



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAKHA, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 297 OF 1998 (114/98 UR)

BETWEEN

DR. SUNNY SAMUELAPPLICANT

AND

SIMON M. MBWIKA 1ST RESPONDENT

SAMUEL M. MUNYAO 2ND RESPONDENT

(Application for leave to file and serve a Record of Appeal out of time from the Judgment and Orders of the High Court of Kenya at Nairobi (Mr. Justice Juma) dated 16th October, 1997

in

H.C.C.C. NO. 1063 OF 1989)

RULING

In the course of his opposition to this application for an extension of time under rule 4 of the Rules of the Court of Appeal Rules (the Rules), Mr. Madara on behalf of the respondents adumbrated on several issues. He stated from the Bar, (without objection from Mr. Hira appearing on behalf of the applicant) that since judgment and decree the applicant had accepted and received full payment of the sum due without any reservation whatsoever and he submitted that since the applicant had obtained the full benefit of the judgment, he cannot now appeal against it while he is still in enjoyment of the benefits as otherwise he would be approbating and reprobating the judgment at the same time. Mr. Hira conceded this fact but submitted that the respondents only complied with the terms of the decree in making payment of the decretal amount in the absence of any order for stay which had not been applied for or obtained.

I have given most anxious consideration to this submission and the point raised. In my judgment, in the circumstances now obtaining, the applicant is precluded from attacking the judgment. He is no longer an aggrieved person.

Nor can he be allowed to approbate and reprobate the judgment at the same time. I am not persuaded that in the circumstances the applicant is entitled to proceed with his appeal.

In not too dissimilar circumstances, Mustafa J.A. (as he then was) delivering the first judgment of the

Court of Appeal for East Africa in the case of INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION VS. KARIUKI GATHECA 1977 KLR 52 was inclined to the view that the applicant had in effect affirmed and approbated the judgment, and had enjoyed and continued to enjoy the full benefit of it and would be precluded from attacking it. Law V-P, agreed in every respect with the judgment prepared by Mustafa, J.A. and so did Musoke J.A.

In view of the above, it is not necessary for me to deal with the other points raised.

It follows that a case for an extension as sought has not been made out. For this reason, the application fails and is dismissed with costs.

Dated and delivered at Nairobi this 16th day of December, 1998.

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR