



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL (APPLICATION) NO. 96 OF 2019

BETWEEN

GABRIEL ONYANCHI SUNDIA..... APPELLANT

AND

FRANCIS TOBIAS AKELLO suing as administrator

of the estate of MATAYI AKELLO OLOO.....RESPONDENT

(An application to strike out the appeal from the Judgment of the Environment and Land Court of Kenya at Busia (Kaniaru, J.) dated 20th February, 2019

in

E.L.C. No. 44 OF 2015)

RULING OF THE COURT

By the notice of motion dated 20th June 2019, Francis Tobias Okello, the respondent has brought under **Rules 84** of the **Court of Appeal Rules**, an application to strike out the appeal. The grounds on which it is based appear on its face as follows;

- 1. The Appeal was filed out of time and without leave.***
- 2. The Appeal is filed by an Advocate who is not on record.***
- 3. The Record of Appeal is incomplete.***

In support of the motion, the respondent swore an affidavit outlining the reasons why the appeal is incompetent. He deposed that the judgement was delivered in the presence of both parties on 20th February 2019 and the notice of appeal was duly lodged on 22nd February 2019. His advocates were never served with the letter bespeaking the typed proceedings but after almost four months, they were served with the record of appeal. He claimed that the last day for lodging the appeal as per the timelines required by the **Rules** of this Court was 21st April 2019. The said appeal is also incomplete as it does not contain a certified copy of the decree, and the submissions of counsel at the close of the hearing.

Further, the firm of Okeyo Ochiel & Co who filed and served the appeal are not properly on record for the appellant. They have never served the respondent's advocates with a notice of change of advocates nor a notice of appointment of advocates. For these reasons, he urged this Court to strike out the appeal for being incompetent.

We have given this application, the affidavit in support and the submissions as well as authorities cited due consideration. It is not in dispute that the notice of appeal was lodged at the High Court registry on 22nd February 2019. It is trite that by dint of **Rule 82(1)** of the Rules of this Court, the appeal ought to have been instituted within **60 days** thereafter, but was not the case. The same was instituted 3 months and 20 days later, which was about 50 days past the statutorily required timeline.

This Court has time without number pronounced itself on the importance of adherence to its **Rules**. In **MAE PROPERTIES LIMITED V**

JOSEPH KIBE & ANOTHER [2017] eKLR it was stated;

“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.”

Failure to comply with the timelines set invites sure and dire consequences as the notice of appeal is deemed withdrawn after the expiry of **60 days** by operation of the *proviso* to **Rule 83**. Instituting an appeal within the required timelines is of utmost importance as it goes to the jurisdiction of this Court. Non-compliance with the same is so critical that it cannot be cured by **Article 159** of the **Constitution**. See PATRICK KIRUJA KITHINJI V VICTOR MUGIRA MARETE [2015] eKLR.

Consequently, we are satisfied that the appellant’s failure to file the record of appeal within the required **60 days’** period has rendered the appeal incompetent. We allow the application.

Accordingly both the notice and the record of appeal be and are hereby struck out with costs.

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