



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MUSINGA, JJ.A)

CIVIL APPLICATION NO. 14 OF 2020

BETWEEN

ECOBANK LIMITED.....APPLICANT

AND

DAPHINE BALIDA KETTER.....RESPONDENT

(An application to strike out the Notice of Appeal against the Ruling of the

Environment and Land Court of Kenya at Eldoret

(Anthony Ombwayo, J.) dated 10th March, 2017

in

E.L.C Case No. 139 of 2014)

RULING OF THE COURT

1. The applicant herein is seeking the striking out of the Notice of appeal filed and lodged on 13th March, 2017 and 14th March, 2017 respectively under **Rules 83** and **84** of this Court’s Rules (the Rules). The application is premised on the grounds that firstly, the respondent is currently enjoying a stay of sale of the charged properties pending the filing of the appeal which was granted by the trial Court on 7th September, 2018. Secondly, that neither the borrower nor the respondent herein is paying the outstanding loan due to the applicant hence the applicant has been put in a helpless situation as it can neither sell the charged properties nor proceed with the hearing of the appeal. Thirdly, the respondent has neither filed the appeal nor taken any essential steps to ensure that the appeal process is on course almost 2 years after the Notice of appeal was filed. Lastly, that the time within which to proffer such appeal has lapsed and no extension of time to file the Notice of appeal out of time has either been sought or granted by the Court.

2. The respondent did not file a replying affidavit or grounds of opposition in response to the application but her counsel on record put in submissions in response to the applicant’s submissions. We may, however, point out that the factual depositions in the applicant’s supporting affidavit cannot be controverted by way of submissions by counsel for the respondent in absence of a replying affidavit as such submissions would be limited to enunciation of the law.

3. The application was heard by way of video link in absence of counsel/ parties on the basis of the record and the submissions filed by counsel due to the current Covid-19 Pandemic Court Protocols. In his submissions in support of the application, counsel for the applicant, urged that pursuant to sections **3A** and **3B** of the Appellate Jurisdiction Act this Court is bestowed with inherent power to uphold the overriding principles of just and expeditious disposal of appeals to make such orders as may be necessary to meet the ends of justice and/or prevent abuse of the Court process. He maintained that the respondent ought to have filed its appeal within sixty (60) days of filing its Notice of appeal but had not done so in over seven hundred and twenty (720) days of filing of the notice. Further, that such delay was inexcusable and prejudicial to the applicant. Counsel urged us to allow the application and strike out the Notice of appeal with costs to the respondent.

4. Opposing the application, counsel for the respondent submitted that the respondent unsuccessfully applied for certified copies of typed proceedings and the ruling of the trial Court first on 13th March, 2017 and subsequently on diverse dates between 26th April, 2017 and 22nd July, 2020. Counsel attributed the delay of filing and lodging the appeal on the alleged prolonged course of Court proceedings before the trial Court between 20th March, 2017 and 4th December, 2018 when parties sought different audience before the trial Court after delivery of its

impugned ruling. He further attributed the delay to the recent Covid-19 pandemic for having crippled the normal operations of the courts hence further frustrating his efforts to acquire certified copies of typed proceedings and the ruling. We reiterate however, that these claims were not deposed to and they remain allegations which cannot be substantiated.

5. We have considered the application in its entirety, submissions made on behalf of the respective parties and the law. In interrogating the competency of the application, this Court is enjoined to scrutinize the instant application *vis-a-vis* **Rules 83 and 84** of the Rules. **Rule 83** provides as follows:-

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order ...”

Rule 84 on the other hand provides thus:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, 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.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

6. On one hand, it is the applicant’s case that since lodging the Notice of appeal on 14th March, 2017 the respondent has failed to take any further requisite steps to file the record of appeal. On the other hand, it is the respondent’s case that the delay to lodge the appeal was due to the delay by the Court to provide the proceedings due to numerous litigation processes after delivery of the impugned ruling which ran through 13th March, 2017 to 22nd September, 2020 and also the Covid-19 pandemic having affected the normal operation of courts. Therefore, the respondent seems to call in aid the proviso to **rule 82 (1)** to exclude the time taken for preparation of the certified proceedings from the period of delay.

7. **Rule 82** of the Court of Appeal Rules stipulates as follows:

“(1) Subject to rule 115, 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 quadruplicate;**
- b. the record of appeal in quadruplicate;**
- c. ...**
- d. ...**

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.”

8. Further, **sub rule (2)** of **rule 82** goes on to provide that:-

“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”

9. Principally, **rule 82** makes provision for the period of delay in the supply of the proceedings by the registry to the effect that, provided the pre-requisites set out in the provision are complied with, then the time taken for preparation of the proceedings can be excluded from the total period of delay. **Sub-rule (2)** makes it clear that for an applicant to rely on the proviso, it must demonstrate that firstly, a request for proceedings has been made in writing to the registrar, and secondly, that a copy of such request has been served on the respondent.

10. This then begs the question; did the respondent satisfy the requirements of **rule 82 (2)** so as to benefit from the proviso? The respondent filed a Notice of appeal on 13th March, 2013 and the same was lodged on 14th March, 2013. It is regrettable that the respondent did not file a replying affidavit to contest the application on matters of fact. Therefore, it cannot be established whether the respondent ever requested for certified copies of typed proceedings and the impugned ruling or whether a copy of such letter was served upon the applicant. Further, a careful perusal of the record reveals that there is no certificate of delay to back up the said arguments, and the respondent’s claim of frustrations to obtain the same to enable her file the record of appeal in time remain mere allegations which are not supported by evidence.

11. It is common ground that the Notice of appeal was filed and lodged on 13th March, 2013 and 14th March, 2013 respectively and since then the respondent has not taken any steps to lodge the substantive appeal. That being so, the applicant was entitled to bring a motion under either **Rules 83 or 84** to have the Notice of Appeal deemed as withdrawn or for the same to be struck out.

12. A close perusal of the record as correctly observed by the applicant, reveals that no application for extension of time to file and lodge the

substantive appeal has been filed before this Court.

13. In **Mae Properties Limited v. Joseph Kibe & Another**, Nairobi Civil Appeal (Application) No. 201 of 2016, this Court pronounced itself thus:

“It is safe to say, therefore, that a Notice of Appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgement of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the Notice of Appeal dies in the eyes of the law.”

14. In view of the foregoing, the respondent has not satisfactorily explained the delay in filing the record of appeal by virtue of having failed to bring himself within the proviso of **rule 82 sub-rule 1**, or to demonstrate that an extension of time within which to file the same has been granted by this Court. Conversely, the applicant has demonstrated that in terms of **rule 84**, the Notice of Appeal ought to be struck out. We cannot conclude without pointing out that the appellant has been enjoying orders of stay of execution from the ELC for the last three years to the prejudice of the respondent whose debt remains unpaid, and that would explain the respondent’s sluggish conduct in prosecuting this appeal.

15. In view of the above, we are satisfied that the application before us has merit and we allow it and grant the orders as prayed. The Notice of appeal is hereby struck out with costs to the applicant herein.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR