



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT ELDORET

CIVIL APPEAL 11 OF 1999

KEN KNIT (K) LIMITED:.....APPELLANT/ORIGINAL DEFENDANT
VERSUS
ALI BAKARI:.....RESPONDENT/ORIGINAL PLAINTIFF

(From the decision of Hon. M. Kiptoo Ag. Resident Magistrate in SPMC Civil Suit No. 653 'A'/90 delivered at the Senior Principal Magistrate's Court at Eldoret delivered on 6th January, 1999)

R U L I N G

(Preliminary Objection)

I. Background

1. On 29th January 1999 an appeal against the decision of the acting Resident Magistrate was filed to this High Court. This appeal does not appear to have any records showing that it had been admitted for hearing but on 4th October 2002 Hon. Etyang judge, took directions before both parties under order XLIV r 8 Civil Procedure Code.
2. The appeal involved an industrial accident claim whereby the respondent original plaintiff had sustained injuries to his finger that was amputated. An award was given. The appellant defendant being dissatisfied with the decision of that court filed appeal.
3. The appeal having been adjourned several times came for hearing before J.V. Juma J on 29/9/03. The Hon. Judge heard substantial portion of the appeal and adjourned the same to 25th November 2003 for judgment. He was not able to be available to complete the said judgment.
4. Nothing occurred until 3 years later when Ibrahim Judge ordered that one of the deceased respondent be enjoined through their estate. He further ordered the matter be heard De nova.
5. Bauni J. on 5th March 2008 allowed an application for the substitution of the respondent regardless of the opposition by the advocate for the Respondent.
6. On several adjournments of the mater 10th March 2009, 16th June 2009, 8th December 2009 the appeal came for hearing on 27th April 2009. The respondent raised a preliminary issue that there was no decree filed Under Order XLIV r 1a Civil Procedure Rules. This means that this was fatal.

7. The advocate for the appellant opposed this on grounds that Etyang J had taken directions and that the respondent had never raised any issues and or objections on this matter for 11 years that this matter had been pending.

II. Opinion

8. The rules under order XLIV r 1A is that before a judge admits an appeal for hearing, he or she through the deputy registrar must ascertain that there is indeed a decree of the subordinates court filed. If there is none the file is to await such decree to be filed but, the judge has discretion to admit the appeal to hearing then give a time limit in which to file a decree.
9. The registrar (note there should be no application filed by parties) is the one who places the file before the Hon. Judge with notices to both parties to attend to court for directions where the file is ready with the decree.
10. Before directions is taken then any party may raise the issue of the courts jurisdiction.
 - i) **Was the appeal filed with leave of the court,**
 - ii) **Was it filed within time,**
 - iii) **Was a decree filed or not etc.**
11. Thereafter order XLIV r 8 b (4) on the issue of the records **before court is taken up.**

III. Opinion

12. In this matter the appeal was to be heard De nova. As a precaution the court went through the preliminaries. It is then that this matter of there being no decree filed was raised. The appellant stated the objection was raised too late. It should have been done before Etyang J. on 21st March 2003 and was not.

13. This file had a substantial autonomy it therefore means that not only is there no decree filed but also the appeal had never been admitted for hearing.

14. This court would now proceed to order that this appeal be and is hereby admitted for hearing. It further orders under Order XLIV r 1 a Civil Procedure Rules that the applicant files a certified decree within 14 days.

15. That his matter will be mentioned at the convenience of parties to confirm compliance.

16. Costs in the cause.

Dated this 29th day of April, 2010 at Eldoret.

**M.A. ANG'AWA
JUDGE**

Advocate

A.K. Nyairo Advocate And S. Nyoike Advocate instructed by the Firm of M/s Nyairo & Company Advocate for the Appellant.

D.K.N. Magare Advocate instructed by the Firm of M/s Magare & Company Advocate for the Respondent

29th April 2010

Coram - Hon. Lady Justice M.A. Ang'awa

Court Clerk - Oscar Limisi

A.K. Nyairo together with S. Nyoike Advocates from the firm of Ms. Nyairo & co. Advocates for the Appellant - present

D.K.N. Magare Advocate from the firm of Ms. Magare & Co. Advocates for the Respondent - present

Interpretation English

Court:

Ruling signed, read and delivered in open court.

Dated this 29th day of April 2010 at Eldoret

M.A. ANG'AWA
JUDGE

By consent formal mention on 26th May 2010 to confirm compliance. That hearing of appeal be heard on subject to 29 June, 2010 at 9.00am. subject to compliance of 26th May, 2010

A.K. Nyairo Advocate for Appeallant & Defendant in the Lower Court - Signed.

D.K.N. Magare C/o Magare & Co. Advocates for the Respondent (Plaintiff in Subordinate Court.)

Application granted and orders accordingly

M. A. ANG'AWA
JUDGE

29th April 2010