



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 438 OF 2013

ELIJAH KAGONDU..... APPELLANT

V E R S U S –

DAVID KURIA..... 1ST RESPONDENT

KIAMBU INSTITUTE OF SCIENCE & TECHNOLOGY..... 2ND RESPONDENT

ELIAS KIMANI GITAU 3RD RESPONDENT

RULING

1) On 8th October 2014, Mr. Justice Onyancha issued an order striking out this appeal on the basis that the same was filed out of time and without leave of court. Elijah Kagond, the Appellant has now taken out the motion dated 10th October 2014 in which he sought for the aforesaid order to be set aside by way of review. In the same motion the Appellant also asked this court to issue an order reinstating the appeal and to further give directions. The motion is supported by the affidavit of Charles Mbugua Njuguna. The Respondents namely Elias Kimani Gitau, David Kuria and Kiambu Institute of Science and Technology filed grounds of opposition and the replying affidavit of James H. Gitau Mwara to appeal the motion.

2) It is the submission of the applicant that this court struck out the appeal on the mistaken belief that the memorandum of appeal was filed on 19.12.2013. It was pointed out that the memorandum of appeal was actually filed on 14.8.2013 well within the time to appeal. It is for this reason that the order striking out the appeal should be reviewed and set aside.

3) The Respondents strenuously opposed the motion claiming that the appeal was properly struck out for being incompetent. Mr. Mwara, learned advocate for the Respondent argued that the appeal was rightly struck out for being incompetent on the basis that the memorandum of appeal seeking to set aside the lower court's ruling which dismissed the plaintiff's application to impose liability after a consent judgment on a third party by the plaintiff was filed without leave of court as per Order 43 Rule 9 (1), (2), (3) of the Civil Procedure Rules. In other words what the Respondent is saying is that irrespective of whether the memorandum was filed in time or out of time is immaterial because it is mandatory to apply for leave. In short, the Respondent is of the view that there was no automatic right of appeal. I have perused the proceedings taken before Justice Onyancha on 8.10.2014 and it is apparent that on the aforesaid date Mr. Waweru, learned advocate for the Respondents successfully applied for the appeal to be struck out because the same was filed out of time and without leave of court.

4) After weighing the submissions of learned counsels, I think it is important to ascertain the reason or reasons why Mr. Justice Onyancha struck out the order. It is plain on the face of record that Justice Onyancha actually struck out the appeal on the basis that the same was filed out of time. It is clearly

recorded that the decision sought to be impugned on appeal is the ruling delivered by trial magistrate on 19.7.2013. The same record also shows that Mr. Justice Onyancha stated that the memorandum of appeal was filed on 19.12.2013. It is obvious from the above that by the time the memorandum of appeal was filed the thirty (30) days allowed to appeal had already lapsed. If the dates indicated by Justice Onyancha were correct then he would have been perfectly right to issue the orders.

5) It is the view of the Respondent that whether or not the memorandum of appeal was filed within time, still it would make no difference because the Appellant had no automatic right of appeal. However, the problem here is that the appeal was not struck out for want of leave. It was struck out because it was filed out of time. The Appellant has now pointed out that there is an error on the face of record in that the memorandum of appeal was filed and served within 30 days. The applicant has annexed to his affidavit a copy of the memorandum of appeal showing the same was filed on 14.8.2013 and served upon the Respondent's advocate on 15.8.2013. The ruling sought to be impugned on appeal was delivered on 17.7.2013. The Respondents did not contest these later facts. It is clear to me that there is an apparent error on record. Mr. Justice Onyancha indicated in the court record that this appeal was filed on 19.12.2013 yet it is clear that the same was actually filed on 14.8.2013. That is an error which is apparent. The question as to whether or not leave must be sought first is a matter which the Respondent formally apply to court for determination after this appeal has been reinstated.

6) In the end, I find the motion dated 10.10.2014 to be well founded. The same is allowed as prayed with costs to the Appellant.

7) The appeal having been reinstated, the same may be listed for directions on a date convenient to the parties.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent