



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 42 of 2007

GRACE WANGARI1ST APPELLANT

JOYCE NYAMBURA2ND APPELLANT

VERSUS

STANLEY KITHOKA 1ST RESPONDENT

TERESIA MUTHONI MWENA 2ND RESPONDENT

R U L I N G

This is the Notice of Motion dated 12th October 2012 for orders for review and setting aside of orders dated 15th March 2012 and 22nd June 2010 where the Applicants' appeal was struck out.

Secondly the Applicants are asking the Court to allow them argue their appeal or extend time for filing of the appeal.

The grounds are in the body of the application. The main ground is that the Court was wrong in striking out the Applicants' appeal. The other grounds actually touch on the merits of the appeal itself. There is a supporting affidavit by the 1st Applicant in which she explains why her appeal should be reinstated.

The Respondents did file grounds of opposition on 8th November 2012. The Counsels agreed to file written submissions in respect of the application dated 12th October 2012. I have carefully read all the affidavits, grounds and submissions. Mr. P.N. Mugo in his submissions explained to this Court that it is the duty of the Court and not the Appellant in ensuring that a certified copy of decree is in the record of appeal. He has also tried to explain all manner of things about the record filed herein. An Appellant has a duty to ensure that his/her record is properly before the Court.

The Court on 22nd June 2010 struck out the appeal herein for reasons clearly explained in the Ruling of Hon. Lady Justice Karanja (as she was). The Appellant as per the Memorandum of appeal was appealing against a Judgment and there was no **DECREE** in the record. The record of appeal clearly has orders and not a decree. Were the Appellants appealing against a Judgment or Ruling? The Hon. Judge also talked of confusion/mix up of two different files and proceedings. Instead of rectifying this mess the Applicants came up with an application for review of that Ruling. The application is dated 25th January 2011. A Ruling in respect of the said application was delivered on 15th March 2012 and I clearly indicated that there was nothing new that had been brought on board to make me review the orders of my sister Judge. Infact I indicated that Counsel ought to have rechecked his record and acted on the errors pointed out by the Hon. Judge. He did not. Even as he comes before this Court with this application he has not

corrected anything. The Ruling of 15th March 2012 dismissed the application dated 25th January 2011 and did not dismiss any appeal. It is therefore not true as submitted by Counsel that he refiled an appeal and this Court struck it out. That is very misleading. He has further misled the Court by stating that he has finally filed an appeal which has complied with the Rules. Where is this appeal and when was it filed?

I will not delve into all that the Counsels have filed in their written submissions because looking at the submissions one would think the submissions were on the appeal itself and not an application.

The Applicants having been dissatisfied with this Courts Ruling of 15th March 2012 cannot again come before me with a similar application based on the same facts. Their option was to appeal. I have even seen a Notice of Appeal filed. Its not known how far it went. I do find this limb for review in this application to be resjudicata and an abuse of the Court process as the same had been dealt with by myself.

On the 2nd prayer the Applicants are asking to be heard or have time for filing appeal extended. First of all there is no pending appeal to be heard.

Secondly there is no substantive application before this Court for leave to file appeal out of time. When the appeal was struck out, the Appellants had all the liberty to refile an appeal. The appeal had not been dismissed. The rules in the Civil procedure Act have been provided to assist litigants file their claims in an orderly manner. Blatant disobedience of these Rules does not create shelter for a litigant under Article 22 and 159(1) (d) of the Constitution. The result is that the application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT EMBU THIS 6TH DAY OF MAY 2013

**H.I. ONG'UDI
J U D G E**

In the presence of:-

Mr. Kariithi for Respondent

Mr. Okwaro for P.N. Mugo for Appellat/applicant

Njue – C/c