



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 80 OF 2016

(FORMELY CIVIL APPEAL NO 16 OF 2016 AT MURANGA)

PHILIP MUREITHI WACHIRA.....1ST APPELLANT/APPLICANT

STANLEY NG'ANG'A.....2ND APPELLANT/APPLICANT

VERSUS

NAFTRARY MUIRURI MWANGI KIRAGU.....RESPONDENT

[Being an appeal from the Judgment of Hon A. Lorot Senior Principal Magistrate in Thika Civil Appeal No 16 of 2016 delivered on 7th March 2016]

RULING

INTRODUCTION

1. The Appellants' Notice of motion application dated 2nd October 2017 and filed on 3rd October 2017 was brought pursuant to the provisions of Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Chapter 21 Laws of Kenya and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the period of fourteen (14) days fixed by the Ruling and/or Order of this Honourable on 19th September 2017 within which the Appellants' were required to file a Supplementary Record of Appeal be and is hereby extended and/or enlarged.

4. THAT in the alternative to Prayers Nos 2 and 3 above, this Honourable be pleased to set down and/or fix this Appeal for hearing and/or directions on any date before 30th October 2017.

5. THAT this Honourable Court be pleased to make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.

6. THAT the costs of this Application abide the outcome of the Appeal.

THE APPELLANTS' CASE

2. The Appellants' application was supported by the Affidavit of their advocate, Nancy Gathoni. The same was undated.

3. Their case was that a Ruling was delivered on 19th July 2017 in which they were directed to file a Supplementary Record of Appeal within fourteen (14) days thereof. Their advocates forwarded a draft decree to the Respondent's advocates for approval, to which the Respondent's advocates responded. However, their advocates were unable to file the Supplementary Record of Appeal as had been ordered because the lower court file had been transferred to Thika Law Courts for the signing of the decree.

4. They contended that their advocates were not at fault for not having filed the said Supplementary Record of Appeal within the stipulated

time and thus urged this court to enlarge time within which their said Record could be filed.

5. Their Written submissions were dated 5th March 2018 and filed on 13th March 2018.

THE RESPONDENT'S CASE

6. In response to the said application, on 6th December 2017, the Respondent filed a Replying Affidavit that he swore on 5th December 2017. He contended that the Appellant's excuse for failure to attach the decree in their Record of Appeal was a mere delaying tactic and was intended to frustrate him from enjoying his fruits of judgment.

7. He added that the Appellants lodged their Memorandum of Appeal on 30th March 2016 and that since then, they had never set down their Appeal for hearing. He averred that they were guilty of laches which defeated equity. He therefore urged this court to dismiss their application with costs to him.

8. He did not file any Written Submissions in respect of the present application.

LEGAL ANALYSIS

9. After carefully considering the Appellants' application, this court deemed it prudent to address its mind to the consequences of an unsworn affidavit, as a preliminary issue. Notably, the Appellant's Supporting Affidavit was undated. This was contrary to the mandatory provision of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya).

10. The said Section 5 of the Oaths and Statutory Declarations Act provides as follows:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

11. In view of the mandatory nature of the provision of the law that a commissioner for oaths must date the affidavit that he or she is commissioning, the failure to date the Affidavit in support of the Appellants' present application rendered the same fatally defective and was null and void *ab initio*.

12. This court thus had no option but to stop any further analysis of merits or otherwise of the Appellants' application that was technically defective as the omission to date the Supporting Affidavit was not a procedural technicality that could be cured under the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010.

DISPOSITION

13. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application dated 2nd October 2017 and filed on 3rd October 2017 was not merited and the same is hereby dismissed with costs to the Respondent.

14. It is so ordered.

DATED at NAIROBI this 28th day of July 2018.

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at KIAMBU this 31st day of July 2018

C. MEOLI

JUDGE