



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 519 OF 2015

RAYMOND MARAGA NYAMBISA. APPELLANT

VERSUS

**JENIFFER KANINI NZILE & SCHOLAR MUENI KIVUVA *Suing as the Administrator*
*of***

***the Estate of the Late* THOMAS MUTWAWA NZILE. RESPONDENTS**

R U L I N G

This is a ruling to a Preliminary Objection dated 11th day of November, 2015 and a Notice of Motion dated 3rd day of November, 2015.

The Notice of Motion was filed on the 4th day of November, 2015 and it is brought under Order 42 Rule (1) and (2) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant seeks the following orders: -

1. Spent.
2. Pending the hearing and determination of this Application inter partes, this Honourable court be pleased to grant interim stay of execution of the judgment delivered on the 25th September, 2015 and all its consequential orders.
3. The Honourable court be pleased to grant a stay of execution of the Warrants of Attachment by way of sale dated 30th October, 2015 pending the hearing and determination of this Application inter partes.
4. Upon hearing this Application inter-partes, this Honourable Court be pleased to order a stay of the Judgment delivered on the 25th September, 2015 until the hearing and determination of the Applicant's Appeal.
5. Costs of this Application abides the appeal.

The Application is premised on the grounds set out in the body of the same and on the annexed Affidavit of Raymond Maranga annexed thereto.

The Respondents have opposed the Application vide a replying affidavit filed on the 16th November,

2015 sworn by Peter Odhiambo on the 11th day of November, 2015.

Before the Application could be heard the Respondent filed a Preliminary Objection on the 16th November, 2015. The same is on the following grounds.

1. The Appeal is incompetent, bad in law and fatally defective for it has been filed out of time and without leave of the Honourable Court.
2. The Appeal is frivolous, vexatious and an abuse of the court process.

The Application came up for hearing on the 16th day of December, 2015 and the parties agreed to argue the Preliminary Objection and the Notice of Motion together. I shall first consider the Preliminary Objection because its outcome will determine the fate of the appeal.

Counsel for the Respondents submitted that there is no proper Appeal on record, the judgment in the lower court matter was delivered on the 25th September, 2015 and the Appeal was filed on the 4th November, 2015. The Appellant ought to have filed the Appeal within 30 days as prescribed by the law. If the Appeal is filed outside that period, then leave of the court is necessary as provided for under Order 50 Rule 6 of the Civil Procedure Rules.

On his part, counsel for the Appellant submitted that the Appeal has been filed in time. According to him, he did not require the leave of the court to file the Appeal. He relied on Section 79 (G) of the Civil Procedure Act which states that an Appeal shall be filed within 30 days from the date of the decree. He submitted that the decree is dated 21st October, 2015 and the Appeal herein having been filed on 4th November, 2015, the Appellant was within time to file the same.

The essence of a Preliminary Objection was given by Law JA Old Sir Charles Newbold P, in **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) E.A. 696 at page 700 JA** stated that: -

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court or a plea of Limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newsbold P added as follows page 701: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion.”

I have carefully considered the Preliminary Objection together with the submissions made by the learned counsels. Section 79G of the Civil Procedure Act provides: -

“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 anytime 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.

Section 79G talks of a decree or an order appealed against. It is important at this point to consider what a decree is. Section 2 of the Civil Procedure Act defines a decree as follows: -

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final, it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91, but does not include

- a. Any adjudication for which an appeal lies as an appeal from an order: or***
- b. Any order of dismissal for default provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;”***

My understanding of the word decree as defined in Section 2 of the Civil Procedure Act is that it also includes a judgment. The Section further states that a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such a judgment may have been drawn up or may not be capable of being drawn up.

The Appellant herein has appealed against a judgment and not an order and this being an Appeal, the proviso to Section 2 applies which then means the date of the judgment is the date of the decree. The decree was given on the 25th day of September, 2015, but it was issued on the 21st day of October, 2015. The actual date of the decree is 25th September, 2015.

Under Section 2 of the Civil Procedure Act, a party who intends to file an Appeal against a judgment does not require a decree to be able to do so. It was, therefore, not necessary for the Appellant to await the drawing of the decree for him to file the Appeal. The stage at which the decree is required is when compiling the record of appeal which comes much later in the proceedings.

The appeal herein ought to have been filed within 30 days from the 25th September, 2015 that is to say on or before the 24th day of October, 2015. Infact the decree was issued before the expiry of the period within which the Appeal ought to have been filed and therefore, the Appellant does not have any excuse for failure to file the Appeal on time.

In view of the foregoing, I find that the Appeal is incompetent for having been filed out of time. The same is struck out with costs to the Respondents.

Dated, signed and delivered at Nairobi this 10th day of March, 2016.

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L NJUGUNA

JUDGE

In the Presence of

..... *for the Appellant*

..... *for the Respondent.*



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