

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 19 OF 1998

REUBEN MBURU GATHIGI.....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....DEFENDANT

RULING

Counsel for the Respondent, Mrs Mbabu, raised a preliminary objection to the application dated 31st May, 2004 for leave to file an appeal out of time, on the grounds that it was *res judicata*, having been heard and determined on 24th September, 2001.

The applicant admits in the grounds on the face of the application that a similar application was indeed made and determined by the Court on 24th September, 2001 when the Court allowed the application on condition that the appeal was filed within 7 days of the Court's order. That was, of course, not done and the order lapsed. The present application, made some three years after the previous one, is exactly the same. I agree with Mrs Mbabu that the same is *res judicata*, and on that ground alone it is dismissed with costs to the Respondent.

Mrs Mbabu also argued that the affidavit in support of the application does not identify the person or advocate who drew the same, and accordingly it violated Sections 34 and 35 of the Advocates Act, and ought to be struck out. I agree with that argument based on the reasoning outlined in the case of *Johann Distelberger vs Joshua Muindi (HCCC No 1587 of 2003 – Nairobi)* and hereby strike the same out.

Accordingly, the application dated 31st May, 2004 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 10th day of February, 2005.

ALNASHIR VISRAM

JUDGE