



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, KIAGE & SICHALE, J.J.A]

CIVIL APPEAL (APPLICATION) NO. 117 OF 2018

BETWEEN

BHAVIN ASHWIN GUDKA.....1ST APPLICANT

ASHWIN RAMJI GUDKA.....2ND APPLICANT

AND

KIRISANTUS ODERO.....RESPONDENT

(Being an application to strike out the Record of Appeal in Civil Application No. 117 of 2018

lodged in the Court Registry on 20th September 2018 and filed against the Judgment of the

Environment and Land Court at Migori (Ongondo,J) dated 11th April, 2018

IN (ELC Case NO. 78 OF 2017)

RULING OF SICHALE, JA

Before us is a motion dated 2nd November 2018 brought under **Rules 42, 43, 82 (1), 84 and 90 of the Court of Appeal Rules 2010, Section 3A of the Appellate Jurisdiction Act, CAP 9 of the Laws of Kenya** in which the applicants seek the following orders:

- “1. The Honourable Court be pleased to strike out the record of appeal dated 17th September 2018 albeit lodged by the respondent herein on 20th September 2018, in respect of civil appeal No. 117 of 2018 inter alia for failure to institute the instant appeal within statutory timelines.**
- 2. Consequent to prayer 1 herein being granted, the appeal lodged by the respondent herein on 20th September 2018 be dismissed.**
- 3. Costs of this application and of the main appeal be borne by the respondent.**
- 4. Such further and/or orders as the court may deem fit and expedient”.**

The application is supported on the grounds on the face of the motion and the affidavit sworn by **Joseph Mboya Oguttu**, learned counsel who has the conduct of this matter on behalf of the applicants. The gist of the application is that judgment in respect of Migori ELC Case No. 78 of 2017, was delivered on **11th April, 2018**, pursuant to which the respondent filed and/or lodged a notice of appeal on **25th April, 2018**. That, upon lodgment of the notice of appeal, it was incumbent on the respondent to procure the pleadings for purposes of filing the record of appeal and that having filed the notice of appeal, it was incumbent upon the respondent to file the record of appeal within 60 days i.e. on or before **24th June, 2018**, but the instant record of appeal was only filed on **20th September, 2018**, well outside the statutory timelines.

The application was opposed vide a replying affidavit filed in court on **11th December, 2018**, by **Humphrey Obach**, learned counsel who has the conduct of this matter on behalf of the respondent. **Mr. Obach** deponed that they had filed the instant appeal as cross appellants and

that the delay in filing the cross appeal was occasioned by the applicants who failed to file their record of appeal in time.

I have carefully considered the motion, the supporting affidavit, the replying affidavit; the authorities cited by the parties, their submissions and the law. It is indeed not in dispute that judgment in respect of Migori ELC Case No. 78 of 2017 was delivered on **11th April, 2018**, pursuant to which both the applicants and the respondent filed notices of appeal.

The applicants lodged their notice of appeal on **24th April, 2018** while the respondent lodged his notice of appeal on **25th April, 2018**. It is therefore true that the respondent desired to file the instant appeal as a cross appellant. It is not clear from the record what became of the applicants' intended appeal after lodging the notice of appeal and whether they subsequently filed their record of appeal. Indeed, they have made no mention of the same whatsoever.

On the other hand, the respondent has contended that the reason as to why he delayed in filing the record of appeal was because he was filing the appeal as a cross appellant and the applicants had delayed in filing their record of appeal.

As I observed earlier, the applicants have not made any mention of their intended appeal and it is not clear what became of that appeal. Similarly, the applicants have not controverted the respondent's contention that the reason as to why he delayed in filing his record of appeal was as a result of deliberate failure by the applicants to file their record of appeal. Further the applicants have not controverted the respondent's contention that he was never served with the letter dated **23rd April, 2018** by the Deputy Registrar hence, he never acted upon it and he only received documents from court after time had lapsed and the applicants having failed to file their record of appeal.

Taking into totality all the circumstances in this case and in light of the aforementioned applicants' conduct, it is my considered opinion that the applicants have not acted in good faith and it is very possible that the failure on the part of the respondent to file his appeal in time was on account of the fact that he believed he would be filing a cross-appeal.

In light of the provisions of **Sections 3A and 3B of the Appellate Jurisdiction Act CAP 9** of the Laws of Kenya and due to the aforesaid reasons, I am inclined to disallow the instant motion dated **2nd November, 2018**. I hereby dismiss it in its entirety with costs to the respondent.

As **Okwengu, JA** agrees, it is so ordered.

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

F. SICHALE

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JUDGE OF APPEAL

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

Singed

DEPUTY REGISTRAR