



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 218 of 2007

DR. FLORENCE MUSAU.....APPELLANT

VERSUS

KENYA ANTI-CORRUPTION COMMISSION.....RESPONDENT

R U L I N G

1. By a notice of motion dated 4th November, 2009, the Kenya Anti-Corruption Commission who is the respondent to the appeal pending before this court, seeks to have the appeal struck out under Section 3A of the Civil Procedure Act and Order L rule 1 of the Civil Procedure Rules, for being incompetent. In the alternative the respondent seeks to have the appeal dismissed for want of prosecution.

2. The respondent maintains that the appeal is filed out of time as it was filed on 28th March, 2007, whilst the ruling subject of the appeal was delivered on 20th February 2007. It is further contended that the appellant has failed to take necessary steps to facilitate the admission and prosecution of the appeal. The application is supported by an affidavit sworn by the respondent's counsel Ben Mutei who swears that the ruling subject of the appeal was delivered on 20th February, 2007 and not on 27th February, 2007 as indicated by the appellant.

3. The application is opposed through a replying affidavit sworn by the appellant. She depones that the record of appeal has not been tampered with. The appellant swears that the appeal was filed within time, as the ruling subject of the appeal was delivered on 27th February, 2007. An objection has been taken to the affidavit sworn by the respondent's counsel in support of the respondent's notice of motion, on the ground that counsel has deponed to contentious issues. It is further maintained that there is no provision in the Civil Procedure Rules for striking out of an appeal, and that the only available provision is for an appeal to be dismissed for want of prosecution.

4. I have carefully considered the application, the affidavit in support and in reply as well as the submissions of counsel. Three main issues arise. Firstly, whether the application before the court is supported by a competent affidavit, or whether the affidavit of the respondent's counsel sworn in support of the notice of motion is incompetent. Secondly, whether this court has powers to strike out an appeal. Thirdly, whether appeal before this court is incompetent for having been filed out of time. And fourthly, whether the appeal should be dismissed for want of prosecution.

5. As regards the first issue which was raised by the respondent, it is trite law that a party's counsel should not play the double role of being advocate and witness in the suit. Therefore, counsel cannot swear an affidavit deponing to contentious issues in the suit. This means that should it become necessary for a party's advocate to give evidence in a suit, then he cannot continue appearing in the suit as an advocate. (Rule 9 of the Advocates (Practice) Rules refers).

6. While it is not disputed that the respondent's counsel did swear an affidavit in support of the notice of motion, the question is whether the matters deponed to in the counsel's affidavit are contentious issues. The matters deponed to by the respondent's counsel related to matters which were within the counsel's knowledge regarding what transpired in court. Counsel did not depon to contentious issues of fact relating to the subject of the appeal. It is true that counsel deponed to a contentious issue regarding the date when the ruling of the lower court was delivered. That however, is a formal matter of procedure. Although the parties have disagreed on when the ruling was delivered, what the parties say regarding this date is immaterial as the court is bound by what is in the lower court record as certified by the lower court.

7. Therefore, the issue of counsel being called upon to testify does not arise, as all that is required is a certified copy of the decree or order appealed against and the date of the ruling will be established. The court cannot go by the respondent's allegations even

though made on oath. I would therefore overrule the objection relating to the competence of the respondent's supporting affidavit and find that the notice of motion is properly before me.

8. It is true that there is no specific provision in the Civil Procedure rules, for striking out an appeal. However, the court is not toothless where it is clear that an appeal ought to be struck out. Indeed, the respondent moved the court under the court's inherent powers which are preserved under Section 3A of the Civil Procedure Act. Such powers are to be used in situations such as this where the Civil Procedure Act has not provided a specific provision to deal with the situation. It is therefore my view that this court has powers to strike out an incompetent appeal.

9. As regards the competence of the appeal, that is equally tied up to the issue regarding the date of the ruling subject of the appeal. In this case no certified copy of the decree or order appealed from has been availed. Without a certified copy of the decree or order appealed against, this court cannot tell for certain whether the appeal was filed within the statutory period. The respondent has therefore failed to establish that the appeal is incompetent for being filed out of time.

10. On the alleged failure by the appellant to prosecute the appeal, Order XLI Rule 31(1) of the Civil Procedure Rules provides for dismissal of an appeal for want of prosecution at the instance of the parties, only after the giving of directions under Order XLI Rule 8B of the Civil Procedure Rules. In this case, the appeal has not been admitted to hearing nor have directions under Order XLI Rule 8B of the Civil Procedure Rules been given. Therefore, the respondent cannot move the court for dismissal of the appeal under that provision.

11. Allegations were made that the appellant's failure to extract a copy of the order subject of the appeal is a clear indication of the appellant's lack of interest in the appeal. That may well be so, however, under Order XLI Rule 1A of the Civil Procedure Rules, the best that the respondent can do is to move the court to order the appellant to provide a certified copy of the order within a specified period failing which the court would be at liberty to make orders as may be appropriate including dismissal of the suit for want of prosecution. The failure to provide a certified copy of the order cannot therefore be an automatic cause for dismissal for want of prosecution without a specific direction to the appellant to provide a certified copy of the order appealed against within a specified period.

12. The upshot of the above is that the respondent's notice of motion dated 4th November, 2009 fails. It is accordingly dismissed with costs.

Dated and delivered this 17th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Shijenje H/B for Kilonzo for the appellant/respondent

Machira H/B for Mutei for the respondent/applicant

Kosgei - Court clerk