



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Appeal 148 of 2005

[Being an appeal from the Judgment of the Hon. A.B MONGARE – RM in Nakuru Chief Magistrate’s Court CMCC No. 2643 of 2002 delivered on the 28th day of July 2002]

TIMSALES LTD APPELLANT

VERSUS

STANLEY NJIHIA MACHARIA RESPONDENT

RULING

The appellant’s appeal came before me on 24th March 2006 for the admission under Section 79B of the Civil Procedure Act. The appeal was summarily dismissed for reasons that there were no sufficient grounds for interfering with the Judgment and decree of the lower court. The appellant filed a notice of motion under **Order 44 of the Civil Procedure Rules** and **Section 80 of the Civil Procedure Act**. He has sought for orders of review and setting aside of the orders made on 24th March 2006 in which the appeal was summarily rejected.

The application is premised on the grounds that there are substantial points of law which required a detailed and substantive analysis. Counsel further submitted that, by rejecting the appeal summarily, the court did not accord the appellant an opportunity to consider present the points of law.

Secondly, Counsel for the appellant argued that by the time the appeal was summarily dismissed, the record of appeal had not been filed. The record of appeal was filed on 30th June 2006. He further contended that there is an error on the face of the record and the correct approach is to review the matter. He relied on the authority in the case of **Orero Vs Seko [1984] KLR page 238** in which the Court of Appeal held as follows: -

“The power granted by the Civil Procedure Act Section 79B to a judge of the High Court to summarily reject an appeal should be used most carefully and only in the clearest case such as an appeal based wholly on matters of fact upon which proper findings will have been made.”

On the part of the respondent, this application was opposed. Counsel for the respondent relied on the grounds of objection in support of their opposition. It was their submission that this court summarily rejected the appeal after considering the proceedings in the lower court and since the appellant has not stated which material was not taken into account, the court properly exercised its discretion and the order of rejection should not be disturbed. In further arguments, counsel for the respondent argued that;

Under **Section 79B of the Civil Procedure Act**, the law gives this court power to summarily reject an appeal if the court is satisfied on the perusal of the record that there are no sufficient reasons for interfering with the judgment and the appellant should have appealed to the Court of Appeal against that decision instead of applying for review.

In the case of **Orero Vs Seko**, the Court of Appeal further held that

“Where an order of summary rejection was made and no appeal had been preferred, the matter can be reviewed under Section 80 of the Civil Procedure Act. Under Rule 44 of the Civil Procedure Rules the grounds upon which a review may be sought are also provided.”

In this case therefore, the application for review of the order of summary rejection can be entertained. Further in the case of **Nzioki Vs Kitusa [1984] KLR page 487**, the Court of Appeal expounded on the provisions of **Section 79B of the Civil Procedure Act** and the court held that;

“ The power of summary dismissal should be used sparingly and only in the clearest cases, such as an appeal based entirely on points of facts, raising no questions of law and not as the case was here where the memorandum of appeal raised substantial grounds of law such as that of adverse possession.”

The issue for determination in this application is whether there are issues of law that are raised in this appeal. According to Counsel for the appellant the appeal raises substantial issues of law and he gave instances such as burden of proof, reliance on hearsay evidence and issue of proof of negligence which arise from the judgment of the trial court.

At this stage, I need not belabor so much whether the above issues are of law or facts they could be both an in my humble view it is like sprinting of hairs. Upon consideration of this application and the record of appeal which was subsequently filled, there could be issues of law which can be determined during the hearing of the appeal.

Accordingly, will review the order of summary rejection of the appeal and set aside the order of 24th March 2006. The said order is substituted with an order admitting the appeal for hearing. However I direct the appeal be heard before another Judge and the same be given a priority date.

The cost of this application shall abide the outcome of the appeal.

Ruling read and delivered on 9th day of March 2007.

MARTHA KOOME

JUDGE