

Privy Council Appeal No. 102 of 1934

Rozendo Ayres Ribeiro - - - - - *Appellant*
v.
Olivia Da Ritta Siqueira e Facho and another - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1936

Present at the Hearing:

LORD ALNESS.

LORD MAUGHAM.

SIR SIDNEY ROWLATT.

[*Delivered by* LORD ALNESS.]

This is an appeal by special leave from a decree of the Court of Appeal for Eastern Africa, dated 10th January, 1934, dismissing an application by the appellant for leave to appeal out of time from a judgment and decree of the Supreme Court of Kenya, dated 19th August, 1932.

The proceedings which gave rise to the appeal were instituted, on 7th June, 1929, in the Supreme Court of Kenya at Nairobi, by the respondents, who are daughters of the late B. C. Siqueira, as plaintiffs, against (1) the appellant, and (2) the respondents' mother, as defendants. The latter, by a trust deed dated 27th October, 1910, had appointed the appellant to act jointly with her as co-trustee of the respondents' share in the estate of their late father. The purpose of the suit was to obtain an order against two defendants—one of whom was the appellant, and the other the respondents' mother—to furnish an account of their administration of the trust property, and for payment of an amount alleged to be due by them.

The appellant pleaded that the trust deed had not been acted upon, and that he took no part in the administration of the estate. The other defendant pleaded that she was ignorant of business affairs, and that the proper person to render accounts was her brother, who had been appointed her co-trustee under the trust deed, and who, by virtue of a power of attorney and a partnership deed, had managed the estate of her late husband.

A second suit was instituted by the respondents, on 13th September, 1929, against their mother alone. Their brother who has already been referred to, and the appellant were joined as co-defendants. This suit referred to certain other property, which is not material to this appeal. The first and second suits were ultimately consolidated.

The consolidated suit, out of which this appeal arises, came before the Chief Justice of the Supreme Court of Kenya, Sir Jacob Barth, and, on 19th August, 1932, he delivered a written judgment upon it. By that judgment all three defendants were ordered to furnish an account, but a distinction was drawn between the liability of the appellant and that of the other defendants. No formal decree, following upon that judgment, was drawn up.

In virtue of the judgment, an account was duly taken before the Registrar of the Supreme Court of Kenya (1) as between the respondents and the first and second defendants, and (2) as between the respondents and the appellant. On 19th June, 1933, the Registrar submitted his report upon the accounts to the learned Chief Justice. The Registrar held that, in respect of the trust moneys referred to, the appellant was liable to pay to the present respondents the sum of Shs.101,615, the equivalent of Rs.22,000, with interest at 6 per cent.

On 26th June, 1933, the learned Chief Justice confirmed the Registrar's report, and, on that date, a decree, which included findings against the appellant, was drawn up, entered, and signed by the Chief Justice. This decree was ante-dated, and was described as "given under my hand and the seal of the Court on the 19th day of August, 1932"—being the date of the judgment aforesaid. On 16th September the appellant submitted to the Registrar of the Court of Appeal a memorandum of appeal against the judgment and decree of 19th August, 1932, in which he craved for leave to appeal against it upon certain grounds which were set out in the memorandum. The Registrar refused to accept the memorandum of appeal. On 23rd November, 1933, the appellant presented an application to the Court of Appeal for leave to appeal out of time. This application was duly heard by the Court of Appeal, and, by decree dated 10th January, 1934, the application was dismissed, for reasons which appear in the written judgment of the Court.

On 10th February, 1934, an application by the appellant to the Court of Appeal for leave to appeal to His Majesty in Council from the decree aforesaid was dismissed. On 14th May, 1934, however, an application by the appellant for special leave to appeal from the said decree to His Majesty in Council was granted by Order in Council of that date.

Before the Board the appellant contended (1) that his memorandum of appeal was timeously lodged, and, alternatively, (2) that, in the circumstances, he should have been allowed to file it out of time.

(1) As regards the first contention, the rules of the Court of Appeal provide that "the memorandum of appeal shall be presented in civil cases within three months . . . from the date of the decree appealed against." In this case, the date affixed to the decree appealed against was 19th August, 1932, and it would seem therefore that the memorandum of appeal was not timeously lodged. The appellant, however, contended that the ante-dating of the decree was improper and wrong, and that it should bear the date on which it was in fact pronounced. On that question the Court of Appeal offered no opinion, inasmuch as the application before them was one to appeal out of time. Equally their Lordships, for the same reason, consider themselves absolved from pronouncing an opinion on that matter. The order appealed against is one dismissing an application by the appellant to appeal out of time. Their Lordships may add that they would find difficulty in affirming the contention of the respondents that the original judgment of 19th August, 1932, not having been drawn up in the form of a decree within the definition contained in section 2 (4) of the Kenya Civil Procedure Ordinance, 1924, could be treated as a decree from which an appeal might competently have been taken.

(2) In holding that the appellant had not made a case for being allowed to appeal out of time, the Court of Appeal exercised a judicial discretion, and manifestly such a decision would require strong reasons in order to justify interference with it on appeal. Their Lordships are unable to hold that such reasons have been forthcoming. There can be no doubt that the appellant had an opportunity, if not a duty, in the event of desiring to appeal, to take steps to have the judgment of 19th August, 1932, drawn up in the form of a decree. The Court of Appeal say "Once the judgment was delivered, he (the appellant) could and should have taken steps to ensure his appeal being within time, and, having failed to do so, there are no special circumstances which would justify our granting the application." If further authority for that proposition be required, it will be found in the case of *Jivanji* (Law Reports of Kenya 1929-30, Vol. 12, p. 41). The head-note in that case bears "that it is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the Court to draw up and issue the formal decree or order." In that duty the appellant failed. In these circumstances it is not possible for their Lordships to hold that the Court of Appeal exercised its discretion improperly in the matter. That being so, the appeal must fail. The appellant must pay the costs of the appeal.

In the Privy Council.

ROZENDO AYRES RIBEIRO

v.

OLIVIA DA RITTA SIQUEIRA E FACHO
AND ANOTHER

DELIVERED BY LORD ALNESS

Printed by His Majesty's STATIONERY OFFICE PRESS
Poole Street, S.E.1.

1936