

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc Appli 70 of 2000

PRISCA NJOKI CHOMBA APPLICANT

VERSUS

CHARLES MWANGI CHOMBA RESPONDENT

R U L I N G

By a Chamber Summons dated 25th May 2005, brought under Order VI rules 13(1) (a) & (b) of the Civil Procedure Rules, Prisca Njoki Chomba (hereinafter referred to as the applicant) seeks to have the suit/purported appeal filed herein by Charles Mwangi Chomba (hereinafter referred to as the Respondent) struck out as scandalous, frivolous and or vexatious and disclosing no reasonable cause of action and also being an abuse of the court process.

It is the applicant's contention that the purported appeal is misconceived as no appeal can be filed by way of an application. The applicant further maintains that the purported appeal is an abuse of the process of the court as it is merely being used to facilitate orders for stay of execution pending appeal which were obtained by the Respondent in the lower court on the strength of the purported appeal.

The Respondent on his part maintains that the court having certified the appeal as raising issues of law and admitted the appeal to hearing, the matter is properly before the court. It was further submitted that there is no provision for striking out appeals under Order VI rule 13 of the Civil Procedure Rules and that the current application is similar to the application filed on 5th November 2003 which was dismissed by this court on 22nd June 2004.

Section 8 (8) & (9) of the Land Disputes Tribunals Act (No. 18 of 1990) states as follows:

“(8) The decision of the appeals committee shall be final on

any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within 60 days from the date of the decision complained of provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law (other than customary law) is involved.”

It is evident from the Memorandum of appeal which was annexed to the Notice of Motion filed on 14th April 2000 that this matter arose from a decision of the Provincial Land Disputes Appeals Committee. The orders sought in the notice of motion show an effort to comply with the above quoted sections by seeking certification from the Judge that the intended appeal raises issue of law. The problem that has arisen is that the application was brought before any substantive appeal was filed. Indeed the applicant appreciated this and therefore sought an additional order that *“the Memorandum of appeal annexed herein be deemed as filed.”*

The matter was dealt with by Hon. Juma J on 11th July 2001 who not only certified the “appeal” as raising issues of law but also admitted the “appeal” to hearing. Although the Hon. Judge did not

specifically deal with the prayer to have the memorandum of appeal deemed as filed by implication he did so by having the appeal admitted to hearing. The Respondent ought to have moved the court to set aside these orders if he was of the view that the same were irregularly issued.

I appreciate the difficulty that the Respondent may be in due to the delay in prosecuting the appeal however as I stated in my ruling of 22nd June 2004, the provisions of order XLI of the Civil Procedure Rules must be complied with. I do therefore disallow the application dated 27th May 2005.

Dated signed and delivered this 25th day of April 2006

H. M. OKWENGU

JUDGE