Nyagana v Mohammed & 2 others (Civil Appeal (Application) 127 of 2019) [2022] KECA 20 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 20 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) 127 OF 2019

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

FEBRUARY 4, 2022

BETWEEN

JOSEPH O. NYAGANGA ALIAS JOSEPH O. NYAGANA .... APPELLANT

AND

AMIRALI HASSANALI MOHAMMED .... 1ST RESPONDENT

ZARINA AMIRALI .... 2ND RESPONDENT

HASSANALI MOHAMED .... 3RD RESPONDENT

(An Appeal against the decision and Order at Mombasa by A. Omolo J delivered on the 1st November, 2017 At Mombasa In ELC Suit No. 265 Of 2008)

RULING

1. By an application dated 11th October 2019, the applicants are seeking orders that the notice of appeal dated 3rd November 2017 and the record of appeal filed on 10th September 2019 be struck out with costs. The application is based on the following grounds: That there is no valid notice of appeal against the judgment delivered on 1st November 2017 because the notice dated and filed on 3rd November 2019 pleads that it is against a ruling and not the judgment of 1st November 2017. That the perceived notice of appeal was deemed as withdrawn on 12th February 2018 by operation of Rule 83 when the 60 days for instituting the appeal prescribed under Rule 82 (1) lapsed, and the record of appeal filed on 10th September 2019 should be struck out as of right because it is time barred.

2. The respondent did not serve on the applicants any written application asking for the court proceedings. That the appeal is time barred because the certificate of delay issued under Rule 82 (1) certifies that the period required for preparing and delivering the proceedings was from 9th November 2017 to 13th December 2018; and therefore on the sixtieth day after 13th December 2018, that is 13th January 2019, the notice of appeal was, under Rule 83, deemed as withdrawn.

3. The applicants also plead that they are suffering irreparable loss and damage since 26th June 2018, when the trial court issued order for stay of execution and the applicants denied entry into the suit property, developing the suit property or otherwise enjoying quiet possession of the same. That the applicants will be left without a sufficient remedy in law because the order did not require the respondent to give any security or otherwise give any undertakings as to damages. That the respondent is in possession of the suit property enjoying all rights without paying any rent or compensation to the owners. The application was supported by the affidavit of Simon Karina, the advocate in conduct of the matter for the applicants, which reiterated the grounds on the face of the application.

4. The respondent's response to the application was through a replying affidavit sworn by Samuel Odhiambo Eleakim, counsel for the respondent who swore that there is a valid notice of appeal against the judgment delivered on 1st November 2017 despite the fact that the notice of appeal shows that it is against a ruling which is a typing error, which error should not make this Court strike out the notice considering the provisions of Article 159 of the *Constitution*, and provisions of the *Appellate Jurisdiction Act* and the *Court of Appeal Rules*. That the notice of appeal was not deemed as withdrawn by operation of Rule 83 because the 60 days for instituting the appeal prescribed under Rule 82 (1) had not lapsed.

5. Mr Eleakim averred that the notice of appeal was lodged in the registry on 3rd November 2017. That the appeal was instituted beyond 60 days from 3rd November 2017, by filing of the record on 10th September 2019, because the respondent had not been supplied with certified copies of proceedings and judgment within the 60 days. That the proceedings were certified on 14th July 2019 and judgment certified on 8th July 2019; and a certificate of delay issued to the appellant's advocates on 8th July 2019. That the period of 60 days should be computed from 8th July 2019 when the certified copies were delivered to the appellant's advocates.

6. Counsel averred that he wrote to the Deputy Registrar stating that the proceedings certified on 14th July 2019 were not complete and the court provided the complete certified proceedings thereafter. That it was a lie on the part of the applicants' advocate Simon Karina to aver that they were never served any written application asking for the court proceedings. That there is no evidence that the respondent's advocates were given typed and certified proceedings on 13th December 2018. That the applicants filed a similar application in ELC Case No. 265 of 2008 and the present application is bad in law, an abuse of the court process and guilty of misleading the Court by annexing and marking documents which are not in the file for ELC Case No. 265 of 2008, that is, the certificate of delay.

7. According to Counsel for the applicants, the issues for determination are twofold: whether there is a valid notice of appeal against the judgment delivered on 1st November 2017; and whether the perceived notice of appeal was deemed as withdrawn on 12th February 2018 by operation of Rule 82 (1) and 83 of the Court of Appeal Rules.

8. In his written submissions counsel for the applicants faulted the notice of appeal on record for being against a non-existent ruling delivered on 1st November 2017 and therefore submitted that, no valid notice of appeal was filed within 14 days as per Rule 75 challenging the judgment of 1st November 2017.

9. On the second issue, counsel for the applicants submitted that as the notice of appeal was filed on 3rd November 2017, the last day for filing the appeal was 3rd January 2018. That the certificate of delay certified that the period required for preparing and delivering the proceedings was from 9th November 2017 to 13th December 2018, consequently adjusting the last day for filing the appeal to 13th February 2019. As such, the notice of appeal was deemed as withdrawn by operation of Rule 83 as at 14th February 2019. Counsel cited the cases of *Mae Properties Limited v Joseph Kibe & another* [2017]

eKLR and [*Geoffrey Matoke v Moraa Masare & 4 others [2019] eKLR*]for the proposition that the legal consequence for failure to lodge an appeal within the 60 days is couched in mandatory terms, and the offending party shall be deemed to have withdrawn the appeal the moment the time lapses.

10. Counsel for the appellant submitted that the error in the notice of appeal stating that it was against a ruling instead of the judgment of 1st November 2017 does not prejudice the applicants in any way, and the Court should exercise its inherent discretion pursuant to Rules 1 and 82 of the Court's Rules, and Articles 48, 50 (1) and 159 of the Constitution and not strike out the appeal for that error. Counsel urged the Court to use the oxygen rule so that the appeal can be heard and determined on merits.

11. On the issue of whether the appeal could be deemed withdrawn by operation of Rule 83, counsel submitted that the same was not true and highlighted the correspondence between them, the Deputy Registrar and the applicants' advocates that were annexed to the replying affidavit. He referred to the certificate of delay dated 23rd July 2019 and a copy of their letter informing the Deputy Registrar that some pages were missing from the proceedings; and that page 7 of the proceedings had errors. The same letter urged the Deputy Registrar to furnish them with a decree since the applicants' advocate had sent them a copy of a decree on 31st July 2019 to approve and/or amend.

12. Counsel denied being issued with a certificate of delay dated 22nd April 2019 annexed to the applicant's affidavit, and submitted that there was no evidence that certified proceedings were given to the respondent's advocates on 13th December 2018. He instead pointed to the copies of proceedings and judgment, a certificate of delay and their letter of 10th September 2019 attached to the replying affidavit, to correct errors. Counsel contended that the averment that the respondent did not serve the applicants with any written application asking for court proceedings was a lie on oath, as there were several letters proving that the application was served.

13. Counsel submitted that the last day for lodging the appeal ought to have been on 8th September 2019, which was a Sunday, and the appeal was lodged on 10th September 2019, a delay which counsel urged the Court to excuse in the interest of justice.

14. On the issue of irreparable loss and security, counsel submitted that when the superior court granted orders for stay pending the hearing and determination of the appeal, the applicants did not appeal against the said order nor did they urge the court to order the respondent to give security or undertaking as to damages, and therefore the applicants are stopped from raising and/or using the same to have the appeal struck out. That the application offends the provision of Rule 84. Counsel urged the Court to dismiss the application with costs to the respondent.

15. The glaring error in the respondent's notice of appeal dated 3rd November 2017 is that it indicates that the appeal is against the ruling of the superior court of the 1st November 2017. However, it is clear from the record that the appeal was intended to be against the judgment of the Environment and Land Court delivered on 1st November 2017. The appellant has pleaded that this is an excusable typographical error that should not render the entire appeal incurably defective.

16. The provisions of Sections 1A and 1B of the [*Civil Procedure Act*], Sections 3A and 3B of the [*Appellate Jurisdiction Act*] and Article 159 of the Constitution encourages courts to administer justice without undue regard to procedural technicalities. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*, this Court held in its majority decision that:

> "Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be

innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings."

17. In the present case, the error in the notice of appeal is not fatal. It has not occasioned prejudice or miscarriage of justice to the applicants. The error ought to be excused.

18. The other limb of the application is that the appeal is time-barred by operation of Rule 84 of this Court's Rules, where a party may apply to the Court to strike out a notice or appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The appellant averred that the appeal was not filed within 60 days of lodging the notice of appeal because certified copies of the proceedings and judgment had not been received within that time, implying that the delay in instituting the appeal would be backed up by a certificate of delay as provided in the proviso to Rule 82 (1).

19. An appellant cannot rely on the proviso to Rule 82 (1) without having served a copy of a written application for a copy of the proceedings upon the respondent. The applicants averred that they were never served with the application requesting for certified copies of proceedings. From the correspondence attached to the respondent's replying affidavit, the respondent wrote two letters asking for certified copies of the proceedings and judgment. While the earlier letter dated 8th November 2017 indicates it was copied to the applicant's advocates, it does not bear the said advocate's stamp. The second letter dated 11th July 2018 bears the said advocate's stamp confirming service of the letter. The applicants cannot therefore deny service of a written application for certified copies of proceedings.

20. On the matter of the respondent's reliance on a certificate of delay, what is confounding is that there appears to be two certificates of delay on record. The applicants attached a copy of the first certificate in time dated 23rd April 2018. According to the certificate, certified copies of the proceedings were delivered to the respondent's advocates on 13th December 2018; and the period taken to prepare and deliver the proceedings was between 9th November 2018 and 13th December 2018. The respondent's advocate, in his replying affidavit, categorically denied being issued with that particular certificate of delay. The respondent's advocate instead attached a copy of a different certificate of delay dated 23rd July 2019. The certificate certifies that the proceedings were certified and delivered to the respondent's advocate on 4th July 2019 while the judgment was certified and delivered on 8th July 2019; and that the period necessary for preparing and certifying the proceedings was between the date of application and 4th July 2019.

21. Trying to establish which of the two certificates of delay is valid may be an unnecessary endeavour because, even if the respondent is given the benefit of doubt and the latter certificate of delay is considered the proper one, the appeal would still have been instituted out of time. The respondent, having received certified copies of the proceedings and judgment by 8th July 2019, ought to have lodged the appeal within 60 days of receiving the certified copies, that is on or before 6th September 2019. The respondent admitted to lodging the appeal on 10th September 2019, four days later. The appeal was filed out of time without seeking leave of the Court to do so.

22. The issue of whether or not an appeal has been lodged on time is not an ordinary issue of procedural compliance but a matter that goes to the jurisdiction of the Court. It is therefore not curable by invoking the provisions of Article 159 of the Constitution and the overriding objectives as provided under Sections 3A and 3B of the *Appellate Jurisdiction Act*. See Trustees of the Kenya Assemblies of God v Suresh Kumar Sofat & 2 others [2016] eKLR and Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others [2016] eKLR.

23. In *Patrick Kiruja Kithinji vs Victor Mugira Marete [2015] eKLR* this Court held:

> " In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159."

24. The upshot is therefore that the appeal is incompetent and accordingly struck out with costs.

Dated and Delivered at Mombasa this 4th day of February 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR