



Mwachibulo & 165 others v Leisure Lodges Limited & 600 others (Civil Appeal (Application) 4 of 2020) [2022] KECA 1122 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1122 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 4 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 21, 2022**

BETWEEN

LEISURE LODGES LIMITED.....APPLICANT

AND

NASSORO ABDALLA MWACHIBULO & 165 OTHERS.....RESPONDENT

BETWEEN

NASSORO ABDALLA MWACHIBULO & 165 OTHERS APPELLANT

AND

LEISURE LODGES LIMITED & 600 OTHERS RESPONDENT

(Being an application to strike out the Notice and Record of Appeal filed on 10th January 2020 from the judgment and decree of the High Court at Mombasa, (E.K. Ogola, Chepkwony and Thande, JJ) delivered on 23rd May 2019 in Constitutional Petition No. 21 of 2010)

RULING

1. The application dated February 18, 2020 is brought under the *Appellate Jurisdiction Act*, Rule 82, 83 and 84 (now, and hereafter Rules 84, 85 and 86 respectively) of the *Court of Appeal Rules* (herein after the Rules) seeking orders that;
 - a. The respondent's notice of appeal lodged on May 30, 2019 be deemed as withdrawn for failure to file the record of appeal within time.
 - b. The record of appeal filed on January 10, 2020 be struck out for having been filed out of time without leave of the court.
2. The appeal is against the judgment and decree of the High Court at Mombasa dated May 23, 2019 in Constitutional Petition No 21 of 2010. The grounds in support of the application are;



- i. That, the record of appeal has been filed out of time without leave of the court.
 - ii. That, the respondent has excluded necessary parties who participated in the High Court proceedings in Petition No 21 of 2010.
 - iii. That, the respondent proceeded to file the record of appeal on January 10, 2020 beyond the 60 days prescribed under Rule 82 of this [Court's Rules](#) without leave.
 - iv. That, no certificate of delay was obtained from the High Court.
3. The background of the matter is that the applicant, claiming to be the registered owner and entitled to absolute possession of the land Kwale/diani Beach Block/856, was aggrieved by a Gazette Notice purporting to revoke the said title. It filed the Petition pursuant to Sections 22 and 165(3) of the old [Constitution](#) challenging the constitutionality of the revocation and further, claiming rights of ownership over 10 parcels of land known as Kwale/diani Beach Block; 586, 551, 552, 553, 554, 555, 556, 557, 558 and 559 (herein after the suit properties). The respondents filed a cross-petition in the applicant's Petition in which they claimed that the suit land belonged to the Government for resettlement of squatters.
 4. On May 23, 2019, the High Court, in a judgment by a three (3) Judge Bench who had heard the Petition found in favour of the applicant. The bench also dismissed the cross-petition. Being aggrieved by the judgment of the High Court, the respondents filed their appeal on the 28th and May 30, 2019.
 5. The grounds of the application are that the record of appeal was filed outside time without leave of Court; that the respondent applied for the proceedings by a letter dated May 27, 2019, and that the same were ready for collection on the July 24, 2019. That despite that, the respondent did not file the record of appeal until January 10, 2020, more than the 60 days prescribed under Rule 86 of the Rules, and that no certification of delay was obtained from the High Court. Further, that the respondents excluded necessary parties who had participated in the Petition before the High Court; that the appeal has been filed on behalf of parties who did not file a notice of appeal.
 6. The application is premised on grounds on the face of the application as above stated, and reiterated in the supporting affidavit sworn by Eunice Wanja Njeru Kibe of even date.
 7. The applicant relies on the case of [Patrick Kiruja Kitthinji v. Victor Mugira Marete](#) (2015) eKLR for the proposition that whether or not an appeal is filed on time goes to the jurisdiction of the court. That is the correct position in law.
 8. The application is opposed through a replying affidavit sworn by Japheth Asige, counsel for the respondents and also one of the respondents, dated May 10, 2021. Referring to page 1843 of Volume 4 of the Record of Appeal, Mr. Asige deposed that the Record of Appeal has not been filed out of time because it was filed on the January 10, 2020 pursuant to a Court of Appeal Ruling dated November 14, 2019, giving the respondents 45 days within which to file the record of appeal. The respondents submitted that in the circumstances, there was no necessity for a certificate of delay from the Registrar.
 9. This application was heard virtually on the March 22, 2022. Learned counsel Mr. Ochieng Oduol led learned counsel Mrs Eunice Kibe for the applicant, while learned counsel Mr. Japheth Asige appeared for himself as one of the respondents, and for all other respondents, except for the 8th respondent who was represented by learned Counsel Mr. Njoroge Mwangi who was present. Mr. Oduol relied on the applicant's submissions dated November 3, 2020, while Mr. Asige relied on his submissions dated May 12, 2021. Mr. Mwangi made no submissions. In addition, both Mr. Oduol and Mr. Asige reiterated



what was sworn in the affidavits for and against the application by Mrs. Kibe for the applicant and Mr. Asige and Mr. Nassoro for the respondents, respectively.

10. Mr. Oduol, urged that the proceedings of the High Court were ready for collection on July 24, 2018 and that the Record of Appeal should have been filed by September 29, 2019. Mr. Oduol in response to the respondents' contention that this court gave timelines on the filing of the appeal, in response to applications by the respondents, urged that the directions that the appeal be filed within 45 days were given to the AG in an application for stay of proceedings, and that the order applied only to the AG. He urged that the application for stay did not include an application for extension of time. Mr. Oduol took issue with the filed appeal for excluding parties who participated in the High Court proceedings in Petition No 21 of 2010, *Leisure Lodges Limited vs Commissioner of Land and 766 others*. He also contended that the appeal was filed on behalf of parties who did not file a Notice of Appeal.
11. The respondents, in the replying affidavit sworn on their behalf, aver that there was a ruling of November 14, 2019 given by this Court which gave directions as to the filing of the Record of Appeal, effectively creating timelines for filing of the Record of Appeal. Mr. Asige in his submissions before us urged that the Court of Appeal ruling of November 14, 2019 was in respect of two applications, one by the AG in Civil Application No 8 of 2019 and the other by the respondents' who are the respondents in the instant application. (Civil Application No 4 of 2019). He urged that the two applications were consolidated in Civil Application No 54 of 2019, and a ruling delivered which was applicable to the respondents, contrary to the contention by Mr. Oduol that it only applied to the AG.
12. Regarding the availability of the proceedings of the High Court for collection on the July 24, 2018, and that the Record of Appeal should have been filed by September 29, 2019 Mr. Asige urged that as counsel for the respondents he was never notified of the readiness of the proceedings. In regard to the filing of the appeal for parties who had not filed notice of appeal; and of leaving out necessary parties who were parties in the trial before the High Court, Mr. Asige challenged the applicant's counsel of not specifying who had not filed the notice of appeal and which parties were left out.
13. We have considered the application, the affidavits sworn by the parties, their respective written submissions and authorities relied upon, together with their oral submissions urged virtually before us. Having done so we find that the issue for determination is whether the respondents record of appeal filed on January 10, 2020 was filed out of time without leave and whether the Notice of Appeal filed by the respondents on the May 30, 2019 should be deemed as withdrawn or should be struck out.
14. The judgment of the High Court was delivered on the May 23, 2019. The respondents filed a notice of appeal timeously on May 30, 2019. The record of appeal was filed on January 10, 2020 way beyond the 60 days prescribed under the rules. The respondents did not annexe a certificate of delay as the proviso to rule 86 prescribes. Rule 86 provides as follows:
'(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded



such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.’

15. In *Charles Wanjohi Wathuku v Githinji Ngure & Another* [2016] eKLR, this court reiterated the position taken in the case of *John Mutai, Mwangi & 26 Others v Mwenja Ngure & 4 Others* [2016] eKLR on the intent and purport of Rule 86 of the *Court’s rules* as follows:
16. “That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”
17. In regard to the filing of the notice of appeal there is no contention that it was filed and served timeously. There is no contention that the record of appeal was filed way past the 60 days prescribed in the rules, and that no certificate of delay was annexed. The respondents contend that the ruling of this Court in Civil Application No 54 of 2019 gave the AG and the respondents in the instant application 45 days to file their respective appeals from the date of the ruling, which was November 14, 2019. They contend that the respondents participated in the application which, they urged was a consolidation of applications for stay of execution by the AG in Civil Application No 8 of 2020 and the respondents in the instant application in Civil Application No 4 of 2020.
18. We have perused the ruling of this Court of November 14, 2019. It was AG and Land Registrar, *Kwale v Leisure Lodges & 761 others*, Civil Application No 54 of 2019 [Musinga, Gatembu and Murgor, JJA]. We noted that the application, the subject of the said ruling was filed by the AG and the Land Registrar Kwale, seeking a stay of execution of the High Court judgment, and stay of proceedings. We noted that the respondents herein participated at the hearing of the application through counsel, Mr Asige, The applicant in the instant application was also present. All these parties fully participated at the hearing of applications.
19. The Court in that ruling granted stay of execution to the applicants therein and gave conditions:

“The intended appeal to be filed within 45 days from the date hereof.

If the intended appeal is not filed within time given, the orders granted herein shall stand discharged...”
20. There is nothing in that ruling indicating that the application was consolidated with any other applications, as Mr Asige urged. Besides the application before the court was for stay of proceedings and of execution of judgment of the High Court. It was not an application for extension of time. Nonetheless, given their full participation at the hearing of the application leading up to the ruling of 14th November, 2019, we think the respondents should have the benefit of doubt and benefit from the orders made in that ruling.
21. On the issue of the respondents leaving out necessary parties in the suit, and of filing the appeal for parties who had not filed notice of appeal, we are of the view that this is a matter that can be taken up on appeal. In light of the provisions of Rule 107 of this *Court’s Rules* which speaks to the need for the



leave of the court to raise certain arguments at the hearing, we grant leave to the applicant herein to argue the issues it has raised in regard to the competence of the appeal. Rule 107 (a) provides:

“ 107. At the hearing of an appeal— arguments at hearing.

(a) no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 95 or rule 96;...”[emphasis ours]

22. As we have stated above, the applicant is granted leave to raise the issue of the competence of the appeal as filed at the hearing of the appeal, if need be. The result of this application is that the same is unmerited and is accordingly dismissed. The costs of the application shall be costs in the appeal.

Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

