



JOSEPH NDUNGU MUIRURI..... APPELLANT

VERSUS

GAICHANJIRU SELF HELP GROUP..... RESPONDENT

RULING

1. A preliminary objection has been taken to the hearing of a Chamber Summons dated 20th July, 2009, brought by Gaichanjiru Self Help Group, hereinafter referred to as the applicant. The applicant, who is the respondent to this appeal, seeks orders under Order XLIV Rule 3, Section 78(2) and Section 3A of the Civil Procedure Act, Cap. 21 Laws of Kenya, as follows:

- (i) That the orders of 19th July, 2008 be reviewed.
- (ii) That this appeal be dismissed.
- (iii) That the costs of this application and the appeal be met by the appellant.

2. The preliminary objection which has been raised by the appellant is anchored on the following grounds:

(a) That the application is bad in law in that it contravenes the express and mandatory provisions of Order L Rule 1.

(b) That the Court's jurisdiction has not been properly invoked since the provision of law relied on do not confer jurisdiction for appellate Court to dismiss an appeal.

3. Mr. Kibathi who argued the preliminary objection on behalf of the appellant submitted that prayer (a) of the application cannot stand, as Order XLIV Rule 1 of the Civil Procedure Rules has not been invoked.

Nor have any grounds for review been set out. With regard to prayer (b), it is contended that the applicant has invoked section 78(2) of the Civil Procedure Act, which does not give the Court powers to dismiss the appeal. Further it was contended that the application contravenes order L Rule 1 of the Civil Procedure Rules as it ought to have been brought by way of a Notice of Motion.

4. Miss Wangari who appeared for the applicant maintained that the application was properly before the Court. She submitted that the application was brought under Order XLIV of the Civil Procedure Rules, which do not provide for review. She argued that the grounds for review could only be established during the hearing of the application. She further maintained that section 78(2) of the Civil Procedure Act, gives the Court powers to dismiss the appeal. Further Miss Wangari contended that Section 3A of the Civil Procedure Act gives the Court inherent powers to dispose of the appeal.

5. I have considered the preliminary objection which has been raised. I cannot but concur with the respondent/appellant that the application is incompetent as the Court has not been properly moved. It is clear from the grounds stated on the face of the Chamber Summons in support of the application, and the supporting affidavit sworn by David Mwaura, that the applicant is essentially seeking review of the orders of 19th July, 2008 and dismissal of the appeal, because the respondent/appellant has failed to have the appeal listed for hearing as directed by the Court on 15th July, 2008.

6. Firstly no ground for setting aside orders, under Order XLIV Rule 1 of the Civil Procedure Rules, have been alleged or alluded to. Secondly, Section 78(2) of the Civil Procedure Act, relates to powers of an appellate Court, upon hearing an appeal. The dismissal of an appeal for want of prosecution is clearly provided for under Order XLI Rule 31 of the Civil Procedure Rules. That is the provision under which the applicant ought to have moved the Court. The Court's inherent power is a residual power used only where there are no specific provisions.

7. Thirdly, the applicant's failure to prosecute the appeal can only be anchored on the order of 15th July, 2008 which gave the applicant 90 days within which to take a date for the hearing of his appeal. Review of the order is therefore not justified. At best the Court can only be moved to dismiss the appeal for want of prosecution.

8. For the above reasons I uphold the preliminary objection and strike out the Chamber Summons dated 20th July, 2009.

Orders accordingly.

Dated and delivered this 29th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant/respondent, absent

Mrs. Gulenywa holding brief for Wangari for the respondent/applicant

Eric, court clerk