



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 100 OF 2016**

**CKO.....APPELLANT**

**VERSUS**

**JMO.....RESPONDENT**

**(Being an appeal from part of the judgment and orders of Hon. LM Wachira, Senior Principal Magistrate (SPM), given on 13<sup>th</sup> September 2016 in Milimani CMDC No. 460 of 2015)**

**RULING**

1. What I am called upon to determine is an application dated 30<sup>th</sup> November 2017. It seeks the striking out of the Memorandum of Appeal herein dated 11<sup>th</sup> October 2016, on the grounds that the same is scandalous and frivolous as it does not disclose any reasonable grounds of appeal, and is only intended to embarrass the court.
2. The Memorandum of Appeal had been filed by the appellant herein challenging the judgement delivered by the trial court on 13<sup>th</sup> September 2016. It raises several grounds that are set out on the face of the Memorandum, which I do not therefore have to recite herein. He would like the findings of the lower court that the marriage be dissolved on grounds of cruelty and adultery and that the appellant was not entitled to maintenance by the respondent set aside, and be substituted with an order that the appellant was entitled to reasonable maintenance from the respondent.
3. The application was canvassed by way of written submissions filed following directions given on 15<sup>th</sup> March 2018. I have read through the written submissions and noted the arguments advanced. I shall only mention, in the receding paragraph, some of their salient arguments.
4. The respondent submitted that the appeal be struck out by dint of Order 2 rule 15(1) of the Civil Procedure Rules as it was scandalous, frivolous and vexatious for it raised no reasonable grounds. She accused the appellant of forum shopping in an attempt to scuttle the hearing and determination of HCCC No. 55 of 2015 (OS), a suit for division of matrimonial property pending at the High Court. She argues that the suit at the High Court for division of matrimonial property cannot proceed so long as the issue of dissolution of the marriage was not fully determined owing to the pendency of the appeal herein. She relied on the decision in *Stephen Somek Takweny & another vs. David Mbutia Githae & 2 others* Nairobi (Milimani) HCCC No. 363 of 2009 (unreported), where it had been observed that the court had inherent jurisdiction to prevent abuse of its process and a duty to intervene and stop proceedings or put an end to the abuse of process. She urged that as the appeal was intended to embarrass the court and it amounted to abuse of court process, and the court ought to strike it out.
5. The appellant submitted that the provisions of the Civil Procedure Rules cited by the respondent provided for striking out of suits, saying that the relevant provision ought to have been section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, which gives the court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. He urged that a party dissatisfied with a judgement of the lower court has a right under section 65(1)(b) of the Civil Procedure Act Cap 21 Laws of Kenya, and submitted that a party exercising such right cannot be said to be acting in abuse of court process.
6. Appeals are governed by order 41 of the Civil Procedure Rules. Proceedings for striking out of an appeal can only be premised on the said the provisions. The provisions upon which the application before me are founded are designed for suits, not for appeals arising out of the determination of such suits. No provision has been made in order 41 for striking out of appeals on any of the grounds set out in the instant application. Indeed, there is no provision at all upon which a party can move the court for striking out of an appeal. I trust that that is so as it was held in *Selle & another vs. Associated Motor Boat Co. Limited & another* (1968) EA 123, that the duty of the first appellate court is to go through the entire record of the trial court, and evaluate and reexamine the evidence that was adduced before that court and to thereafter reach its own conclusions. It should be left to the appellate court to do just that, and thereafter determine whether or not the appeal is frivolous or in abuse of court process or not.
7. My reading of the law on appeals is that once an appeal has been properly lodged, and admitted by the court, that is in keeping with the processes governing the filing of appeals, it would be available for determination by the appellate court, and there is no room for any party to move for its striking out on grounds that the appeal is frivolous or vexatious or an abuse of court processes or does not raise reasonable grounds or was filed to serve some extraneous purpose. Indeed, an appeal that has been admitted is to be dealt with summarily, by dint of Order 41 rule 31 of the Civil Procedure Rules, only for want of prosecution, should the appellant fail to prosecute it after directions on its disposal have been given.
8. I do not find any basis for me to make the determinations that the respondent invites me to make in the instant application. There is therefore no merit in the application dated 30<sup>th</sup> November 2017. It is for dismissal, and I do hereby dismiss the same with costs. It is so ordered.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31<sup>st</sup> DAY OF January, 2019**

**W MUSYOKA**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15<sup>th</sup> DAY OF February, 2019**

**ASENATH ONGERI**

**JUDGE**