REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Civil Appeal 13 of 2006

SIA BAHATI…… ……. ……..APPELLANT

VERSUS

MARTHA GORRET WAMBUI &

NORBERT TERRY VIDOT…… RESPONDENTS

JUDGMENT

1. This is an appeal against the judgment in Civil Case No. 427/2005 passed on 23rd March, 2006 by C. Obulutsa SRM sitting at Kilifi. The memorandum of Appeal lists four grounds:

1. THAT the learned magistrate erred in law and fact in making a finding, that the appellant herein had encroached on her plot sub-division no. 60 (original no. 938/111/MN).

2. THAT the learned magistrate erred in law and fact in not giving the appellant an opportunity to lead evidence in favour of her case.

3. THAT the learned magistrate erred in law and fact by making a finding that the beacon no. 205 which had been placed between the boundaries of plot no. 60 and 59 is not the right and proper beacon.

4. THAT the learned magistrate erred in law and fact by relying heavily on the evidence of the Respondents; and not giving a chance to the respondent (sic) to prosecute her case.

2. During the appeal, Mr. Okanga submitted on behalf of the appellant that the Respondent did not tender any official deed plan or map but instead relied on a private surveyor, and complained that the appellant

had no chance to call her witnesses. Mr. Mativo appeared for the Respondent. He challenged the competence of the appeal which he said was filed five days out of time. He cited several authorities to support his contention that the appeal is incompetent and ought to be struck out; such as **LUCY WANJUGUNA NDEGWA AND OTHERS VS MAKI COMMERCIAL AGENCIES AND ANOR [2006]e KLR.**

3. On the substance, he submitted that the Lower Court had exercised its discretion judicially and that the appellant was given many opportunities to call evidence but did not, instead applying to set aside proceedings when the judgment date was set. She did not attend the hearing date for her application set for 11th March, 2006, hence judgment was read on 23rd March, 2006 after the application to set aside was dismissed. He submitted that the Lower Court in giving judgment considered credible evidence and the appellant's defence. He argued that the appellant had not demonstrated any error in the Lower Court's exercise of discretion, citing the decision of the Court of Appeal in **BARAKA APPARELS EPZ VS LUSA MBULA CA NO.280 OF 2005(NAIROBI).** Finally Mr. Mativo submitted that litigation must come to an end.

4. In response, Mr. Okanga defended the appeal arguing that "time runs differently" in April, the month in which the appeal was filed. He submitted that the mistakes of counsel ought not to be visited on a litigant.

5. It is necessary to first consider whether the appeal is competent as this will determine whether to proceed to the substance thereof. The appellant clearly has no answer to the Respondent's objection that this appeal was filed late, by five days. Mr. Okanga's contention that the computation of time in the month of April is different was not supported by any legal provision. The appeal was clearly filed late without the court's leave.

Section 79(g) provides:

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

6. The judgment of the Lower Court was given on 23rd March 2006 but Memorandum of Appeal was not filed until 28th April 2006. No leave was obtained nor certificate of delay obtained prior to the filing. Order 50 Civil Procedure Rules does not aid the Appellant's contention that the computation of time in April excludes Sundays and public holidays, as the same applies where the time set for doing any act is less than six days.

7. A cursory reading of the Lower Court proceedings reveals that the Appellant's conduct has been characterized by tardiness. The court and the parties are duty bound under Section 1 (a) and (b) of the Civil Procedure Act to ensure the attainment of the overriding objective of the act being the facilitation of just, expeditious, proportionate and affordable resolution of disputes. Parties can no longer expect to litigate endlessly while paying scant attention to the overriding objective.

The appeal herein being incompetent is struck out with costs.

Delivered and signed at Malindi this **11th** day of **May, 2012** in the presence of:

C. W. Meoli
JUDGE