in support of the appeal on 15th October, 2020. In a short oral highlight during the plenary hearing on 22nd October, 2020, the appellant maintained that he filed his appeal on time; the same was registered and given **No. 30 of 2011**, and it was therefore wrong for the High Court to find that the appeal was filed in February, 2012.
6. Opposing the appeal, Mr. Nasimiyu, learned counsel for the respondent conceded that the "first memorandum of appeal" was filed correctly, on time. He however contended that instead of filing the record of appeal, the appellant filed another memorandum of appeal with the record on 19th February, 2012. He maintained that the appellant ought to have sought leave of the court before filing the second memorandum of appeal.

7. We have considered the record of appeal before us along with the submissions made by the parties. Counsel for the respondent concedes that the memorandum of appeal which was registered and given Civil Appeal No. 30 of 2011 was filed within the stipulated time. Indeed, we note that the appeal number itself is self-explanatory and evidence that the appeal was not filed in 2012 as submitted by counsel for the respondent. The record shows that the memorandum of appeal dated 7th March, 2011 was stamped at the High Court Registry on 7th March, 2011. The confusion on the part of the respondent is that when the appellant filed the record of appeal on 19th February, 2012 a copy of the memorandum of appeal which had already been filed and stamped by the registry was enclosed as page 1A of the record and stamped again with the date 19th February, 2012. That was nonetheless not the date of filing the appeal.

8. A cursory look at page two of the memorandum of appeal would have revealed that the memorandum had already been filed on 7th March 2011, which was within time. It was not therefore necessary for the appellant to obtain leave to file the appeal as indicated by counsel for the respondent.

9. We have gone through the record of appeal before us. There is no indication, indeed there is even nothing to suggest that after filing the memorandum of appeal on 7th March, 2011, the appellant ever withdrew the same. The Memorandum of Appeal filed on 7th March, 2011 is the one that carried the record of appeal. The same memorandum, duly stamped on 7th March, 2011 is what was included in the Record of Appeal filed on 19th February, 2012. This did not however mean that the appeal was filed on 19th February, 2012. The latter copy of the memorandum of appeal did not invalidate the one officially lodged before the court on 7th March, 2011. It was therefore, a misdirection on the part of the learned Judge to conclude that the appeal was filed out of time. We find the appeal before us meritorious and allow it with costs to the appellant. As the appeal was not determined on its merits, we order that **Civil Appeal No. 30 of 2011** be and is hereby remitted to the High Court to be heard *de novo* by a Judge other than Judge H. A. Omondi.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR