

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

Civil Appeal 250 of 2006

PEOPLES PARTY OF KENYA.....APPELLANT

VERSUS

MARY WAITHIRA NDUNG'U.....1ST RESPONDENT

JOHN KARANJA.....2ND RESPONDENT

ALI ADEN.....3RD RRESPONDENT

ROBERT MUGO.....4TH RESPONDENT

THE TOWN CLERK,MUNICIPAL

COUNCIL OF LIMURU.....5TH RESPONDENT

R U L I N G

By a notice of motion dated 16th July, 2007, the respondents have moved this court under Order XLI Rule 31(2), Order L Rule 1(2) & (3), of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking to have the appeal filed herein dismissed for want of prosecution. In the alternative the respondents seek to have the memorandum of appeal dated 25th April, 2006 struck out for being incurably defective. The respondents seek to have the original file in respect of Limuru SRMCC No. 125 of 2005 transferred back to the lower court to enable them pursue the costs awarded to them by the lower court.

With regard to the issue of dismissal of the suit for want of prosecution, under Order XLI Rule 31(2) of the Civil Procedure Rules, the process of dismissal of a suit for want of prosecution is initiated by the Registrar of the High Court by sending appropriate notices to the parties and listing the matter before a judge. In this case, no notices have been sent to the parties by the Registrar. The respondent cannot usurp the powers of the Registrar under Order XLI Rule 31(2) of the Civil Procedure Rules by purporting to move the court.

To this extent the application is defective. The respondents must enlist the cooperation of the Registrar to invoke Order XLI Rule 31(2) of the Civil Procedure Rules.

I have considered the submission that the appeal herein is defective and should be struck out as it was filed by a body having no capacity to litigate in its own name. Nonetheless, it is evident from the record of the lower court that the suit in the lower court was filed by the same party who has filed this appeal. The issue of the capacity of the appellant as a litigant has been raised in the pleadings but has not been determined in the lower court, and therefore is an issue which cannot be dealt with by this court at this stage. Indeed, the two cases cited by the respondents' advocates i.e.

(i) HCCC No.2824 of 1997 (OS) Jane Nyambura Joshua vs Apostolic Faith Church.

(ii) HCCC No. 529 of 2004 Savana Jua Kali Association (suing through its chairperson) Anne

Khasoa vs Councillor Amos Ngata & 2 Others,

are distinguishable as they did not relate to an appeal, but were both cases in which the issue of the capacity of the litigant was being dealt with by the court as a court of first instance.

With regard to the contention that the memorandum of appeal was lodged by an unqualified person, I am satisfied that there is substance in this contention. James Gacheru Kariuki who is indicated as having drawn and filed the appeal, has not filed the appeal as an advocate nor is he a party to the suit. He is not therefore a qualified person and has contravened Section 34 of the Advocates Act in filing the appeal. I therefore find that the appeal is incompetent having been filed by an unqualified person. For this reason, I order that the memorandum of appeal be struck out. I award costs to the respondents to be paid by James Gacheru Kariuki.

Orders accordingly.

Dated and delivered this 10th day of June, 2008

H. M. OKWENGU

JUDGE