



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 144 “B” OF 1993

BETWEEN

SAMWEL NDURA KANYARA:.....APPLICANT

AND

MARY NJAMBI:.....DEFENDANT

(Being an appeal from the decision of the Resident Magistrate Hon. M.O. Opondo in Eldoret Senior Principal Magistrate’s Court Civil Suit No. 249 of 1989)

RULING

This is an application (Chamber Summons dated 21st March, 2011) by the respondent, **Mary Njambi**, seeking the striking out of the appellant’s (**Samwel Ndura Kanyara’s**) appeal for being *res judicata*. The application is brought under section 6 of the Civil Procedure Act and Order LI Rule 1 of the Civil Procedure Rules.

The application is based on one substantive ground that the appellant filed High Court Civil Appeal No. 152 of 1993 against the same judgment (Eldoret CMCC No. 249 of 1989) which appeal was on 3rd February, 1994, summarily rejected. The appellant appealed against the summary rejection to the Court Appeal being Court of Appeal Civil Appeal No. 152 of 1995 which appeal was struck out. The appellant lodged another application in the court of Appeal seeking leave to file a proper record of appeal being Court of Appeal Civil Application No. NAI. 88 of 1997 which application was allowed and the appellant then lodged civil appeal No. 215 of 1999. That appeal was again struck out on 26th September, 2001.

Documentary support of the above appeals and applications by the appellant are exhibited by the respondent in her affidavit filed in support of her application.

The appellant has opposed the application on the basis of his replying affidavit sworn on 16th May, 2011 and surprisingly filed on 15th May, 2011. At Paragraph 15 of the affidavit, the appellant deponed that the memorandum of appeal in Civil Appeal No. 152 of 1993 was indeed struck out on 3rd February, 1994. He also, at paragraph 16, acknowledged the decision of **Ibrahim J.** dated 16th December, 2008 rendered in the said appeal in which the Learned Judge ordered the appellant not to file any further application without the leave of the court. In paragraph 17 of the said affidavit the appellant deponed that Appeal No. 152 of 1993 was between other parties and not him and the respondent.

In view of the denial by the appellant that Appeal No. 152 of 1993 was between him and the

respondent, I perused the file for the same. Although I was unable to trace a memorandum of appeal therein, it is clear that the said appeal was lodged by the appellant herein against the respondent. It is also clear that the appeal was from the judgment of **M.A. Opondo**, then a Resident Magistrate, delivered on 30th November, 1993 in Eldoret SPMCC NO. 249 of 1989. That is the same judgment which is the subject of the appeal herein.

The record of HCCA NO.152 of 1993 shows that the appellant's appeal was indeed struck out on 3rd February, 1994 by **D.K.S. Aganyanya J.** (as he then was). Indeed a decree to that effect was signed and sealed by the Deputy Registrar of this court on 12th March, 1997. The record further shows that the appellant was aggrieved by the summary rejection of his appeal and on 25th April, 1994 lodged a Notice of Appeal against the said rejection. He then, vide Civil Application No. NAI. 88 of 1997 sought and obtained leave of the court of appeal to lodge an appeal against **Aganyanya J's** decision out of time.

The appellant eventually filed Civil Appeal No. 215 of 1999 which was on 26th September, 2001 struck out on the grounds that the appellant had not obtained leave to appeal and that the order appealed from had not been included in the record of appeal.

The appellant cannot have forgotten the proceedings in HCC Appeal No. 152 of 1993 in which he represented himself. In my view he has simply not been candid. He would probably wish to erase those proceedings from his mind given that he failed to obtain leave to appeal against the lower court's decision from **Dulu J.** when he attempted to start the appeal process afresh after the Court of Appeal had struck out his appeal. Judge **Dulu's** decision was delivered on 14th January, 2004.

The appellant also argued an application for extension of time to file a Notice of Appeal before **Ibrahim J.** as he then was, which application was refused and the Learned Judge ordered the appellant not to file any further application in the said appeal without the leave of the court.

The appellants appeal herein is from the same decision of the lower court in Eldoret PMCC NO. 249 of 1989 which was the decision appealed against in HCC Appeal No. 152 of 1993 and which appeal **Aganyanya J.**, as he then was, summarily rejected. A summary rejection is a meditated decision and may only be challenged on appeal. It cannot be challenged in separate proceedings as the appellant believes. The appellant cannot be allowed to canvass the same issue again. The Law prohibits it. That Law is section 7 of the Civil Procedure Act.

I therefore agree with counsel for the respondent that this appeal is *res judicata*. The respondent's Notice of Motion dated 24th March, 2011 and filed on the same date is allowed. This appeal is struck out

The appellant shall pay the respondent's costs of this application and the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 27th DAY OF SEPTEMBER, 2011**

**F. AZANGALALA
JUDGE**

Read in the presences of:-

The appellant and Mr. Chepkwony hold brief for Mr. Njuguna for the Respondent.

**F. AZANGALALA
JUDGE
27TH SEPTEMBER, 2011**