



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC APPEAL NO. 22 OF 2019**

**RHOBI CHACHA.....APPELLANT**

**VERSUS**

**JUSTUS MOMANYI.....RESPONDENT**

**RULING**

The application before me for determination is the Respondent's Notice of Motion application dated the 4<sup>th</sup> November, 2019 where he seeks the following orders:

1. Spent.
2. That the supplementary record of appeal be struck out for want of compliance with the rules of procedure requiring this Honourable Court's leave to be sought in the event of filing out of time.
3. That cost of this application be provided for.

The application is premised on the grounds on the face of it and the affidavit of JUSTUS MOMANYI where he deposes that the supplementary Record of Appeal was filed out of time. He explains that the Appellant through the supplementary Record of Appeal seeks to challenge the ruling of Hon. Magistrate Kasera in Kajiado CMCC No. 27 of 2004 in which the Magistrate granted orders in favour of the Respondent. He contends that on 14<sup>th</sup> February, 2012, Hon. Temu had made a decision in respect to the subject land No. 496/ RES Noonkopir Trading Centre which is the dispute in this Appeal and directed parties to present their respective letters of allotment to the County Council Clerk of Ol Kejuado to point to each one their plots. Further, that he heeded to the Court Order and vide a report by the County Surveyor, he confirmed the suit plot belonged to him. He explains that due to the Appellant's actions of interfering with the subject plot herein, he filed an application dated the 27<sup>th</sup> February, 2019 seeking to be declared the rightful owner of the said plot and Hon. Kasera delivered a Ruling in his favour. He claims the Appellant filed the supplementary Record of Appeal on 14<sup>th</sup> October, 2019 which is more than two months after expiry of the thirty (30) days period without seeking leave of court.

The Appellant opposed the application by filing a replying affidavit sworn by PAUL AMUGA an Advocate acting on his behalf where he deposes that he received instructions to act for the Appellant after the Memorandum of Appeal including Record of Appeal had been lodged in court by his previous Advocates on 6<sup>th</sup> August, 2019. He explains that the said Record of Appeal did not include all the pleadings, proceedings, exhibits, judgement and order of the Lower Court which is appealed against. Further, that the said documents, especially the certified copy of the Order appealed against are primary documents which must be filed before an appeal is heard, hence they prepared and filed a Supplementary Record of Appeal. He is aware directions on the Appeal had been given vide an Order of Justice E C Mwita on 30<sup>th</sup> September, 2019. He insists the Respondent's application seeking to strike out the Record of Appeal is an attempt to derail the fair hearing and timely determination of the Appeal. He reiterates that the Appellant did not require this Court's leave to file the Supplementary Record of Appeal. Further, that in the unlikely event that this court finds that the Appellant required leave to file the Supplementary Record of Appeal, then he seeks leave to have the same to be deemed properly filed.

The Respondent and the Appellant filed their respective submissions to canvass this instant Application.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 4<sup>th</sup> November, 2019 including the respective parties' affidavits and submissions, the only issue for determination is whether the Supplementary Record of Appeal should be struck out.

The Respondent in his submissions reiterated his claim above and relied on the decisions of **Stephen Somek Takwenyi & Another V David Mbuthia Githare & 2 others Nairobi HCCC No. 363 of 2009 and Raila Odinga & 5 others V Independent Electoral and Boundaries Commission & 3 others (2013) eKLR** to support his arguments. The Appellant in his submissions insist Order 42 Rule 2 of the

Civil Procedure Rules does not set the time within which to file a supplementary Record of Appeal. He has relied on Article 159 (2) (d) of the Constitution.

Section 79G of the Civil Procedure Act provides that:’ **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.’**

Order 42, rule 2 of the Civil Procedure Rules provides that:’ **Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.’**

On perusal of the disputed Supplementary Record of Appeal, I note the documents including all the pleadings, proceedings, exhibits, judgement and order of the Lower Court which is appealed against have been included therein. In the current scenario the Appellant filed a Supplementary Record of Appeal after 30 days. From a reading of Order 42 Rule 2 of the Civil Procedure Rules, it is clear there is no prescribed time to file one but gives the Court discretion to grant direction on when to do so. The Respondent insists the Supplementary Record of Appeal should be struck out. The Appellant has sought for leave for the same to be deemed duly filed. The Respondent has relied on the case of **Raila Amolo Odinga** where the Supreme Court rejected the affidavit filed late and insists the said Supplementary Record of Appeal should be struck out. I beg to distinguish the said case with this matter as this is an Appeal and the Court is required to have all the documents which formed the basis of the lower Court matter to form part of the Record to enable it make a proper determination of the same. It is my considered view that the Respondent will not be prejudiced if the Supplementary Record of Appeal is admitted as the documents therein formed the basis of the lower court matter. Further, I note it has also filed certain documents together with his submissions. In relying on Order 42 Rule 2 of the Civil Procedure Rules, Article 50 (1) and 159(2) (d) of the Constitution and in the interests of justice, I will proceed to admit the Supplementary Record of Appeal as duly filed.

In the circumstance, I find the application dated 4<sup>th</sup> November, 2019 unmerited and will disallow it.

Costs will be in the cause

**Dated Signed and Delivered via email this 26th Day of May, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**