



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 8 OF 2019

BETWEEN

HARUN THEURI NGUNYI..... APPLICANT

AND

KINANGOP DIVISION LAND DISPUTES TRIBUNAL.....RESPONDENT

(An Application to strike out a Notice of Appeal in an intended appeal from the decision of the Environment and Land Court (D.O. Ohungo, J.) dated 7th December, 2018 *in* Nakuru ELC JR Application No. 26 of 2018 (Formerly HC J.R. Application No. 50 of 2008)

RULING OF THE COURT

Before us, is a Notice of Motion dated 1st February, 2019 under **Rules 42, 43, 75(2) (6) and 84** of the **Court of Appeal Rules 2010**, substantively seeking an order that the Respondent's notice of appeal dated 2nd January, 2019 and filed on 3rd January, 2019; out of time be struck out.

The application is supported by grounds on its body and a supporting affidavit of **Kahiga Waitindi** together with annexures thereto. It has not been opposed.

In summary, the Applicant submits that the impugned notice of appeal should be struck out, for failure to comply with the time line within which it ought to have been filed and served on the opposite party. It is the Applicant's contention that the decision intended to be appealed against was delivered on 7th December, 2018, while the notice of appeal against the said decision was lodged on 3rd January, 2019, a period of twenty five (25) days contrary to the prerequisite in **Rule 75(2)** of the Rules of the Court which require the impugned notice of appeal to be lodged within fourteen (14) days of the date of the decision and served within seven days of such lodging pursuant to the prerequisite in **Rule 77(1)** of the **Rules** of the Court.

Second, the impugned notice also stands vitiated, on account of want of failure to conform to the format provided for in the rules for framing of a notice of appeal namely to indicate whether the appeal is against the whole decision or partially; and lastly for failure to indicate the party on whose behalf the impugned notice of appeal was filed, flaws Applicant contends are fundamental as according to him these go to the root of the intended appellate process and are therefore incurable under Article 159 of the Constitution as procedural technicality.

To buttress the above submission, the Applicant has cited a wealth of case law namely: **Patrick Kiruja Kithinji vs. Victor Mugira Marete** [2015]eKLR; **Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 Others** [2016]eKLR; **Trimborn Agricultural Engineering Limited vs. David Njoroge Kabaiko & Another** [2000]eKLR; **Ali K. Ahmed T/A Sky Club Restaurant vs. Kabundu Holdings Limited** [2009]eKLR; **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others** [2013] eKLR; **Hunter Trading Co. Ltd vs. ELF Oil Kenya Ltd** [2010]eKLR; **Ramji Devji Vekaria vs. Joseph Oyula** and **Kenya Industrial Estate Limited vs. Anne Chepsiror & 4 Others** [2018]eKLR, all on the parameters for the exercise of the Court's mandate under the above cited provisions of law and to which we shall revert shortly.

We have considered the record in light of the above sole pleadings and submission proffered by the Applicant in support of the application. Lack of opposition to the application notwithstanding, we are obligated in law to render a merit decision which we hereby proceed to do as hereunder.

Our invitation to intervene on behalf of the Applicant has substantively been invoked under **Rules 75(2) & (6) and 84** of the **Rules** of the Court. **Rule 75(2) and (6)** provides as follows:

“75(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

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6. A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.”

Rule 75 for purposes of an application of this nature is not a stand-alone provision. It has to be considered in conjunction with the requisite in **Rule 77(1)** of the Court’s Rules which requires a notice of Appeal lodged pursuant to the prerequisite in **Rule 75(2)** of the **Rules** of the Court to be served on the opposite party within seven (7) days of such lodging.

The Court has numerously pronounced itself on consequences of non-compliance with the above prerequisites. We take it from the case of **Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR**, for the proposition that issue as to whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the Court. Second, that the Court only has jurisdiction to entertain appeals filed within the requisite time and or appeals filed out of time but with the leave of the Court; the following authorities; **Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 Others [2016] eKLR**; **Ali K. Ahmed T/A Sky Club Restaurant vs. Kabundu Holdings Limited [2009] eKLR**; and **Kenya Industrial Estates Limited vs. Anne Chepsiror & 4 Others [2018] eKLR**; were cited for the holding *inter alia*, that an appeal filed out of time without leave is a proper candidate for striking out; **Trimborn Agricultural Engineering Limited vs. David Njoroje Kabaiko & Another [2000] eKLR**, for the holding *inter alia* that, a notice of appeal being a primary document is incapable of amendment. Where found defective, it can only be struck out; **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** for the holding *inter alia* that, a defective notice of appeal ought to be struck out; and, second, that court’s ought not to sympathize with litigants who have failed to follow express rules of procedure.

We have applied the parameters set by the Court in the above assessed case law to the uncontroverted position herein and are satisfied that, the impugned notice of appeal was not filed within the time line stipulated in **Rule 75(2)** of the Rules of the Court and without leave of the Court is a proper candidate for striking out.

The above finding now leads us to interrogate as to whether our mandate has procedurally been invoked under **Rule 84** of the **Rules** of the Court. It provides:

“84. A person affected by appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided 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.”

Rule 84 requires an aggrieved party to seek the court’s intervention within thirty days of service upon him of either the impugned notice of appeal or the record of Appeal. The supporting affidavit is silent as to when the Applicant was served with the notice of appeal. It is however evident from the record that the impugned notice of appeal was lodged on 3rd January, 2019, served on the Applicant on a date not disclosed in their supporting affidavit but one which enabled them to prepare the application under consideration, date it 1st of February, 2019 and cause it to be filed on 4th March, 2019 which brings it within the thirty (30) days within which to take action as provided for in the said rule.

We, therefore, entertain no doubt in our minds that the application was filed within time. We are therefore properly seized of the same and shall proceed to pronounce ourselves on the merits thereon.

In the result and on the totality of the above assessment and reasoning based on the uncontroverted position on the record, we find merit in the application. It is accordingly allowed with costs to the Applicant.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR