**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT ELDORET**

**Civil Appeal 43 of 1996**

**LUCAS CHANGWONY & 6 OTHERS ……..……. APPELLANTS**

**VERSUS**

**STANLEY CHEBIATOR …… RESPONDENT**

**(Being an appeal from the ruling in Eldoret CMCC. 803 of 1988 by Mr. K. Bett Esq. (P.M.) undated and delivered on 9/4/1996)**

**R U L I N G**

This matter has had a very long history. The suit was initially filed in November 1988 as SPMCCC No. 803/1988 after which it was handled by several Magistrates leading to a judgment in the plaintiff's favour which was dated 10/4/1995 and was delivered on 28.4.1995, in the presence of the plaintiff's counsel. The defence counsel was however not present.

The defendants took issue with the said judgment, which was in their view prepared and delivered before they had closed their case, and they moved back to court seeking an order to review it and to have it set aside. They also prayed that they be allowed to state their case.

In his short ruling the learned trial Magistrate found that there was no reason to grant the orders being sought and he dismissed the application with costs. That ruling was not dated.

Being dissatisfied, the defendants filed their Memorandum of Appeal on 22/4/1996 and indicated that they intended to appeal against the undated ruling which was delivered on 9/4/1996 in which their application for setting aside of the court's judgment to facilitate full hearing of their case and counter-claim on merit, was denied.

The respondent in the appeal has now moved this court in an application to strike out the Memorandum of Appeal on the grounds that the appeal is against a non-existent ruling; that the appellant prays for an order to set aside a judgment dated 28/4/1995 despite the fact that there is no appeal against such a judgment. It is also based on the grounds that the decree in the matter before the subordinate court has never been challenged by appeal. He is also of the view that the appeal is but an abuse of the process of the court.

It is important that before I proceed, I enumerate the grounds in which the Memorandum of appeal, which are:

"*1. The learned Principal Magistrate erred in law and in fact in holding that the court had jurisdiction to deal with the matter and deeming the claim to be for only 7 acres in Irong/Kapsoiho/11 when the*

*defendants counter-claim was against the defendants ownership/proprietorship of the whole of the said parcel which measures 52 acres and undisputed evidence in that regard was before the court.*

*2. The learned Principal Magistrate erred in law and in fact in failing to give the defendants an opportunity to be heard on their defence and counter-claim when this is a land case involving tens of acres of land and large families/very many people.*

*3. The learned Principal Magistrate erred in law and in fact by emphasizing on legal technicalities to the detriment of substance/merit.*

*4. The learned trial Magistrate erred in law and in fact by disallowing the defendants application on the basis of inter alia his own speculation regarding the fate of the defendants vis-avis the plaintiff's ownership of the suit land when the defendants had not at all been heard both on their defence and on the counter-claim.*

*5. The learned trial Magistrate erred in law and in fact by sacrificing natural justice for the litigation in question to come to an end.*

*6. The learned trial Magistrate erred on all points of law and fact in arriving at his said ruling*."

I have perused the pleadings in the matter before the subordinate court as well as the matter before me, and bearing in mind that it is trite that parties are bound by the pleadings, it is my humble opinion, that except for grounds 5 and probably 6 of the Memorandum of Appeal, all the other grounds touch on the judgment, which the appellants were not able to have reviewed and which were therefore not set aside.

In any event, having chosen to apply for review of that judgment, they have already exhausted their chances for lodging an appeal against the judgment.

I find that the appellants cannot now seek the sympathy of this court by attempting to include in their appeal issues which arise from the said judgment against which they did not prefer an appeal. To allow it would be tantamount to encouraging parties to abuse the due process.

I need not reiterate that "*the court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal" (*Order XLI rule 27 of the Civil Procedure Rules), and thus being duly empowered to deal with this type of an application, I find that this application is meritorious and I do in the circumstances strike out the Memorandum of Appeal with costs to the applicants.

Dated and delivered at Eldoret this 13th day of June 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mrs. Fundi holding brief for Mr. Chebii for the appellants

No appearance for the respondent