



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO 61 OF 2020

BETWEEN

DARIYA SHINYANZWA.....1ST APPLICANT

JANE AGISTA LUSIMBA.....2ND APPLICANT

VERSUS

JOSEPHAT LISIOLO

LISHENGA JACKSON

KHAYUMBI INZIANI.....1ST RESPONDENT

T/A KHAYUMBI & CO. ADVOCATES.....2ND RESPONDENT

THE LAND REGISTRAR KAKAMEGA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL4TH RESPONDENT

(An application to strike out the notice and record of appeal against the Judgment and order of the High Court of Kenya at Kakamega (N.A Matheka, J.) dated 5th November, 2019

in

KAKAMEGA ELC 250 OF 2016)

RULING OF THE COURT

The application before this Court is a Notice of Motion dated 17th July 2020.

We have noted that in the pleadings, description of parties is a bit mixed up but we are able to establish that the application has been drawn by **Dariya Shinyanzwa** and **Jane Agista Lusimba** (the Applicants) seeking to have the Notice of Appeal filed by **Josephat Lisiolo Lishenga** (the 1st Respondent) and dated 5th November, 2019 and the Record of Appeal filed thereafter, struck out for having been filed out of time and without leave of Court.

The applicants averred that the Notice of Appeal was not served upon them within 7 days of lodging as provided for in Rules 74 and 76 of the Court of Appeal Rules; that they were not served with a letter bespeaking certified proceedings in accordance with Rules 81 and 82 of the Court of Appeal Rules; that time for service of the Record of Appeal had lapsed; and that there was no plausible explanation as to why the

respondent had not served the record of appeal on the applicants' advocates.

In response, the 1st respondent was steadfast that the Notice of Appeal had not been filed out of time and that he had applied for typed proceedings. He deposed that there was delay on the part of the registry in issuing the typed proceedings and a certificate of delay had been issued to that effect; that he had already filed and served a Record of Appeal and the same should be deemed as having been filed and served. He further deposed that he had filed an application, through a Notice of Motion dated **13th May 2020** seeking leave to file appeal out of time and the same had been served upon the applicants electronically. The application is yet to be given a hearing date.

The parties to the application herein filed their respective submissions.

This Court has considered the Notice of Motion application, Replying Affidavit, the submissions filed by the applicants and the respondent as well as the law. The Court has given due consideration to the fact that the respondent filed an application dated **13th May 2020**, seeking leave to file the Appeal out of time and serve his Notice of Appeal dated **5th November, 2019** as well as his Memorandum of Appeal and Record of Appeal upon the applicants herein and that the respondent attached to that application a Draft Memorandum of Appeal. That motion for enlargement of time preceded the present application. The Court is cognizant of the fact that it may not be the respondent's fault that his Notice of Motion application dated **13th May, 2020** has not been listed for hearing.

On our part, we think that the applicants have jumped the gun by filing the instant application knowing very well that the respondents' notice of motion for enlargement of time is pending before the court. We think it is only fair that the 1st respondent's application for enlargement of time which was filed before the applicant's motion be heard first. Accordingly, the Applicants' Motion dated **17th July, 2020** is hereby dismissed. We make no order as to costs.

It is so ordered

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

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR