

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL 23 OF 2004

BINGA WAFULA.....APPELLANT

VERSUS

HABAKUKI INGALI AKANGA.....RESPONDENT

RULING

On the 2nd of February 2004, Musinga J. made the following order pursuant to the application made by the appellant to be granted extension of time to appeal out of time:

“I am inclined to exercise my discretion to grant the applicant leave to file the appeal out of time and in conclusion I make the following orders:-

- (a) The application dated the 13th of June 2003 be and is hereby allowed.*
- (b) The appeal filed and served within SEVEN (7) DAYS from the date hereof.*
- (c) The applicant pays the respondent costs of this application assessed at Kshs 5,000/= within the next thirty days from the date hereof.*
- (d) In default of compliance with order (b) hereinabove, this application shall stand dismissed without any further orders of the court and the respondent shall be at liberty to proceed with execution.”*

The appellant herein filed the appeal within the seven days ordered by the court, the appeal having been filed on the 6th of February 2004 (*though the memorandum of appeal states the date to be 6th February 2003*). However there has arisen a dispute as to whether the appellant complied with the second limb of order (b) which required the appeal to be served within seven days.

The respondent has filed an application under the provisions of **Sections 3A of the Civil Procedure Act** seeking that the appeal filed by the appellant herein be struck out as it was not filed and served within seven days nor had the applicant paid the costs of Kshs 5,000/= ordered to be paid within thirty days of the order issued by the court extending time to file appeal. The application is supported by the annexed affidavit of Lawrence Macharia Karanja and based on the grounds stated on the face of the application. The appellant has filed grounds in opposition to the application. The appellant’s counsel, Richard Machage has sworn a replying affidavit in opposition to the application.

At the hearing of this application, Mr Karanja Learned Counsel for the respondent reiterated the contents of the application and its supporting affidavit. He submitted that the respondent had not been served with a copy of the memorandum of appeal within the requisite period of seven days. He submitted that the appellant had not filed an affidavit of service to indicate that he had served the said memorandum of appeal in compliance with the order issued by Musinga J. It was contended on behalf of the respondent that a letter had been written on the 22nd of March 2004 by the appellant to cover up the fact that he had not served the respondent with the memorandum of appeal in time. It was further contended that the costs of Kshs 5,000/= ordered paid within thirty days was received by the respondent on the 11th of March 2004 which was beyond the thirty days stipulated by the court. Mr Karanja argued that the letter

enclosing the sum of Kshs 5,000/= (*which was in cash*) was backdated to suit the circumstances of the case. It was argued that the receipt annexed to the application dated the 11th of March 2004 was issued on the actual date the said sum of Kshs 5,000/= was paid. For the stated reasons, the respondent urged this court to strike out the appeal as it was incompetent.

In response Mr Machage, in opposing the application submitted that he had personally served the memorandum of appeal and paid the sum of Kshs 5,000/= on the 6th February 2004. Learned Counsel admitted that although he had not filed an affidavit of service that he had served the respondent, he had in actual fact served the respondent. He submitted that the copy of the memorandum of appeal which was served upon the respondent was not indorsed by the respondent and neither was it sent back to him. He denied that the respondent had served or paid the costs ordered outside the period indicated by the court. Learned Counsel admitted that he made a mistake in not filing the affidavit of service. He urged the court not to consider this failure on his part to punish the appellant. Learned Counsel submitted that he had acted in good faith when he served the respondent's counsel and expected to be reciprocated by the respondents counsel treating him similarly in good faith.

I have considered the application filed by the respondent and the response made to it by the appellant. I have also carefully considered the submissions made. The issue for determination by this court is whether the appellant complied with the court order that required him to serve the memorandum of appeal within seven days and pay the costs of the application for extension of time within thirty days. Certain facts are not in dispute. It is not disputed that the appellant did not file an affidavit of service to indicate that he had served the respondent within the requisite period. Mr Machage wants this court to believe that the fact that no affidavit of service was filed was an oversight on his part.

Both the appellant and the respondent agree that for the appeal filed by the appellant to be sustained, the appellant was required to abide by the conditions set by Musinga J when he allowed his application to file and appeal out of time. The explanation given by counsel for the appellant does not appear to be truthful. It is inconceivable that Learned Counsel, knowing the importance of effecting service within a period ordered by the court, could have been so casual about it. This court fails to comprehend how the appellant's counsel could have purported to have served the respondent on the 6th of February 2004 and yet fail to secure the endorsement of receipt at the back of the copy of the memorandum of appeal. The appellant knew or ought to have known that the respondent would be keen to see if the appellant would have complied with the order of the court as regard the filing and service of the memorandum of appeal.

In this case, even if I were to believe the appellant's submission that the counsel for the respondent acted in bad faith, the mistake of the appellant is not excusable in view of his past conduct where he had failed for some reason to file the appeal in time. Orders are made by the courts to be complied with. It has been established that the appellant served the appeal outside the period ordered by the court. It has further been proved that the appellant paid the costs ordered by the court outside the thirty day period. The failure by the appellant to comply with the order of the court as regard time, has to be taken in the context of the leave that was granted to him to file his appeal on time.

I hold that the appellant has been indolent. He was given a chance to ventilate his appeal by this court but he spurned the opportunity. I agree with the respondent. The appellant having failed to comply with the order of the court as regard the period which the appeal ought to be served and the costs paid, this appeal is incompetent. It is consequently struck out with costs to the respondent. The belligerent attitude adopted by the counsel for the appellant has not helped the appellant. If the appellant's counsel owned up to his mistake earlier and sought extension of time to comply with the orders of this court maybe the result of the application made could have been different. But as it were, the exercise of this option has now been overtaken by events.

It is so ordered.

DATED at NAKURU this 30th day of June 2005.

L. KIMARU

JUDGE