



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL (APPLICATION) NO. 195 OF 2020

BETWEEN

CMMAPPLICANT

AND

MNAPPELLANT/RESPONDENT

(Being an application to strike out the appeal filed out of time without leave against the ruling of (S. M. Githinji, J) delivered on 3rd April, 2020

in

KITALE/ELDORET DIVORCE CAUSE NO. 8 OF 2019

RULING OF THE COURT

[1] The applicant CMM, seeks to have the appeal filed by the respondent MN, against the judgment of the High Court (S. Githinji, J) struck out on the grounds: that the appeal as filed offends the mandatory provisions of Rule 82 of the Court of Appeal Rules having been filed out of time and without leave of the Court; that the appeal as filed is incompetent, the notice of appeal on record being deemed to have been withdrawn by virtue of Rule 83 of the Court of Appeal Rules; and that the delay in filing the appeal is fatal and not curable by Article 159(2)(d) of the Constitution.

[2] In an affidavit sworn in support of the motion, the applicant states that the ruling subject of the appeal was delivered on 30th April, 2020, and the applicant’s advocate was served with a notice of appeal on 15th May, 2020, and a record of appeal on 26th November, 2020. He contends that both documents were filed by the respondent out of time. This is because he was not served with any letter from the respondent requesting for proceedings, and therefore, time did not stop running. The applicant therefore urged the court to strike out the notice of appeal.

[3] In her written submissions, the respondent MN urges the Court to dismiss the applicant’s motion contending that she filed the notice of appeal within the required 14 days as provided under Rule 75 of the Court of Appeal Rules and served the respondent 3 days after filing the notice. She maintained that she applied for certified copies of the proceedings and served the applicant with the letter bespeaking the proceedings and therefore, she complied with all the necessary rules.

[4] We have considered this motion and we note that the respondent has not filed any replying affidavit. In the written submissions, the respondent appears to rely on the proviso in Rule 82(2). However, she has not exhibited any evidence to show when the letter bespeaking the proceedings was filed and when, if at all, it was served on the applicant. The applicant has also not availed any certificate of delay signed by the Deputy Registrar of the Court.

[5] In the circumstances, the respondent is not entitled to the benefit of the proviso to Rule 82(2) of the Civil Procedure Rules. We find that the record of appeal was filed out of time and without leave.

[6] Consequently, we allow the applicant’s motion, deem the notice of appeal as withdrawn and strike out the appeal under Rule 83 of the Court Rules. Given that this matter involves a divorce matter, we do not find it appropriate to make any orders for costs.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR