



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CIVIL APPEAL CASE NO. 152 OF 2009

ALAKI MINYARI.....APPELLANT

VERSUS

JACK KAMUNDIA TEKENDEI.....RESPONDENT

(Being an appeal from the ruling of Ndungu H. N. (Miss), Senior Principal Magistrate's, in Nanyuki Senior Principal Magistrate's

Civil Case NO. 59 of 2006 dated 29th July 2009 at Nanyuki)

RULING

This ruling is the outcome of the notice of preliminary objection dated 2nd September 2010 in which the Respondents herein have raised the following grounds against the application dated 18th August 2010 and the entire Appeal:

- 1. That the application is incurably defective as it offends the provisions of Order XXI, Order XXXIX and Order L Rule 15 of the Civil Procedure rules.**
- 2. That there is already a similar application seeking for a similar order dated 30th December 2009 which is pending and unprosecuted.**
- 3. That the application offends the provisions of Order XLI rule 4 (1) of the Civil Procedure rules.**
- 4. That the appeal herein was filed out of time and without the leave of the Court thus the application has no basis and cannot stand.**
- 5. That the said application be dismissed with costs for being an abuse of the court process.**

There is evidence that the preliminary objection together with a hearing notice for 28th March 2011 were served upon the Appellant's counsel. This court permitted the Respondents' counsel to argue the preliminary objection *ex parte*.

Mr. Chweya, learned advocate who appeared as holding brief for Mr. Ombachi, learned advocate for the Respondents, argued the main ground which was to the effect that the appeal was filed out of time and without leave of court. Mr. Chweya urged this Court to strike out the appeal for being incompetent. It is now convenient to set out the facts leading to the filing of this appeal. The record shows that Samuel Kameri Kilusu and others trading as Munishoi Group Ranch, the appellants herein, sued Jack Kamundia Tukendei & 14 others, the respondents herein, vide the Complaint dated 27th April 2006 filed at Nanyuki Senior Resident Magistrate's Court. In the aforesaid complaint the Plaintiffs (Appellants) prayed for judgment against the Defendants (Respondents) in the following terms:

- (a) An order that the Defendants be henceforth evicted from land Number LAIKIPIA/ILNDIRGIRI/6 and be restrained from ever trespass on the same.**
- (b) General damages for trespass and mesni profits.**
- (c) Cost of this suit and interest thereon.**
- (d) Any other or further relief that this Honourable Court may deem fit to grant.**

The Defendants (Respondents) filed a defence to deny the Plaintiffs (Appellants') claim. The suit was heard by Hon. Ndungu H. N. (Miss) learned Senior Principal Magistrate. In her judgment delivered on 29th July 2009, the learned Senior Principal magistrate, she dismissed the suit on the ground that she had no jurisdiction to hear and determine a dispute based on trespass. Apparently the judgment was delivered in the absence of the parties and their advocates. It would appear the Appellants were aggrieved by the judgment consequently they filed this appeal. The Memorandum of Appeal dated 30th December 2009 was filed in court on the same date. The Appellants filed the Motion dated 30th December 2009 in which they sought for an order of stay of execution for the recovery of costs. The record shows that the Respondents filed a notice of preliminary objection against the entire appeal and the Motion dated 25th January 2010. For some unexplained reasons, the record shows that the Appellants again filed another application by way of the Chamber Summons dated 18th August 2010 in which they sought for similar orders like those prayed in the Motion dated 30th December 2009. The Respondents then filed the preliminary objection dated 2nd September 2010, the subject matter of this ruling.

Having set out the background of the preliminary objection, let me now examine whether or not this appeal was filed out of time. There is no dispute that judgment of the subordinate court was delivered on 29th July 2009. Under *Section 79 G* of the Civil Procedure Act, an aggrieved party is required to file an appeal to this court within 30 days from the date of judgment. The Court is given a wide discretion to admit an appeal out of time if good and sufficient cause is shown. The Memorandum of Appeal herein was filed on 30th December 2009 about four (4) months (i.e. 90 days) after the date of judgment. There is no evidence to show that the Appellants applied for leave to appeal out of time under *Section 79 h* of the Civil Procedure Act. It is therefore clear that this appeal is incompetently before this court. The same was filed out of time without the leave of court. Consequently, I find the notice of preliminary objection to be well founded. The appeal is hereby ordered struck out with costs to the Respondents.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON

JUDGE

In open court in the absence of parties with Notice.