



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCC NO. 193 OF 2011

SAMMY KURIA NDUNG'U.....PLAINTIFF

-VERSUS-

SAMUEL MBUGUA IKUMBU.....DEFENDANT

RULING

1. The Defendant/Applicant moved the Court vide an Application dated 11/11/2020 seeking the following prayers:

1) - Spent –

2) *THAT the Honourable Court be pleased to enlarge time for filing of a Notice of Appeal and the Notice of Appeal herein dated the 21st day of October, 2020 be deemed as properly filed.*

3) *THAT in the alternative, the Honourable Court be pleased to enlarge time for filing of a Notice of Appeal out of time.*

4) *THAT pending the hearing and determination of the intended appeal and application, the Honourable Court be pleased to grant stay of execution of the judgment delivered on the 1st day of October, 2020.*

5) *THAT the Court grants any other orders as it deems fit to grant in the interests of justice.*

2. The Application is supported by the affidavit of the Applicant, Samuel Mbugua Ikumbu sworn on 11/11/2020.

3. The Application is opposed. The Respondent has filed a Notice of Preliminary Objection dated 08/12/2020 and a Replying Affidavit of even date. The grounds in the Preliminary Objection are:

i. That the High Court lacks the jurisdiction to entertain the Defendant's application dated 11th November 2020.

ii. That once a Notice of Appeal has been lodged unprocedurally, the mandate to validate the same lies with the Court of Appeal.

iii. That the alternative prayer made by the Defendant in his Application is untenable since it is only the Court of Appeal that can strike out an Incompetent Notice of Appeal so as to pave way for a fresh Notice of Appeal

iv. That the orders of a Stay of execution cannot be granted on the strength of an invalid Notice of Appeal.

4. Both the Application and the Preliminary Objection was canvassed by way of written submissions, pursuant to the directions given on 23/11/2020.

5. The primary question raised in the Application is whether the High Court has jurisdiction to extend time for filing a Notice of Appeal out time at the Court of Appeal where the intended Appellant had already filed an incompetent Notice of Appeal at the Court of Appeal and where the incompetent Notice of Appeal is still extant. This is the essence of the Preliminary Objection raised by the Respondent.

6. In the instant case, the judgment was delivered on 01/10/2020. The Applicant was aggrieved by the judgment. However, he did not lodge a Notice of Appeal at the Court of Appeal until 21/10/2020 – six days beyond the time limit stipulated in Rule 75(2) of the Court of Appeal Rules, 2010. Having been alerted by the Respondent's Preliminary

Objection to an application for stay about the incompetence of the Notice of Appeal, the Applicant elected to come to this Court with the present Application in a bid to regularize his appeal at the Court of Appeal.

7. The Applicant argues that section 7 of the Appellant Jurisdiction Act donates powers to the High Court to consider such an application. That section provides that:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

8. He further argued that the Court is mandated by Article 159(2)(d) of the Constitution to dispense justice without undue regard to technicalities and relied on **Kenya Power and Lighting Company Limited v Gimalu Health Estate Limited (2020) eKLR**.

9. The Respondent, on the other hand, submitted that Section 7 of the Appellate Jurisdiction Act gave the High Court jurisdiction to exercise its discretion in three instances only:

- 1) To extend time for giving a notice of intention to appeal;
- 2) To extend time for making an application for leave to appeal; and
- 3) To extend time for a certificate that the case is fit for appeal.

10. The Respondent argues that the issue of regularizing an incompetent Notice of Appeal was a matter to be placed before the Court of Appeal and not the High Court. He relied on **Cosmas Mutiso Muema v. Kenya Road Transporters Limited & Another (2020) eKLR** and **Trimborn Agricultural Engineering Limited v David Njoroge & Another (2000)eKLR**.

11. In **Cosmas Mutiso Muema Vs. Kenya Road Transporters Limited and Another (2014) eKLR**, Kasango J. was of the view that once a party had filed a Notice of Appeal out of time, the hands of the High Court are tied and that such a party can only approach the Court of Appeal for purposes of validating the Notice of Appeal.

12. **Trimborn Agricultural engineering Limited v David Njoroge Kabaiko and Another (2000) eKLR** is in accord. In that case, Shah J.A. said:

*The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of **Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported)**, said:*

*“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of **Edward Allan Robinson & 2 others vs Philip Gikaria Muthami, (Civil Application No***

***Nai 187 of 1997)** (unreported), where he remarked, in pertinent part, thus:*

‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’

Besides, from a careful reading of the provisions of rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time. The jurisdiction to restart the appellate procedures is not donated by section 7, above, but by rule 4 of the Rules. The rule, in effect, empowers the Court to reinstate the struck out appeal, while section 7, above, empowers the High Court to, in effect, assist a litigant in distress who otherwise would not seek help of either Court for any interim relief before he lodged his appeal for the first time.

13. The binding reasoning of the Court of Appeal in the **Trimborn Agricultural Engineering Limited Case** and the persuasive reasoning of the High Court in the **Cosmas Mutiso Muema Case** appear self-evidently dispositive of the case. While the High Court is clothed with jurisdiction by section 7 of the Appellate Jurisdiction Act to extend time for a litigant who is desirous of filing a Notice of Appeal to the Court of Appeal for the first time and before he has taken any action at the Court of Appeal, such authority dissipates once the intended Appellant has taken any step at the Court of Appeal. This is so however incompetent the Notice of Appeal filed at the Court of Appeal is. Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal not the High Court.

14. This is not a mere formalistic fetish which can be cured by an appeal to Article 159(2)(d) of the Constitution which admonishes Courts to eschew undue regard to technicalities in dispensing justice. It makes sense that once a Notice of Appeal has been lodged, any further applications related to the appeal should be filed at the Court of Appeal which is then seized of the matter. This prevents the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts. It provides for a predictable docket management system. For example, a party who brings an application in the High Court in such circumstances and whose application is declined on its merits might approach the Court of Appeal with the same application hence getting two bites at the cherry. This is because in such a situation, the Court of Appeal would not be exercising its appellate powers over a decision of the High Court but an original jurisdiction. Even where a party whose such application is denied at the High Court chooses not to pursue a similar application at the Court of Appeal, he is still left with a comatose Notice of Appeal at the Court of Appeal. This often leads to increased numbers of inactive files which have to be cleaned up frequently.

15. The upshot is that the Preliminary Objection succeeds. The Application dated 11/11/2020 is hereby dismissed with costs to the Respondent.

16. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND APRIL, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.