



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL APPEAL NO. 22 OF 2017

HAMISA SWALEH.....APPELLANT

VERSUS

RAMA SWALEH

MAUWA SWALEH.....RESPONDENTS

RULING

1. The Application before me is the Notice of Motion dated 27th June, 2018 filed by the Respondent. It seeks the following orders

i. That this Honourable court be pleased to strike out the Memorandum of Appeal dated 8th August 2017 and Record of Appeal dated 26th February 2018.

ii. That that Appellant do bear the costs of this application and appeal.

2. The Application is premised on the following grounds:

a. That the Appellants Memorandum of Appeal has been filed out of time.

b. That the appeal as lodged is incompetent and ripe for striking out with costs.

c. That the respondent was not afforded notice of the appeal as required by law.

d. That the application is in the interests of justice.

3. The Application is supported by the affidavit of Rama Swaleh sworn on 27th June, 2018 in which it is deposed inter alia, that the notice of Record of Appeal was served on the Respondents' advocates on 16th March 2018 and that is when they got notice of the instant appeal. That the Respondents' Advocates were never served with the Memorandum of Appeal and that the appeal was filed out of time and without leave of court to extend time for filing of the Appeal. It is therefore the Respondents' contention that the appeal and the record are incompetent and ripe for striking out.

4. The Application is opposed by the Appellant who filed a replying affidavit sworn on 13th August, 2018. The Appellant states that the suit was last in court on 14th April 2016 when the trial Magistrate advised that the ruling would be on notice. That the ruling was delivered on 12th July, 2017 in the absence of the appellant and her advocate both of whom were not aware of the delivery of the ruling on the said date. The Appellant avers that she only found out about the ruling about two months later and upon tracing the file from the archives. That she immediately instructed her advocate to file a memorandum of Appeal which was duly filed on 4th October 2017, about 54 days after the delivery of the ruling. It is the Appellant's contention that the delay of 54 days was not in the circumstances inordinate and is excusable. The Appellant further argues that striking out the appeal is a draconian step which will send away the appellant from the seat of justice without being heard yet the right to be heard is a pillar of fair hearing and therefore that the appeal should be allowed to go on trial.

5. The Application was canvassed by way of written submissions. The Respondents filed their submissions dated 18th December 2018 on 19th December 2018 while the Appellant filed her submissions dated 25th November 2018 on 30th November 2018. Both parties cited and relied on case law.

6. I have considered the application and the submissions filed. I have also considered the authorities relied on. I have perused the record. It shows that the ruling in **Mombasa CMCC No.1613 of 2016** was to be delivered on 14th April 2017. However, the said ruling was delivered on 12th July 2017 in the absence of both parties.

7. On 4th October, 2017 the Memorandum of Appeal herein was filed by the Appellant. The appeal is against the ruling and Order of Hon. L. T. Lewa, Senior Resident Magistrate delivered on 21st July, 2017 in **RMCC No.1613 of 2016**.

8. There is no contest that an appeal from the magistrate's courts needs to be filed within 30 days of the decision. This is brought out in Section 79G of the Civil Procedure Act which provides as follows:

79G "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."

9. Counsel for the applicant has conceded that parties in this matter never received notice of delivery of the ruling which was delivered in their absence on 21st July, 2017. That the Memorandum of Appeal was filed only after the appellant perused the court file some two months later and learnt about the dismissal of the case. Counsel however submitted that Section 79G of the Civil Procedure Act provides that an appeal must be filed within 30 days.

10. It is the Respondents submission that the appellant failed to move the court by way of a formal application seeking leave to file appeal out of time. The Respondent further faulted the Appellant for failing to serve the Memorandum of Appeal within 7 days as required under Order 42 Rule 12 of the Civil Procedure Rules. It is the Respondents submission that the Appellant cannot rely on Article 159 of the constitution to cure the procedural defects enumerated. They relied inter alia, on the cases of **Asma Ali Mohamed –v- Fatime Mwinji Juma Civil Appeal No.75 of 2014, and Nicholas Kiptoo Arap Korir Salat –v- Independent Electoral and Boundaries Commission & 6 Others (2013)eKLR**.

11. I have considered the matter. I am not in doubt that the Memorandum of Appeal was filed out time. The ruling was delivered on 21st July 2017 in the absence of both parties. The appeal needed to have been filed by 21st August, 2017 at the latest. The Memorandum of Appeal in this case was filed on 4th October, 2017.

12. In my view, the Appellant cannot hide under the cover that he learnt about the dismissal of the case some two months later. The Appellant ought to have made an application and satisfy the court that he had good and sufficient cause for not filing the appeal in time. Instead, the appellant went ahead and filed the appeal out of time and without leave of the court. The appellant cannot also hide under the cover that he was let down by counsel. This court cannot shut its eyes to the blatant non observance of the provisions of the law and the rules.

13. The upshot of the above is that the Memorandum of Appeal dated 8th August 2017 and the Record of Appeal dated 26th February 2018 are hereby struck out with costs to the applicants.

DATED, SIGNED and DELIVERED at MOMBASA this 7th day of March 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Maugo holding brief for Khatib for Appellant

Ms. Ndunda for Respondent

Yumna Court Assistant

C.K. YANO

JUDGE