



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, GATEMBU & M'INOTI, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 123 OF 2017

BETWEEN

DAMON ODERO OCHIENG.....1<sup>ST</sup> APPLICANT

DANIEL ODHIAMBO OCHIENG.....2<sup>ND</sup> APPLICANT

EONORA OPUDO OCHIENG.....3<sup>RD</sup> APPLICANT

AND

ALEX ODERO KASONGO.....1<sup>ST</sup> RESPONDENT

AGNES O. WAGANDA.....2<sup>ND</sup> RESPONDENT

*(Being an application to strike out Record of Appeal against the Judgment and Decree of Hon. Justice S. Okongo dated 21<sup>st</sup> June 2016 and delivered on 27<sup>th</sup> June 2016 by Hon. Justice J.M. Mutungi in the original Kisii High Court Civil Case No. 100 of 2011 (O.S.))*

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RULING OF THE COURT

1. In their application made under Rules 42, 43, 82(1), 83, 84 & 90(1) of the Court of Appeal Rules, Alex Odero Kasongo and Agnes O. Waganda, the respondents in this appeal, pray that the appellants' record of appeal dated 23<sup>rd</sup> November 2017 lodged on 29<sup>th</sup> November 2017 be struck out; and that it be ordered that the Notice of Appeal lodged on 12<sup>th</sup> July 2016 has been withdrawn for failure to institute the appeal within the statutory timelines. There is also a request that consequent to those prayers, the appeal be dismissed with costs.

2. The grounds in support of the application as amplified in the supporting affidavit of Winny Adhiambo Ochwal advocate for the applicants, are that upon delivery of judgment in their favour by the Environment and Land Court on 27<sup>th</sup> June 2016 upholding their claim for adverse possession, the appellants filed a notice of appeal on 12<sup>th</sup> July 2016; that the appellants should have filed their memorandum and record of appeal within 60 days from that date; that the same ought to have been filed on or before 13<sup>th</sup> September 2016 but they did not do so until 29<sup>th</sup> November 2017 without seeking or obtaining leave to file the same out of time. That even then, the record of appeal was not served within 7 days from the date of filing as required under the Rules of the Court, and consequently, the notice of appeal should be deemed to have been withdrawn.

3. In his replying affidavit filed in opposition to the application, Samuel Michael Onyango advocate for the appellants deposes that the appellants applied for certified copies of the typed proceedings and judgment on 6<sup>th</sup> July 2016, which was within 30 days of the date of delivery of judgment and copied the request to the applicants advocates; that the memorandum and record of appeal was filed out of time on 29<sup>th</sup> November 2017 "due to no fault of our own, the delay herein being occasioned by the courts failing to provide the proceedings and judgment on time"; that the appellants applied for certificate of delay but "never received the said certificate of delay" and;

***"...did not seek leave of the court to file the memorandum of appeal and record of appeal out of time because there is no provisions under the court of appeal rules that states that a party should seek leave of the court to file memorandum of appeal and record of appeal out of time, if there has been any delays occasioned by the process of obtaining copies of the proceedings".***

4. Counsel for the appellants beseeched the court to invoke Article 159 of the Constitution for purposes of administering substantial justice and that the application should be dismissed.

5. As *Ouko, JA* stressed in the majority decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR*, procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. In the same case, *Kiage, JA* in the minority decision expressed that:

*“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”*

6. In light of Rule 4 of the Court of Appeal Rules, we are unable to understand the claim by counsel for the appellants that there is no provision in the Rules of the Court for seeking extension of time in the circumstances prevailing of this case. It was incumbent upon the appellants, if they were so minded, to seek and obtain extension of time. They did not do so.

7. The foregoing notwithstanding the proviso to Rule 84 of the Court of Appeal Rules provides 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.

8. The advocate for the applicants has deposed in the supporting affidavit that the record of appeal was served on the applicants’ counsel on 26<sup>th</sup> January 2018. At the very latest, an application for striking out should have been filed by 26<sup>th</sup> February 2018. The present application, although dated 16<sup>th</sup> February 2018, was filed on 27<sup>th</sup> February 2018, a day late, with the result that an otherwise merited application is time barred.

9. Consequently, as the application before us is incompetent, it is hereby dismissed with costs to the appellants.

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

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**