



REPUBLIC OF KENYA

High Court at Busia

Civil Suit 1 of 2011

REUBEN PORONG IMAIAPPELLANT/RESPONDENT.

=VERSUS =

1. JACKLINE NASIMIYU.....1ST RESPONDENT.

2. EVERLYNE NASIMIYU IMAI2ND RESPONDENT

R U L I N G.

The Applicants **JACKLINE NASIMIYU IKADI** and **EVERLYNE IMAI** through their advocates M/S. Gacheche Wa Miano advocate, filed the application dated 14.12.2011 for the following orders;

“1. That this honorable court be pleased to dismiss and or struck out this appeal with costs for want of prosecution.

2. That, in the alternative and or as additional relief this Honorable court

be pleased to dismiss and or strike out the appeal with as being a sham, frivolous, vexations and on abuse of process of this Honorable court.”

The application is brought under order 2 Rule 15, order 51 Rule 1 of the Civil Procedure Rules S.8 (a) of Land Disputes Tribunal Act No. 18 of 1990 and all other enabling provisions of the law. It is based on two grounds on the face of the application which are:-

" a. The appellant has ignored, neglected , failed and or refused to take crucial action towards the prosecution of the appeal within the time limited by law.

b. The appeal was filed out of time without leave"

The application is supported by the affidavit of Jackline Nasimiyu Imai, the 1st applicant.

The application is opposed by the defendant through a replying affidavit sworn on 2.4.2012 that was drawn and filed through his advocate M/S. Wanyama and company advocates.

During the hearing, Mr. Gacheche and Mr. Wanyama advocates appeared for the Applicant and Respondents respectively and have

Considered their verbal submissions and will deal with the issues raised herein below.

Is the application grounded on the appropriate provisions of the law and of the should it be struck out and or dismissed? Order 2 rule 15 of the Civil Procedure Rules is the general provision on striking out pleadings order 51 rule 1 of the Civil Procedure Rules provides the procedure that all application under the Rules takes. Section 8 (a) of land Disputes Tribunal Act provides the period within which an appeal to the High Court may be made on a point of law from the decision of the Appeals Committee. Even though none of these provisions clearly provides for the striking out or dismissing and appeal for reasons the applicants have put forward, the court is alive to the provisions of order 51 Rules 1 and 2 of the Civil Procedure Rules and Article 159 (2) d of the constitution 2010. These provisions emphasizes on substance and not technicalities and this is an appropriate instance where objections on technicalities should overruled.

Was the Respondents time barred when they filed the memorandum of appeal? Parties are in agreement that the memorandum of appeal was filed on 28.1.2011.

I have perused the record and confirmed that is the date the memorandum of appeal was filed. The application dated 14.12.2011. and 1st Applicants supporting affidavit sworn on 30.12.2011 only state that the appeal was filed out of time without leave but falls short of giving the specific dates. Applicants counsel in his submissions indicated that the award appealed against was issued on 28.10.2010 and the 60 days for appeal therefore ended on 28.12.2010. Thus he submitted showed by the time the memorandum of appeal was filed on 28.1.2011 a period of 90 days had expired. Respondent's counsel submitted that the memorandum of appeal has indicated the tribunal award was adopted as Judgment of the court on 19.01.2011 and they filed the appeal on 28.1.2011. which is only a days thereafter. He submitted the 60 days. Right of appeal was explained on 19.1.2011 and that was the time the 60 days started to run. As there has been no other evidence availed to challenge the contents of the memorandum of appeal as far as the date of the lower courts decree adopting the award from the tribunal, the Applicants claim that the appeal was out of time fails.

The Civil Procedure Rules 2010 were in effect by the time this appeal was filed on 28.1.2011. it is therefore the duty of the Respondents as appellants to comply with the provisions of the law to ensure their appeal is prosecuted without undue delay. The Applicants cannot claim they are waiting for the Deputy Registrar to call for the lower court record as it used to be the procedure. Order 54 of the Civil Procedure Rules provides:

1. The Civil Procedure Rules are revoked.
2. In all proceedings pending the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done: Provided that:
 - a)
 - b)”

The court does not find any difficulty that the Respondents/appellants would face or that would make it impracticable for them to comply with the provisions of order 42. As already stated above the court is not satisfied that they have done enough and their slow pace may make the Applicants feel impatient. This is especially so when there is a stay order issued by the lower court on the basis of a pending appeal as submitted

For the reasons given above the court orders:

1. That the application dated 14.12.2011 is dismissed with no orders as to costs as it lacks merit.
2. That so as to avoid any further delay the Respondent /applicant is directed to file a certified copy of the decree or order appealed against in terms of order 42 Rule 2 of Civil Procedure Rules within 21

(Twenty one) days and thereafter comply with order 42 Rule 11 of Civil Procedure Rules for directions.

Delivered in open court in presence of Mr. Gacheche Advocate for Applicants/Respondent and absence of Respondent/Appellant and his advocate Mr. Wanyama Advocate.

**S. KIBUNJA,
JUDGE.
17.4.2013.**

Mr. Gacheche.

I pray for certified copy of the proceedings herein and leave to appeal.

S. KIBUNJA, JUDGE.

ORDER – Leave to appeal the ruling granted. Certified copy of the proceeding and ruling be provided to the Applicants upon payment of the usual fees.

**S. KIBUNJA
JUDGE,
17.4.2013.**