



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

Civil Appeal 527 of 2001

STEPHEN KIARIE NJUGUNA PLAINTIFF

VERSUS

JOHN KABUCHO KARIUKI 1ST RESPONDENT

JOHN NGURA KINUTHIA 2ND RESPONDENT

RULING

On 31st October, 2007 parties appeared before me for the hearing of their appeal in this matter. At the same time they showed me a Notice of Motion dated 5th June, 2006, filed by the Respondents in the appeal, seeking orders to strike out the appeal and the said Notice of Motion was fixed for interpartes hearing on 20th November, 2007.

Further I was shown the Grounds of Objection to the hearing of the appeal filed, also by the Respondents in the appeal. They are dated 25th April, 2007.

Mr. D.B. Wati, Counsel for the Appellant, and Mr. Mwicigi Kinuthia, Counsel for the Respondents subsequently agreed to adjourn hearing of the appeal in order to have the hearing of the Notice of Motion together with the Objection the later being heard as a preliminary objection.

According to Mr. Kinuthia, the appeal herein was filed out of time contrary to section 8(9) of the Land Disputes Tribunals Act. On 24th April, 2003 the Respondents filed an application to strike out the appeal on the ground that it had been filed out of time without leave of the court. That application was subsequently heard and decided by Justice Ransley who on 28th July, 2003 allowed the Appellant to file a fresh appeal within 60 days after striking out this appeal. Instead of the Appellant filing a fresh appeal, he merely filed record of appeal in this same appeal which he has therefore continued to prosecute – instead of filing a fresh appeal. On that basis, Mr. Kinuthia submitted that there is no valid appeal to be heard by this court in this matter.

Mr. Wati on the other hand submitted that the issue that the Memorandum of Appeal in this matter was filed out of time is now rejudicata as that issue was properly before Justice Ransley in the aforesaid

application filed on 24th April, 2004 which sought to strike out this appeal because it was filed out of time. It is Mr. Wati's submission that the Learned Judge did not strike out this appeal. Instead the Judge asked the Appellant to file the record of appeal within 60 days from 28th July, 2003 and the Appellant complied as the record of appeal was filed on 24th September, 2003.

The issue of filing this appeal out of time is therefore resjudicata as the court made a ruling over it on 28th July, 2003 and Mr. Wati therefore concludes that this appeal is a valid appeal before this court to be heard and determined.

In the light of those arguments, I have looked at the Ruling delivered on the 28th July, 2003 and this is what the Learned Judge said on that issue:

“The Respondent applies to strike out this appeal on the grounds that it was filed some 46 days out of time. Under the Land Disputes Act Section 8(9) an appeal must be lodged within 60 days.”

That ruling goes into computation of the 60 days with reference to section 79 of the Civil Procedure Act which he held applied to an appeal under the Land Dispute Tribunal Act. He concluded:

“In my discretion I will allow this appeal to be filed in the basis that the time obtaining the Judgment is excluded from the period of Sixty days. The Appellant to file his record of Appeal within 60 from to-day.”

From the above therefore, Mr. Wati is correct that this appeal was not struck out by Justice Ransley and is therefore valid and properly before this court for hearing.

It follows that the issue that the Memorandum of Appeal in this matter was filed out of time is now resjudicata, the Respondents not having appealed against the ruling of Justice Ransley dated 28th July, 2003. The Respondent's Notice of Motion dated 5th June, 2006 is correspondingly res-judicata and the same is hereby dismissed and the objection to the hearing of this appeal, raised by the Respondents hereby rejected.

Parties to take another date at the Registry for the hearing of this appeal.

Respondents to pay the Appellant costs of the Notice of Motion dated 5th June, 2006, costs of this appeal on 31st October, 2007 and costs of this appeal to-day the date of this ruling.

Dated and delivered at Nairobi this 21st day of November, 2007.

J.M. KHAMONI

JUDGE