

Rel: December 4, 2020

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190668

William Okeke

v.

Lilian Okumu

**Appeal from Jefferson Circuit Court,
Bessemer Division
(DR-17-900247)**

THOMPSON, Presiding Judge.

William Okeke ("the husband") appeals from a judgment of the Bessemer Division of the Jefferson Circuit Court ("the trial court") that,

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among other things, divorced him from Lilian Okumu ("the wife"), divided the parties' marital property, and awarded the wife sole legal and physical custody of the parties' two children.

Before this court can address the merits of the husband's appeal, we must first consider whether we have jurisdiction over this appeal, because "jurisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu." Nunn v. Baker, 518 So. 2d 711, 712 (Ala.1987); see also Bryant v. Flagstar Enters., Inc., 717 So. 2d 400, 401 (Ala. Civ. App. 1998). On August 12, 2020, this court entered an order directing the parties to submit letter briefs on the issue of the timeliness of the husband's notice of appeal, and they have complied with that request.

The record indicates the following facts relevant to the issue of whether the husband timely filed his notice of appeal so as to properly invoke this court's jurisdiction. On June 25, 2019, the trial court entered an amended final judgment in this matter. On July 24, 2019, the husband filed a timely motion to alter, amend, or vacate the judgment. On August 20, 2019, the trial court scheduled a hearing on the motion for September

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24, 2019. According to the letter brief submitted by the wife, on August 20, 2019, the parties filed a "motion to continue and stipulation of extension under Rule 59.1[, Ala. R. Civ. P.]," purporting to extend the deadline to rule on the husband's postjudgment motion beyond the 90-day period provided in Rule 59.1. In her letter brief, the wife contends that the stipulation extended the deadline for ruling on the husband's postjudgment motion up to an including November 20, 2019. However, as the wife recognizes, that motion and stipulation is not contained in the record on appeal. The wife attached a copy of the motion and stipulation to her letter brief; however, that document is not properly before this court. "[A]ttachments to briefs are not considered part of the record and therefore cannot be considered on appeal." Morrow v. State, 928 So. 2d 315, 320 n. 5 (Ala. Crim. App. 2004) (quoting Huff v. State, 596 So. 2d 16, 19 (Ala. Crim. App. 1991))." Roberts v. NASCO Equip. Co., 986 So. 2d 379, 385 (Ala. 2007). Additionally, neither party has attempted to supplement the record on appeal with the parties' motion and stipulation purporting to agree to an extension of the deadline to rule on the husband's postjudgment motion, as permitted by Rule 10(f), Ala. R. App.

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P. We note that it is the appellant's duty to check the record to ensure that a complete record is presented on appeal. Alabama Dep't of Pub. Safety v. Barbour, 5 So. 3d 601, 606 n. 1 (Ala. Civ. App. 2008). " 'An error asserted on appeal must be affirmatively demonstrated by the record, and if the record does not disclose the facts upon which the asserted error is based, such error may not be considered on appeal.' Martin v. Martin, 656 So. 2d 846, 848 (Ala. Civ. App. 1995)." Brady v. State Pilotage Comm'n, 208 So. 3d 1136, 1141 (Ala. Civ. App. 2015).

In his letter brief, the husband states that the case-action summary reflects the filing of the parties' motion and stipulation to extend the deadline to rule on the husband's postjudgment motion. It is true that a notation of the filing of a motion and stipulation appears on the case-action summary; however, the substance of that document is not contained in the record. It is well settled that "any consent to extend the 90-day period for ruling on a postjudgment motion must be in direct and unequivocal terms." Higgins v. Higgins, 952 So. 2d 1144, 1146 (Ala. Civ. App. 2006).

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Regardless of the validity of the parties' motion to continue and stipulation, however, the record indicates that the trial court did not enter an order purporting to rule on the husband's postjudgment motion until May 15, 2020. The husband appealed from the June 25, 2019, divorce judgment on June 5, 2020, nearly one year after the divorce judgment was entered.

At the time of the events described in this opinion, Rule 59.1, Ala. R. Civ. P., provided:

"No postjudgment motion filed pursuant to Rules 50, 52, 55, or 59[, Ala. R. Civ. P.,] shall remain pending in the trial court for more than ninety (90) days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. A failure by the trial court to render an order disposing of any pending postjudgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period."

(Emphasis added.)

"Parties may agree to extend the 90-day period, but any agreement to extend the time for ruling on a postjudgment motion must be express and must appear in the record. See Rule 59.1. An express consent of the parties, one evidenced by 'positive steps to express [an agreement to extend the 90-day

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period] in a direct and unequivocal manner,' is required to extend the 90-day period under Rule 59.1. Personnel Bd. for Mobile Cty. v. Bronstein, 354 So. 2d 8, 11 (Ala. Civ. App. 1977). Mere assent or agreement to continue a hearing on a postjudgment motion is not sufficient to extend the 90-day period. Bronstein, 354 So. 2d at 10-11."

Johnson v. Cox, 280 So. 3d 1053, 1056 (Ala. Civ. App. 2018).

Because the record on appeal does not contain an express agreement of the parties to extend the time in which to rule on the husband's postjudgment motion, the trial court had 90 days from July 24, 2019, the day the husband filed his postjudgment motion -- i.e., until October 22, 2019-- to enter an order on that motion or the motion would be deemed denied by operation of law. See Rule 59.1. Because the trial court did not enter an order ruling on the husband's postjudgment motion before October 22, 2019, his motion was, in fact, denied by operation of law on that date. The husband then had 42 days from October 22, 2019, or until December 3, 2019, to file a timely notice of appeal in this case. Rule 4(a)(1), Ala. R. App. P. Because the father did not file his notice of appeal until June 5, 2020, the appeal is untimely and must be dismissed. Flannigan v. Jordan, 871 So. 2d 767, 770 (Ala. 2003) ("A court must

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dismiss an appeal for lack of jurisdiction if a party does not appeal within the time prescribed by [rule or] statute.").

We note that, in his letter brief, the husband asserts that Rule 59.1 states that the "[c]onsent to extend the time for a hearing on the postjudgment motion beyond the 90 days is deemed to include consent to extend the time for the trial court to rule on and dispose of the postjudgment motion." That language is contained in an amendment to Rule 59.1 that became effective October 1, 2020, long after the time in which the trial court had to rule on the postjudgment motion in this case had expired. See Committee Comments to Amendment to Rule 59.1 Effective October 1, 2020. The amended version of Rule 59.1 has no application in this case.

The wife has requested an attorney fee on appeal. Considering the issues the husband raised on appeal and the fact that the husband's notice of appeal was untimely filed, the wife's request for an attorney fee on appeal is granted in the amount of \$2,500.

APPEAL DISMISSED.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.