



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.16 OF 2019

GALSARACHO TETEYA & 5 OTHERS.....APPELLANT

VERSUS

KENYA WILDLIFE SERVICES.....1ST RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. T.M. Wafula, SRM

in Marsabit PMCC No.6 of 2019 consolidated with numbers 2,3,4,5 and 7 of 2019)

J U D G M E N T

The appellants filed six separate civil suits before the Marsabit senior Resident Magistrate's Court seeking damages arising from attacks from wildlife. The suits were consolidated. The respondent raised a preliminary Objection dated 8th April, 2019 contending that the trial court lacked jurisdiction to entertain the case. In its ruling delivered on 15th July, 2019, the trial Court upheld the Preliminary Objection and struck out the appellants' suit.

The appeal herein is against the ruling of the trial court. The grounds of appeal are:-

- 1. That the learned trial Magistrate erred both in law and Fact in striking out the suits on the issue of jurisdiction.**
- 2. That the learned trial magistrate misapprehended both law and fact in failing to appreciate the fact that he had jurisdiction to entertain the suits.**
- 3. That the learned magistrate was in error of both law and fact in failing to give effect to the overriding principles of sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya.**
- 4. That the learned Magistrate failed to consider the established law in Judicial precedent conferring jurisdiction to him to entertain the suits.**
- 5. That the learned trial Magistrate failed to appreciate the law that striking out a suit is drastic remedy that should be exercised only in very clear cases where circumstances permit and the instant cases do not fall within the purview of such cases fit for striking out.**

Before dwelling in detail on the merits or demerits of the appeal, Mr. Kariuki, Counsel for the respondent in his written submission maintain that the appeal was filed out of time. The memorandum of Appeal though dated 19th July, 2019 was filed in Court on 24.9.2019, a period of 75 days from the date of the ruling. Counsel relies on the case of **Lucy Njuguna Ndegwa & 2 others –V- Maki Commercial Agengess & Another** (Nyeri High Court Civil Appeal No.147 of 2001 (2006) eKLR. In that case Khamoni J (as he then was) held:

“A certificate of delay from a Court is only a piece of evidence to be placed before the Court hearing an application for extension of time. It follows that with or without a certificate of delay, a party wishing to file an Appeal out of time must seek leave of the Court.”

In response to those submissions, Mr. Orayo, Counsel for the appellants contend that the authority of **Lucy Wanjuguna Ndegwa** case (Supra) is not applicable as the same was delivered before the promulgation of the 2010 Constitution. Article 159(2) of the 2010 constitution requires that Justice be administered without undue regard to procedural technicalities. The Court can grant leave to appeal since the certificate of delay justify the granting of such leave.

Section 79G of the Civil Procedure Code states as follows:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

The record show that the ruling which is the subject of the appeal was delivered on 15.7.2019. An order was issued on 13th November, 2019 indicating that the Preliminary Objection was upheld and the appellants' suits were struck out with no order as to costs. There is a certificate of delay issued on 13th November, 2019. The memorandum of appeal was filed on 24th September, 2019 before the certificate of delay was issued. The certificate of delay indicate that the proceedings were ready for collection from 28th October, 2019. It is therefore clear that the memorandum of appeal was filed before the proceedings were certified and availed to the appellants. It is equally clear that the memorandum of appeal was filed over two months from 15th July, 2019 when the ruling was delivered. The Court order was issued on 13th November 2019 after the appeal had been filed. The appeal is against the ruling and the order arising from the ruling. The appellants therefore cannot alledge that they were waiting for the order to be extracted before they file their appeal as the memorandum of appeal was filed before the order was extracted. The appellants were aware that their appeals had been struck out after the delivery of the ruling on 15.7.2019.

The appeal was therefore filed out of time. Article 159(2) of the Constitution calls for determination of legal issues substantively as opposed to dealing with issues on technicalities. However, any party seeking such determination must approach the court through the proper and correct procedure. The court cannot just hear cases simply because they have been filed. Some cases are filed out of time and the leave of the Court must be sought first before they can be heard. Other cases are res judicata and the court cannot just hear a case because it is placed before it for hearing. Other cases are referred to arbitration. The contention by Mr. Orayo that the Court can grant leave and proceed to hear the appeal is not the proper procedure. The law provides for the granting of leave to appeal out of time. I do agree with the findings in the case of **Lucy Njuguna Ndegwa (Supra)** that the certificate of delay only assist a party in an application seeking leave to appeal out of time but does not grant such a party an automatic leave. Leave to file the appeal out of time has to be sought first and the Court will determine such application on its own merit. At times even when a certificate of delay is issued, parties delay further the filing of the application seeking leave and the Court has to be satisfied that the delay is reasonable.

Given the circumstances of this case, I do find that the appeal was filed out of time without the leave of the court. The appeal is hereby struck out. The appellants are at liberty to seek the leave of the court to file the appeal out of time. Parties shall meet their own respective costs.

Dated, Signed and Delivered at Marsabit this 19th February, 2020

S. CHITEMBWE

JUDGE