

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 505 OF 2012

(Appeal from an order dated 2nd June 2009 from Co-operative Tribunal Case No. 162 of 2007)

ISAAC NJIRU.....APPELLANT

VERSUS

KAGAARI SOUTH FARMERS

CO-OP SOCIETY LIMITED.....RESPONDENT

RULING

The Respondent herein has applied by Notice of Motion dated 30th January 2013 for orders that the appeal is an abuse of the process of the court and secondly that the court has no jurisdiction to entertain it. The appeal is against the order of the Co-operative Tribunal dated 2nd June, 2009 by which the Appellant's defence was dismissed after determining that it had been filed out of time. The Appellant was the defendant in the lower court while the Respondent was the plaintiff.

The grounds on which the application is based are that the Appellant has filed a total of seven (7) appeals based on the same order while the law recognises only one (1) appeal. There is a supporting affidavit annexed to the application sworn by the Respondent's Chairman, Danson Gakiavi.

The application is opposed by the Appellant.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing and the authorities cited.

The Respondent obtained judgement against the Appellant in the Co-operative Tribunal on 2nd June 2009 for the sum of KShs. 267,264/00 after the Appellant's amended defence was struck out for being filed out of time. The Appellant filed an appeal on 1st July 2009 in HCCA No. 337 of 2009. He also sought stay of execution on the same date. In a ruling delivered on 21st October 2009, Okwengu J. granted stay on condition that the Appellant would deposit a sum of Kshs. 50,000/- in court as security; that he would also file and serve a record of appeal within 4 months from the date of the ruling and that if the appeal was not disposed of within 12 (twelve) months the stay would stand discharged unless otherwise extended by the Court.

It would appear that the Appellant never met the conditions and proceeded to file other memorandums of appeal one of which (HCCA No. 85 of 2012) was withdrawn as his advocate did not possess a practising certificate for the year. It is at this point that he filed the Notice of Motion dated 17th July 2012 seeking stay of execution and extension of time within which to file another appeal following striking out of HCCA No. 85 of 2012.

Whereas this application was opposed vehemently by the Respondent, its argument was disregarded by the court as it had filed grounds of opposition to the application contesting matters of fact instead of a replying affidavit. In any case, no stay of execution was granted by the Court.

Still, the Appellant continued to file other memorandums of appeal as exhibited by the Respondent's supporting affidavit. It appears that whenever the Appellant was faced with execution of decree, he rushed to court and filed appeal after appeal. Largely, he has been lucky here and has obtained, sometimes *ex parte*, the stays that he has sought. This time round, I must agree with the learned counsel for the Respondent that the issues were finally adjudicated upon in the ruling dated 21st October 2009. To permit other applications and filing of memorandums of appeal seeking the very same order of stay of execution and appealing on the same order of the Co-operative Tribunal delivered six (6) years ago, is to permit abuse of the process of the court which this court will not tolerate.

Regarding the orders of this court made on 24th September 2012 (Odunga J.), these were made as the Court did not have all the facts (the grounds of opposition were not considered as earlier stated). The Appellant was lucky that he was permitted to benefit from his own default as the ruling was delivered without consideration of the Respondent's reply to the application due to its Counsel's mistake.

Having considered all matters placed before the court, I find that the appeal herein is an abuse of the process of the court as these proceedings were initiated and carried on by deliberately suppressing facts. The appeal is also frivolous and vexatious since the appellant herein has filed and abandoned similar appeals pending before courts of competent jurisdiction. In the event this appeal is struck out with costs to the Respondent. It is so ordered.

Dated, signed and delivered at Nairobi this 22nd day of July, 2015

A . MBOGHOLI MSAGHA

JUDGE