

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPLICATION 335 OF 2004

1. RICHARD APELA)

2. PENINA ODENY APELA) APPLICANTS

AND

EMMANUEL NGESO NYAOKERESPONDENT

(Application for extension of time to file and serve notice and record of appeal out of time in an intended appeal from a judgment of the High Court of Kenya at Kisumu (Birech, Comm. of Assize) dated 29th June, 2000

in

H.C.C.C No. 18 of 1998)

R U L I N G

The application made before me in this matter is hopeless and unsalvageable. It is a notice of motion filed on 15.12.04 ostensibly by two applicants, **Richard Apela** and **Penina Odeny Apela**. But the affidavit in support of the application is sworn by one **Albert Apela** who says he is the applicant! He also says his father, Richard Apela, was the plaintiff in the superior court but he died on 26.03.01. Nothing is said about the second applicant, Penina Odeny Apela.

Other than the mystery about the parties, the application seeks extension of time to file an appeal against the judgment of the superior court delivered on 29.06.00. That was more than 9 months before the death of Richard Apela. An undated and unsigned notice of appeal is exhibited and I am told it was filed on 13.02.01. Nothing is said about service of the notice of appeal in the affidavit in support. There is also an undated and unsigned certificate of delay exhibited with the application. It shows that certified copies of proceedings and judgment were applied for on 28.08.00 which was two months after the judgment complained about, and that they were received by the applicants' advocates on 27.10.00. That was more than 5 months before the death of Richard Apela. Nothing is said about that delay in the affidavit in support. There is nothing exhibited with the application either, to show that the deponent of the supporting affidavit has authority to speak on behalf of the estate of Richard Apela or that he was substituted in the proceedings as a party.

To crown all the mystery and comedy of omissions, there is non-disclosure of the material fact that the same application for extension of time was made before this Court on 03.10.00 and was dismissed by Lakha, J.A on 20.03.01 during the lifetime of Richard Apela. The affidavit sworn in support of that application had given totally different reasons for seeking extension but they were rejected by Lakha, J.A who found the delay occasioned was inordinate. A reference made to the full Court was subsequently withdrawn. That information was disclosed in a replying affidavit filed in this matter by the respondent's counsel, Mr. Mwamu, who submitted that the application now made is not only *res judicata*, and therefore an abuse of the court process, but also prays that the advocates who filed the application be condemned to bear the costs of the application personally.

This was obviously a difficult application for Mr. Kiriba, learned counsel who held brief for M/S Kamau Kinga & Co. Advocates for the applicants. Mr. Kiriba conceded that the application has been made once

before but was dismissed. He had no explanation for the glaring omissions and total lack of explanation for making this application before me. As stated earlier, it was a hopeless application which was made without proper preparation and in flagrant non-disclosure of material facts. It is for dismissal and I so order.

Costs are in my discretion and would follow the event unless there was a contrary order for reasons given. I agree with Mr. Mwamu that the advocates on record ought to have disclosed that the same application had been made and dismissed earlier. There was no explanation for that non-disclosure and indeed that fact was readily conceded when it was raised. It is a clear abuse of the court process. In the event the advocates on record for the applicants shall personally bear the costs of the application assessed at **Ksh.10,000/=**, to be paid within **30 days** of the date of this ruling and in default, execution shall issue against the advocates.

Dated and delivered at Kisumu this 31st day of March, 2006.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR