



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 171 OF 2020

BETWEEN

ANTHONY MILIMU LUBULELLAH.....APPLICANT

AND

COUNTY GOVERNMENT OF KAKAMEGA.....1<sup>ST</sup> RESPONDENT

THE LAND REGISTRAR, KAKAMEGA COUNTY.....2<sup>ND</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

(Application to strike out the Notice of Appeal dated 26th September 2019 and

Memorandum of Appeal dated 4th December 2020 against the ruling of the

Environment and Land Court at Kakamega (N.A.Matheka, J.)

dated 26th September, 2019 in ELC Petition No. 8 of 2018)

\*\*\*\*\*

RULING OF THE COURT

The motion dated 4th January, 2021, filed by **Anthony Milimu Lubulellah** (the applicant), seeks to strike out the notice of appeal filed at the High Court at Kakamega by **the County government of Kakamega** on 27th September 2019 and the Memorandum of Appeal and Record of Appeal dated 4th December 2020 under **Rule 84** of the **Rules** of this Court.

The motion is premised on thirteen grounds which in summary are that: the notice of appeal, the memorandum of appeal and the record of appeal are bad in law, incompetent and irregular for the reason that the appellant failed to serve the applicant with the notice of appeal and the memorandum of appeal within seven days as required by **Rule 77(1)** and **Rule 90** of the **Court of Appeal Rules**; the appellant did not serve the applicant with the letters bespeaking proceedings dated 27th September 2019, 11th December 2019 and 23rd September 2020, contrary to **Rule 82(2)** of the **Court of Appeal Rules**; there was no order by the Court for the firm of Nyachae & Ashitiva Advocates to come on record for the appellants as required by **Order 9, Rule 9** of the **Civil Procedure Rules**; and the record of appeal does not have within it a certified decree in contravention of **Rule 87(2)** of this Court's Rules. The applicant swore an affidavit dated 4th January 2021, affirming the foregoing grounds.

In response, the appellant, **the County government of Kakamega** through a replying affidavit sworn by the Acting County Attorney, **Vivianne Mmbaka Komwonyo**, deposed that: the notice of appeal dated 26th September 2019 and the letter bespeaking proceedings dated 27th September 2019 were duly served on the applicant on 8th October 2019 by the appellant's previous Advocates on record **Messrs Phoebe Munihi Muleshe & Co. Advocates**; and that although the certificate of delay was issued by the Deputy Registrar on 3rd November 2020 and the record of appeal filed on 9th December 2020, it was only until 11th

December 2020 that the appellant's advocates were allocated a case number. Subsequently, the memorandum and record of appeal were served on the applicant on 18th December 2020, within the stipulated time pursuant to **Rule 90** of the **Court of Appeal Rules**.

As to whether the appellant's advocates **Nyachae & Ashitiva Advocates** were properly on record, the appellant affirmed that their advocates

on record had filed the requisite Notice of Change of Advocates dated 23rd September 2020 at the Kakamega Environment and Land Court. Concerning failure to include a certified decree in the record of appeal, the appellant deposed that they were ready to file a supplementary record of appeal in accordance with **Rule 92(1)** of this Court's **Rules** to include any missing document.

In a further affidavit sworn by **Phoebe Munihi Muleshe**, advocate for the appellants in **Kakamega ELC Petition no. 8 of 2018**, it was deposed that the notice of appeal and letter bespeaking proceedings were served on the applicant on 8th October 2019 pursuant to **Order 5 Rule 5** of the **Civil Procedure Rules 2010**. Counsel further deposed that on 25th October 2019, she was served with a notice of address of service dated 15th October 2019 and filed on 24th October 2019 intimating that the applicant had received the notice of appeal.

We have carefully considered the application before us, the rival affidavits and submissions, the Rules of this Court and the law. By dint of **Rule 84** of our **Rules**, a person affected by an appeal may apply to strike out the notice or the appeal itself, if already instituted. It is under this Rule that the applicant has moved us, asserting that the appellant failed to take an essential step in the proceedings, and further that such step was not taken within the prescribed time.

The applicant's claim is that he was served with the notice of appeal and the memorandum of appeal out of time contrary to **Rule 77(1)** and **Rule 90** of the **Court of Appeal Rules** respectively. The applicant further contends that the letters bespeaking proceedings dated 27th September 2019, 11th December 2019 and 23rd September 2020 were never served on him contrary to **Rule 82(2)** of the **Court of Appeal Rules**.

In response, the appellant's previous Counsel, Phoebe Munihi Muleshe contends that the notice of appeal and letter bespeaking proceedings were served on the applicant by courier on 8th October 2019 pursuant to **Order 5 Rule 5** of the **Civil Procedure Rules 2010**. A copy of an illegible courier receipt was attached to the affidavit in this respect.

If indeed the appellant served the applicant with the notice of appeal on 8th October 2019 as alleged, as it was lodged on 27th September 2019, such service was obviously effected outside the seven days prescribed by **Rule 77(1)**.

That default is sufficient to render the notice and record of appeal amenable to striking out. We accordingly allow the Motion with costs to the applicant

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**