



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 327 of 2010

LINDA WATIRI MURIUKI ..... APPLICANT

AND

NEVILLE PATRICK GIBSON  
DANIEL JAMES CORRY McVICKER  
HAMISH WOOLER KEITH

ZULFIKAR H. ALIBHAI ..... RESPONDENTS

(Being an application to strike out the record of appeal lodged on 17<sup>th</sup> December, 2010 in CA No. 327 of 2010 from the judgment and decree of the High Court of Kenya at Nairobi (Waweru, J) dated 14<sup>th</sup> December, 2007

in

H.C.C.C. NO. 611 OF 2003)

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RULING OF THE COURT

This application arises out of a dispute between the partners of a Nairobi law firm, **DALY & FIGGIS ADVOCATES**. By a plaint dated 19<sup>th</sup> June 2003, the applicant **LINDA WATIRI MURIUKI**, then a partner in the firm sought before the High Court, among others, orders for dissolution of the partnership, appointment of an interim receiver to receive the income of the firm and to pay outgoing, taking of account and determination of the partners' respective shares in the partnership. By a consent order dated 18<sup>th</sup> December, 2003, the parties framed a single issue for determination by the High Court, namely:

*“Whether the terms of the Partnership Deed dated 31<sup>st</sup> October, 1990 applied to the partnership between the plaintiff (present applicant) and the defendants (present respondents).”*

The matter was heard by Waweru, J who on 14<sup>th</sup> December, 2007 found that the terms of the

partnership deed did not apply to the partnership between the applicant and the respondents. Aggrieved by that decision, the respondents lodged a notice of appeal on 21<sup>st</sup> December 2007 and the record of appeal on 17<sup>th</sup> December, 2010.

By a notice of motion dated 3<sup>rd</sup> February, 2011 and filed in Court on 9<sup>th</sup> February 2011, the applicant applied under **rule 84 of the Court of Appeal Rules** for orders that the record of appeal filed on 17<sup>th</sup> December, 2010 be struck out and costs awarded to the appellant. The application was supported by an affidavit sworn by the applicant on 3<sup>rd</sup> February, 2011. The only ground upon which the application is based is that having applied to the High Court for certified copies of the proceedings, the respondents were notified on 31<sup>st</sup> August, 2010 that certified copies of the proceedings and judgment were ready for collection. It followed that under **rule 82** the respondents had sixty (60) days from 1<sup>st</sup> September, 2010 to file the record of appeal. Instead the record of appeal was filed about forty seven (47) days out of time and without leave of the Court.

The respondents opposed the application through a replying affidavit sworn by V. Wangui Shaw, advocate, on 16<sup>th</sup> April, 2011. The affidavit did not address the question whether the record of appeal was filed out of time, and if so the reasons therefor. Instead, the replying affidavit challenged the competence of the application to strike out the record of appeal. The deponent averred that since the record of appeal was filed on 17<sup>th</sup> December, 2010, the applicant was obliged to file and serve on the respondents the application to strike out the record within thirty days from that date. No such application had been filed or served. Instead, the application was filed on 9<sup>th</sup> February, 2011 and served on 10<sup>th</sup> February, 2011. Therefore, the application to strike out the record of appeal was itself filed and served out of time and without leave of the Court.

The respondents also relied on the overriding objective of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya and the Court of Appeal Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of appeals.

During the hearing of the application, Mr Roger Sagana, learned counsel for the respondents attempted to address the issue of whether the appeal was filed out of time. He contended that the record of appeal was filed within time because the certificate of delay was issued on 19<sup>th</sup> October, 2010. If the sixty days within which the record of appeal is required to be filed are computed with effect from 19<sup>th</sup> October, 2010, then the record was filed within the prescribed time. Mr Sagana further argued that since a certificate of delay is an essential part of the record of appeal, the record could not have been filed without the certificate of delay.

On his part, Mr John Mbaluto, learned counsel for the applicant argued that the sixty days for filing the record of appeal started running from the date of collection of the proceedings and that a certificate of delay was a document that could have been easily introduced by a supplementary record of appeal, if for any reason it was not ready for collection with the proceedings and judgment.

Regarding the competence of the application to strike out the record of appeal, Mr Mbaluto relied on **rule 3 (e) of the Court of Appeal Rules** to the effect that the period of the Christmas vacation shall not be reckoned in the computation of time, unless the Court otherwise directs. In the circumstances, he argued that the application to strike out the record of appeal was filed and served within the prescribed period.

We have considered the application, the grounds in support of the application, the supporting and replying affidavits, the submissions by learned counsel and the law.

There is no dispute that the respondents collected proceedings from the High Court on 1<sup>st</sup> September, 2010. The certificate of delay in the record of appeal confirms that. The proviso to **rule 82 (1)** allows exclusion, in the computation of the time within which an appeal is to be instituted, of the number of days certified by the registrar to have been required to prepare **copies of the proceedings**. In this case

the proceedings were ready for collection and were indeed collected on 1<sup>st</sup> September, 2010. Sixty days for instituting the appeal started running from that date and the record of appeal was therefore filed out of time. **Rule 88** allows a party to introduce a document like a certificate of delay in a supplementary record, which the respondents could have easily done.

Regarding whether the notice of motion itself was filed and served out of time, we find that under the High Court (Practice and Procedure) Rules made under the Judicature Act, Cap 8 Laws of Kenya, the Christmas vacation commences on 21<sup>st</sup> December and terminates on 13<sup>th</sup> January. **Rule 3 (e)** provides that unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time. If that period is omitted in computation of time, the application to strike out the record of appeal was filed within the period prescribed by the proviso to **rule 84**.

**Section 3A of the Appellate Jurisdiction Act** which the respondents rely upon states the objective of that legislation and the rules made thereunder to be “to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act” and enjoins the Court to aim for, among other things the just determination of proceedings, efficient use of available judicial and administrative resources, and the timely disposal of proceedings at a cost affordable by the parties. The question that arises is whether in the circumstances of this case the respondents can take refuge in **section 3A**.

In **WALTER MBOYA ONYANGO V ELISHA JUMA OWUOR & ANOTHER, CA (APPLICATION) NO. 46 OF 2010**, this Court sitting at Kisumu stated that:

*“Sections 3A and 3B cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to the Court.”*

In **RAMJI DEVJA VEKARANIA V JOSEPH OLUYA, CA (APPLICATION) NO. 154 OF 2010**, this Court sitting at Eldoret further observed:

*“Mr Kitiwa urged us to exercise our discretion pursuant to the provisions of section 3A and 3B of the Appellate Jurisdiction Act. With respect, this is not a matter in which those provisions can be invoked. This is an omission that goes to the root of the Rules, i.e. whether or not a party can file an appeal out of time and without leave of the Court. To invoke the provisions of section 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reason for following the rules of the Court, even when they have been violated with impunity.”*

Lastly in **MRADURA SURESH KANTARIA V SURESH NANALAL KNATARIA, CA NO. 277 OF 2005**, this Court expressed itself as follows regarding the overriding principles:

*“The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judiciary ascertained.”*

In this particular case the respondents have not placed before the court any material that would lay a proper basis for the application of the overriding principle in their favour. We have noted that the replying affidavit did not at all explain the reasons for the filing of the appeal out of time.

In the circumstances, the record of appeal dated and lodged in this Court on 17<sup>th</sup> December 2010 is hereby struck out with costs to the respondent. It is so ordered.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of April, 2013.**

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEALJ.

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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