



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 84 OF 2013

GETRUDE CHAO WAITA.....1ST PLAINTIFF

STEPHEN MBAKI WAITA (legal Representative of

The Estate of Francis Waita Mbaki).....2ND PLAINTIFF

VERSUS

AGNES WAMAITHA KIBUCHI.....1ST DEFENDANT

EDITH WANGARI KANYEKI.....2ND DEFENDANT

RULING

(Application for enlargement of time for leave to appeal; ruling being one on a preliminary objection for which leave to appeal required; rules prescribing that leave to appeal be applied for either at time of the ruling or within 14 days which was not done; applicant filing Notice of Appeal within time but not seeking leave to appeal within time; applicant citing challenges owing to COVID-19 restrictions; court exercising its discretion in favour of the applicants given the reasons; application allowed)

1. The Application under consideration is the Notice of Motion dated 16 July 2020 in which the Plaintiffs/Applicants principally seek orders for leave to appeal a ruling on a preliminary objection that struck out their suit, and to have their Notice of Appeal deemed as properly filed and on record.

2. The applicants filed this suit on 3 May 2013 through a plaint. The defendants filed defence and raised a preliminary objection to the suit. The preliminary objection was heard by my predecessor, Omollo J, who, through a ruling electronically delivered on 12 May 2020, allowed the preliminary objection and struck out the suit of the applicants. Aggrieved, the applicants filed a Notice of Appeal on 21 May 2020.

3. I have mentioned that the plaintiffs now seek leave to appeal the said ruling. The application is based on the grounds *inter alia* that due to the ruling being delivered electronically, they were unable to make an oral application seeking leave to appeal, and also that the COVID-19 restriction across the country barred them from filing an application within the 14 days time frame prescribed under the law.

4. The respondent opposed the application vide a Replying Affidavit sworn by Agnes Wamaita Kibuchi in which she deposed *inter alia* that the application is fatally defective and should be dismissed *in limine* for the following reasons:

i. that the application seeks orders that the Notice of Appeal be deemed properly on record where there is no Notice of Appeal as, by operation of the law, the Notice of Appeal dated 19 May 2020 be deemed withdrawn;

ii. The application has been brought after an inordinate delay and no reasonable explanation has been offered by the Application.

5. I have considered the application and the affidavits filed by the parties. The first substantive prayer sought by the applicant is to deem the Notice of Appeal as being properly on record. The filing of a Notice of Appeal is covered under Rule 75 (2) of the Court of Appeal Rules. It provides as follows :-

“Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal”

6. It will thus be seen that a Notice of Appeal is supposed to be lodged within 14 days of the decision. In our instance, the applicants filed the

Notice of Appeal on 21 May 2020 after the ruling was delivered on 12 May 2020. This was within time as prescribed above. I am therefore at a loss as to why the applicants want this court to order the Notice of Appeal to be deemed as being properly on record. The Notice of Appeal was filed within time and I therefore need not make any finding on it.

7. I note that the respondents contend that there is indeed no Notice of Appeal, as by operation of the law, the Notice of Appeal dated 19 May 2020 should be deemed as withdrawn. I cannot fathom what the respondents mean by this, because as I have pointed out, the Notice of Appeal was properly filed within time. If it is their argument that because the applicants did not seek leave before filing the Notice of Appeal, this would not hold any water, because pursuant to Rule 75 (4) of the Court of Appeal Rules, even where one requires leave to file an appeal, it is permissible to file the Notice of Appeal before leave to appeal is sought. This is discernible from a reading of Rule 74 (5) which provides as follows :-

“When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”

8. Leave to appeal is however supposed to be sought either at the time the decision is made or within 14 days of the decision. This is prescribed in Order 43 Rule (1) (3) which states that leave be sought at the time the order is made or within 14 days from the date of the order. In our case, the applicants' case was struck out pursuant to a preliminary objection and therefore leave to appeal is required. No leave was applied for within the prescribed 14 days. It is through this application that the applicants now seek leave to appeal out of time.

9. So, should this court exercise its discretion to enlarge time for leave to appeal ? The applicants have cited the COVID-19 restrictions as a factor. It is common knowledge that the COVID-19 restrictions put in place in the country and in our courts brought drastic changes. We all had to suddenly adopt to a new normal such as filing court documents electronically and attending virtual courts proceedings. I will not fault the litigants before me for having challenges during this time. In any event, I would not wish to come in the way of a party who wishes to be heard on appeal, unless it is apparent to me that the party is abusing the court process, which in the instance of the case before me, I do not see. I really have no reason to deny the applicants the leave to appeal. I therefore enlarge time for seeking leave to appeal and do hereby grant leave to the applicants to appeal the subject ruling.

10. I need not make any order on the Notice of Appeal since I believe it was properly filed, but for the avoidance of doubt , it is my finding that the Notice of Appeal is properly on record.

11. The applicants will shoulder the costs of this application as it is them who were late.

12. Orders accordingly.

DATED AND DELIVERED THIS 11 DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA