



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KOOME, MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. 19 OF 2020

BETWEEN

JARED JILO OPUL.....1ST APPLICANT

BENARD ODHIAMBO.....2ND APPLICANT

ERICK OUMA OTUOMA3RD APPLICANT

ELIZABETH NYABERA.....4TH APPLICANT

MONICA ANYANGO ORWA.....5TH APPLICANT

JOSEPH SHADRACK ONONG'NO.....6TH APPLICANT

AND

MUNICIPAL COUNCIL OF KISUMU.....1ST RESPONDENT

TELEPOSTA PENSION SCHEME TRUSTEE

REGISTERED.....2ND RESPONDENT

COMMISSIONER OF LANDS.....3RD RESPONDENT

DISTRICT LAND REGISTRAR – KISUMU.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

MABEL OKWISA OMONDI.....6TH RESPONDENT

JULIUS NYABUNDI.....7TH RESPONDENT

MAUREEN OLEL.....8TH RESPONDENT

FELISTUS BARASA.....9TH RESPONDENT

EDWINA OMUYAKU.....10TH RESPONDENT

WILSON OPONDO.....11TH RESPONDENT

JACKTON OKITA OCHORE.....12TH RESPONDENT

PAUL ODUOL ONALO.....13TH RESPONDENT

RUTH AKINYI OUKO.....	14 TH RESPONDENT
ELIJAH OGOTI OSIEMO.....	15 TH RESPONDENT
ASTERI ANGOLO.....	16 TH RESPONDENT
CORNEL OPIYO OSANO.....	17 TH RESPONDENT
EPHRAIM ENGATIA.....	18 TH RESPONDENT
SEVENTH DAY ADVENTIST CHURCH EAST AFRICA UNION LIMITED (VICTORIA SDA CHURCH).....	19 TH RESPONDENT
MINISTRY OF FINANCE.....	20 TH RESPONDENT
K-REP BANK LIMITED.....	21 ST RESPONDENT

(Being an application to strike out the 1st respondent's Notice of Appeal dated 19th December, 2019 in an intended appeal against the decision and judgement of the Environment and Land Court of Kenya at Kisumu (S.M. Kibunja, J.) dated 20th November, 2019 and delivered by (A.O. Ombwayo, J.) on 13th December, 2019 in Kisumu ELC Case No. 782 Of 2015 Formerly (Kisumu H.C.C. No. 110 Of 2007)

RULING OF THE COURT

1. The notice of motion dated 6th February, 2020 is taken out by the applicants. They seek an order to strike out the Notice of Appeal dated 19th December, 2019 which was lodged in Court on 23rd December, 2019. This is on the grounds that the judgement sought to be appealed against by the respondents was delivered on 13th December, 2019. The outcome of the said judgment was a dismissal of the 1st respondent's suit with costs to the applicants among others. In the suit, the 1st respondent (**County Government of Kisumu**) was claiming a parcel of land that they described as **L.R 12663** measuring 7.72 acres or thereabout in Kisumu. Dissatisfied with the said outcome, 1st respondent lodged a Notice of Appeal on 23rd December, 2019 indicating its intention to appeal against the said judgement.

2. The applicants rely on the provisions of **Rule 77** of the Court of Appeal Rules to support the argument that upon lodging the Notice of Appeal, the 1st respondent failed to serve copies thereof on all persons directly affected by the appeal. The applicants state that although they were served with the Notice of appeal, it was never served upon the 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 18th respondents who were parties before the Court below but did not participate in the proceedings. That although they did not participate in the proceedings, it was incumbent on the part of the 1st respondent to serve them with the Notice of Appeal. The application is supported by the affidavit of **Jared Gilo Opol** sworn on 6th February, 2020. He deposes that the parties he claims were not served were not represented by counsel, they also never entered appearance nor did they file a defence as they were not even served with the pleadings.

3. The applicant further states that in order to regularise the anomaly, the 1st respondent was supposed to make an *ex parte* application seeking leave exempting him from serving the said parties who did not participate in the proceedings. Since no such leave was sought, the applicant prayed that we strike out the Notice of Appeal.

4. We have deliberated on this application which was heard virtually vide "GO TO MEETING" Platform pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Pandemic. We have not seen the replying affidavit by the 1st respondent. Nonetheless that does not lessen our duty to consider the application according to the Court Rules and other relevant laws. **Rule 84** of the Court of Appeal Rules is the basis upon which an application for striking out a Notice or Record of Appeal can be made and it provides as follows:-

"A person affected by an 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."

5. The question we have asked ourselves is whether the 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 18th respondents will be directly affected by the outcome of the appeal and they are they are interested parties to justify the striking out of a Notice of Appeal as prayed by the applicants. It has come from the mouth of the applicants that the said parties did not participate in the proceedings before the lower court; that they were never served with the pleadings and they never entered appearance or filed a defence in the matter. The next question is how they will be

affected by the outcome of the appeal. The applicants had a duty to demonstrate how the said parties would be affected by the outcome of the appeal in view of the admission that the said parties never participated, were never served with the pleadings and did not have an advocate.

6. Also, the said parties were not served with the instant application for them to speak to the issue of whether they are going to be affected by the outcome of the appeal. We think this is a case that affects the respondent who filed the notice of appeal, and in the event that it will be demonstrated in future that the said parties will be necessary parties, at that stage the court can make appropriate orders as the justice of the case may demand. For now we are satisfied that due to lack of interest in the matter from inception, failure to serve the Notice of Appeal on the said parties cannot cause prejudice to any party in the appeal. See the case of Nicholas **Kiptoo arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others** [2013] eKLR where the Supreme Court expressed some sentiments on what constitutes prejudice and substantive justice of a matter.

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

7. In view of the above, we have come to the conclusion that the motion dated 6th February, 2020 cannot succeed and is for dismissal. We make no order as to costs since the motion was not opposed.

Dated and delivered at Nairobi this 5th day of March, 2021.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR