

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Appeal 111 of 2007

ROSALIA WAKAGUYU GAKURUMI.....APPELLANT

VERSUS

HELLEN WAKIRUNDA GAKURUMI.....RESPONDENT

RULING

The application dated 21/6/2008 is a simple and straight forward one indeed. It is asking the court to strike out the Appellant's memorandum of Appeal filed on 22/11/2008. The reason given for this is that the court granted leave for the appeal to be filed out of time but gave a condition that the same be filed and served within 14 days of the said order. The appeal was filed on 22/11/2007 but todate the same has never been served by the appelland hence this application.

Counsel for the respondent in the application responded by saying that the application is vexatious and a gross abuse of the court process saying that the relief sought is not available in law. He contends that a Memorandum of Appeal can only be struck out under Order XLVI rule 31 of the Civil Procedure Rules for non-prosecution. That unfortunately is where counsel goes wrong. This court has inherent powers under Section 37 of the Civil Procedure Act to step in to stem or stop an abuse of the court process in instances which are not provided for under the Civil Procedure Rules. That explains why this application is brought under Section 3A Civil Procedure Act. When a court issues orders but gives a condition precedent which must be fulfilled inorder for the said order to be effective, then that condition MUST be fulfilled. If for whatever reason the party granted the order is to comply with the same, then he should come to court and seek review of the condition precedent. If he does not, and he fails to comply with that condition, then the order lapses and ceases to have any effect. For instance, in this case, the Appellant was ordered to file and serve the petition within 14 days. Todate, he has not complied with that condition. In that case, this order ceased to have effect 14 days after 22/11/2007 when the order was issued. There is therefore no valid appeal on record as at now. Counsel for the applicant was therefore in order and within the law to file this application under Section 3 A Civil Procedure Act to have the said appeal struck out. Section 3A is all encompassing and meant to cover such situations in which the offending party wants to take advantage of flouting the law on one hand and on the other claiming that there is not express law to stop him from further offending or infringing the law. The application before me has merit and the same is hereby allowed. The memorandum of appeal dated and filed on 22/11/2007 is hereby struck out with costs to the Applicant/Respondent in the appeal.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this11th day of March 2008