



IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL (APPLI) 275 OF 2007

JESSIE KUTHII NJERUAPPLICANT/RESPONDENT

AND

JOHANA IRERI SIMON

STEPHEN KIBE.....RESPONDENTS/APPELLANTS

(An application to strike out the record of appeal from the judgment and decree of the High Court of Kenya at Embu (Khaminwa, J.) dated 31st July, 2008

in

H.C.C.C. NO. 6 OF 1995)

RULING OF THE COURT

Civil Appeal Number 275 of 2007 was filed in this Court on 30th November, 2007. The record shows that at the time it was filed, the decree in the record of appeal was as approved by the Deputy Registrar of the superior court. Later, it is alleged that the decree was recalled by the superior court as the judgment in respect of which it was extracted had been put before the superior court Judge and the learned Judge had amended typographical errors in that judgment. That necessitated amendment to the decree such that the decree in this record of appeal is no longer a proper reflection of the judgment as amended. That situation obtaining, the respondent in the appeal **Jessie Kuthii Njeru**, through his advocate moved to this Court and filed this Notice of Motion before us dated 17th January, 2008 and filed on 18th January, 2008 seeking orders: -

“1. That this Honourable Court be pleased to strike out this appeal with costs.

2. The costs of this application be awarded to the applicant.”

The application is made on grounds that:

“(a) The appeal was not instituted within sixty days of the date when the notice of appeal was lodged.

(b) The appellant did not otherwise comply with rule 81 of the Court of Appeal Rules in that:

(i) The requisite registrar’s certificate has not been annexed to the memorandum of appeal.

(ii) *There is no evidence of the service of the copy of letter applying for proceedings on the respondent.*

(c) *The decree was extracted in contravention of order XX Rule 7 (2) (4) in that parties having disagreed with the draft decree, the matter should have been placed before the judge by the Deputy Registrar.”*

The allegations above were in an affidavit sworn by Morris Gachura Njage, the learned counsel for the applicant in the Notice of Motion and who is the respondent in this appeal.

The respondents in the Notice of Motion who are the appellants, filed a replying affidavit sworn by their learned counsel Mr. Peter Mwangi Muchira in which they alleged that the appeal was filed in time and a copy of the letter bespeaking the copies of proceedings and judgment was received by the applicants; that draft decree was drawn in accordance with the judgment delivered in open court on 31st July, 2007 and the counsel of the applicant was invited to approve the decree that was extracted pursuant to that judgment but he declined to do so and hence the Deputy Registrar sealed the decree as is required by the Civil Procedure Rules. He stated in conclusion that the decree prepared after amendments to the judgment, was extracted after the appeal had been filed with the decree extracted as per judgment read in open court. Thus in his view, as explained in that affidavit, the appeal was proper.

When the matter came up before us for hearing and after Mr. Njage had addressed us, Mr. Muchira sought leave of the court to withdraw the appeal. Mr. Njage did not object but asked for costs of the application.

We have perused and considered the application, and the record together with the submissions made before us. In our view the application to withdraw the appeal is merited and we grant it. On the question of costs, we note that the appeal was as at the time it was filed proper in that the offending decree was proper as it was approved by the Deputy Registrar after the appellant had taken steps to seek approval of respondent’s advocates but in vain. The decree in the record of appeal only became improper as a result of subsequent amendments to the judgment which necessitated another decree to be extracted. In the event, we see no reason to penalise the appellants/respondents in costs for a mistake that was not theirs in the first place and which will probably land them into more expenses in mounting a fresh appeal with the newly extracted decree. We therefore make no order as to costs against the respondents in this Notice of Motion who are the appellants in the withdrawn appeal.

In short the Civil Appeal No. 275 of 2007 is hereby marked as withdrawn with no order as to costs. Orders accordingly.

Dated and delivered at Nyeri this 30th day of October, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR