



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

Civil Case 205 of 1998

1. WANGECHI KABIRI1ST APPELLANT

2. NDEGWA KABIRI2ND APPELLANT

VERSUS

CHARLES NGIRIGACHA KABIRI & ANOTHER.....RESPONDENTS

R U L I N G

The Chamber Summons herein dated and filed on 30/3/06 seeks one basic order; namely that leave be granted to the 2nd Appellant to amend the chamber summons dated 15/12/05 and the Annexed Draft Amended Chamber Summons be deemed as duly filed. The application prays that costs in the application be in the cause.

The application is supported by an Affidavit by Lawrence Mugambi Mungania, Advocate for the 2nd Appellant on the grounds that:

1. Since filing this suit the applicant 2nd Appellant's advocates have realized that this court has also jurisdiction to extend the time for giving notice to intention to appeal under Section 7 of the Appellate Jurisdiction Act, Cap. 9 Laws of Kenya.
2. That there were also typing errors that need to be corrected.
3. The grant of this application will enable the court to determine all relevant matters at once which shall be expeditious to the court and all the parties.

The application talks of another Affidavit by Ndege Kabibi the 2nd Appellant – which is claimed to be annexed, but no such Affidavit is annexed to the application before me.

The application is brought under Order 6A rules 3 and 5 of the Civil Procedure Rules and Section 3A of

the Civil Procedure Act, Cap. 21, Laws of Kenya.

In opposition to the application, the Respondents, in their Replying affidavit aver that:

1. There is no good reason at all to reinstate this appeal for hearing;
2. The case came up for hearing before Visram, J. on 18/10/04 and the applicant who was then represented was indulged by the court three (3) times.
3. Finally, when he was unable to tender evidence, his case was dismissed for want of prosecution.
4. On 17/11/04 applicant filed an application to reinstate the dismissed appeal, the advocate who filed the application, citing inadvertence on his – advocate’s – part.
5. The application came up for hearing on 12/4/05 and it was allowed by Visram, J. with costs of K.Shs.5,000/- and was fixed for hearing by the applicant on 27/9/05 but when it came up for hearing for the application for reinstatement the applicant asked for adjournment instead of proceeding with the application. Then the Respondent asked for the case to be dismissed with costs for want of prosecution and it was so dismissed and ordered.
6. On all the occasions that appellant came to court, he has never been ready to proceed with the case, and hence the case was rightfully and lawfully dismissed, and there is no reason why the court should exercise its discretion in favour of an indolent applicant.
7. Litigation must come to an end there is nothing to stay in this case.

At the hearing of the application herein on 20/6/06, the Respondent, through their learned counsel, Mr. Mukunya, submitted that this court lacks jurisdiction over the application as brought, and hence the application is an abuse of the court process. The basis for the submission, the learned counsel stated, was that the appeal – case – was dismissed by this court, vide Visram J., when the then counsel for the appellant/applicant, Mr. Githinji, applied for adjournment which was opposed and the court declined to grant the adjournment. The hearing was ordered to proceed, and the counsel for the applicant did not offer anything to record. Then the application was dismissed for want of prosecution.

Upon the dismissal of the application the option available to the applicant were to appeal against the refusal to grant adjournment or accept the court’s decision and comply.

Upon the rejection of the application for adjournment and the dismissal for want of prosecution, this court was *functus officio* and the applicant had no right to set aside or review that order. The decision was under Order 16 rule 4 of the Civil Procedure Rules, It was a decision by default based on consideration of the evidence adduced or lack of it.

I agree with the submissions of the Learned Counsel for the Respondent that for the applicant to come back to this very court, rather than challenge this court’s dismissal order by way of an appeal is clearly an abuse of the court’s process.

Mr. Mukunya, for the Respondent further submitted that the application is misconceived. It is brought under Order 6A rules 3 and 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya.

Section 3A is only invocable where there are no clear provisions under which the application can be brought. That is not the case here and as submitted by Mr. Mukunya, applications under Section 3A come by way of Notice of Motion, not under Chamber Summons as the applicant has done both in this application and even in the application dated 15/12/05, sought to be amended. In brief both this application and the one dated 15/12/05 sought to be amended are incompetent.

I have perused the Appellate Jurisdiction Act, Cap. 9, Laws of Kenya, which the Learned Counsel for the appellant/applicant submitted gives this court power to grant leave to appeal. I suppose the learned counsel was alluding to Rule 39 of the Court of Appeal Rules.

While agreeing that that Rule may be of assistance to the applicant, that is only so if the Rule is strictly complied with. To do that the application, as per that Rule, must be made in the manner laid down by Rules 42 and 43 within 14 days of the decision against which it is desired to appeal.

I have already held that the manner of the application under Order 6A of the Civil Procedure Rules, which is applicable to this court – the Superior Court is by a Notice of Motion, and that application has to be made within 14 days of the decision sought to be appealed against.

Here, the applicant has failed to comply with any of the Rules he seeks to rely upon. First, he has not appealed against the dismissal of his application to re-instate his case; and when he thought of any action it is neither within 14 days of the decision rejecting his application for re-instatement, nor is the application by way of a Notice of Motion. He has chosen the path of Chamber summons, which is not the manner for such applications under Order 6A applicable to this court.

All in all, and for the above reasons, I dismiss the application herein, for incompetence and with costs to the Respondent and against the Applicant.

DATED and delivered in Nairobi, this 30th Day of October, 2006.

O.K. MUTUNGI

JUDGE