



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 517 OF 2002

BENEDICT WAKABA KIHU.....1ST APPELLANT

EMBAKASI RANCHING CO.....2ND APPELLANT

VERSUS

STEPHEN KARUU MAINA.....1ST RESPONDENT

JOSPHAT NJUGUNA MUGO.....2ND RESPONDENT

R U L I N G

1. I have before me two applications. The first application is a chamber summons filed by the respondents to this appeal on 28th January, 2005, in which the respondents sought to have the appeal struck out. The grounds upon which the application was made are as follows:

(i) That the appeal filed herein was filed without the leave of the court.

(ii) That more than two years have lapsed from the time the appellants filed the appeal and no action has been taken.

(iii) That the appellants have since filed a HC. Misc. Application No.1052 of 2002, for enlargement of time to file appeal out of time.

2. It is contended that the appellants have filed two memorandum of appeal, the 1st one dated 9th September, 2002 and the 2nd one dated 6th December, 2006. The appeal filed on 9th September, 2002 is said to be incompetent as the same was filed without leave of the court. The memorandum of appeal filed on 6th December 2006 is also said to be incompetent as it was filed out of time.

3. Counsel for the respondents submitted that although the appellant was granted leave on 10th December, 2004 to file the appeal out of time such appeal was expected to be filed within a reasonable time. He maintained that the appeal ought to have been filed in another suit and at most within 30 days. He therefore urged the court to strike out the appeal before this court as the same is incompetent.

4. In response to this application it was submitted that the memorandum of appeal filed on 19th December, 2002 was of no consequence as Misc. Application No.1052 of 2002 was filed pursuant to which leave was granted to file appeal out of time. It was pursuant to the leave granted on 10th December, 2002 that the 2nd memorandum of appeal was filed. The court was urged to exercise its discretion in the appellant's favour as the delay was only two years.
5. The 2nd application is a notice of motion which was filed by the appellant on the 22nd January, 2009. In the motion the appellants seek extension of time to file appeal out of time, the appellants also seek to have the memorandum of appeal filed on 6th December, 2006 and the record of appeal filed on 21st December, 2006 admitted out of time and deemed as properly filed.
6. One of the appellants has filed an affidavit in which he explains that their advocate filed an appeal pursuant to leave granted on 10th December, 2004. The appeal was unfortunately inadvertently filed out of time due to a mistake in the advocate's office. The error was only recently discovered forcing the appellants to bring the motion for extension of time. The appellant pleads that the mistake was that of his counsel for which they should not be made to suffer.
7. In response to this application the respondents contend that the application having been made 6 years after the documents were supposed to be filed, the appellants were guilty of undue delay which should not be condoned. It was further maintained that the application for extension of time was *res judicata* as a similar application was dealt with by Visram J.
8. I have considered this application and carefully perused the court record. I have found that this appeal was originated by a memorandum of appeal dated 9th September, 2002 which was filed on 16th September, 2002. The appeal was against a judgment delivered on 29th July, 2002 in Nairobi RMCC No.1434 of 1998. It is therefore apparent that as at the time the memorandum of appeal was filed, time to file the appeal had already ran out. It was therefore necessary for the appellant to obtain leave of the court to either file the appeal out of time or deem the appeal already filed to be properly filed. It is evident that no such leave was obtained and therefore the appeal initiated by the memorandum filed on 16th September, 2002 was incompetent.
9. My perusal of the record has also confirmed there is a 2nd memorandum of appeal dated 6th December, 2006 which was filed on the same date. There is no indication on the face of the memorandum of appeal indicating that that memorandum was filed pursuant to leave of the court. However, Benedict Wakaba Kihui one of the appellants swore a replying affidavit in response to the respondents' application. To that affidavit is annexed a copy of an order made on 10th December, 2004 in Misc. Application No.1052 of 2002 in which Hon. Visram J. extended time to the appellants to file an intended appeal and allowed the appellants to file their intended appeal out of time.
10. The appellants have maintained that the memorandum of appeal filed on 6th December, 2006 was filed pursuant to the order made by Visram J. on 10th December, 2004. The appellants acknowledge that the memorandum was filed out of time but blame their counsel and implores this court to extend time to file the appeal out of time.
11. Given the background to the two applications, it is evident that the memorandum of appeal filed on 6th December, 2006 is incompetent. This is because the same has been filed in an appeal which is incompetent having been anchored on an incompetent memorandum of appeal which was filed on 16th September, 2002. The order issued by Hon. Visram J. on 10th December, 2004 extended time for the appellants to file an intended appeal. That meant that the appellant had to file a new appeal. The filing of the memorandum of appeal dated 6th December, 2006 in this appeal could not change the fact that the appeal was already defective having been initiated by an incompetent memorandum of appeal. The appropriate order would have been an order deeming the memorandum of appeal filed on 16th September, 2002 as properly filed. However, that was not the order sought by the appellants and therefore the appeal

remained incompetent.

12. Further, even assuming that the appellant could file the memorandum of appeal, in this appeal, the order having been made on the 10th December, 2004, it was expected that the appeal would be filed within a reasonable time thereafter. The memorandum of appeal filed two years later cannot be said to have been anchored on the order of 10th December, 2004. It is for this reason that the appellant has sought further extension of time to file the appeal. Nonetheless, the appellant has not satisfied this court that there were good grounds for the delay. An attempt has been made to blame the advocate's office. There is however no evidence to support the allegation. I find that the shifting of the blame is mere excuse which cannot explain the inordinate delay.

13. For the above reasons, I come to the conclusion that the appellants' notice of motion dated 2nd January, 2009 must be rejected. The respondents' chamber summons dated 28th January, 2005 is hereby granted and the appeal struck out with costs.

Those shall be the orders of this court.

Dated and delivered this 13th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Nduati for the appellants

Gitonga M. for the respondents

Erick – Court clerk