



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 107 OF 2005

JOSEPH K. MARIGI.....PLAINTIFF

VERSUS

ANNE KADENGE..... RESPONDENT

RULING

On 30/6/05 the Respondent/Applicant moved to this court, by way of Chamber Summons, under Section 78(2) of the Civil Procedure Act and Order 6 rule 1391) (b) (c) and (d) of the Civil Procedure Rules seeking dismissal of the appeal herein and costs.

The application is supported by an affidavit of Otieno Oluoch of even date and is on the grounds that:

- (a) the appeal is incompetent because the appellant sought leave of the court to file this appeal, which the applicant contends is unprocedural since under Order 42 rule 1 (3) a party is required to seek leave from the subordinate court first, and only if the lower court rejects the application can the appellant come to the High Court.
- (b) The appellant obtained stay of execution in Misc. No. 146/05 which was irregular because a substantive order such as stay cant be obtained under miscellaneous application but only in the main file. Such orders in the miscellaneous application are thus a nullity and should be discharged.
- (c) When Kubo, J. granted the appellant leave and stay on 2/2/05 the stay was conditional that the appellant files his appeal within 14 days of the date of that order, failing which the order would stand vacated forthwith. The

appellant filed the appeal on 1/3/05 – 14 days after the expiry of the time granted by the court.

Having failed to comply with the court order, they can't continue to enjoy the stay order.

In opposition the appellant/Respondent, through his Learned counsel, Mr. Kisia submitted that the issue of incompetence of the appeal cannot be raised until the appeal has been admitted for hearing: and further that under Order 6 rule 13(1) (b) (c) and (d) there is no provision for dismissal of an appeal.

I have found no substance in the learned counsel's submissions in opposition to application for dismissal of the appeal herein. To begin with, it is common ground that despite the appeal having been filed on 27/1/05, to date no steps have been taken to obtain the proceedings from the lower court; seven months after the filing of the appeal.

What must be stressed here is that admission of an appeal is out of the question unless and until those preliminary steps are taken first. Secondly, Order 6 rule 13(1) talks of striking out of proceedings at any stage. In light of this, it is difficult to understand the difference the Learned Counsel is drawing between there being no provision for dismissal of an appeal and striking out of any proceedings (appeal) at any stage. In my view, that submission has no merit and is wanting in logic. I reject the submission as unfounded.

I agree with the learned counsel for the Respondent, Mr. Oluoch, that leave to appeal, under Section 75 of Cap. 21, should first be sought from the lower court and only if such an application for leave is rejected can the party resort to the High Court. To that end, Order 42 rule 1 (3) of the Civil Procedure Rules provides:

“Application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from.....within 14 days from the date of such order.”

Whereas non-compliance with Section 75 of the Act and Order 42 rule 1 (3) of the Civil procedure Rules may be glossed over in light of Section 78(2) of the act, the appellant sought leave to appeal from the High Court and a stay order, which, were both granted on condition that the appeal be filed within 14 days from 2/2/05. The appellant failed to comply with the court order, and went ahead to file this appeal on 1/3/05, without first seeking extension of the period granted by this court.

The upshot of all the foregoing is that I grant the application herein, and accordingly grant the

following orders:

1. Dismiss, with costs to the Respondents and against the appellant, the appeal herein.
2. I also order that the appellant/Respondent do pay costs of this application.

DATED and delivered in Nairobi this 12th Day of October, 2005.

O.K. MUTUNGI

JUDGE