



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, KIAGE & MURGOR, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 67 OF 2020

BETWEEN

EFUREITH IRIMA MUGO.....APPELLANT/RESPONDENT

AND

REPUBLIC.....1ST RESPONDENT

MINISTER FOR LAND & SETTLEMENT.....2ND RESPONDENT

DISTRICT COMMISSIONER MBEERE NORTH.....3RD RESPONDENT

JOHN NGARE MWANIKI.....4TH RESPONDENT

D. EUTON NJUKI.....5TH RESPONDENT

KAHARERI BURI KARUGU.....6TH RESPONDENT/APPLICANT

AND

MOFFAT MURIITHI KANGI.....1ST PROPOSED INTERESTED PARTY

PETER NJIRU MUGEKI.....2ND PROPOSED INTERESTED PARTY

(Application to strike out the Notice of Appeal dated 19th December 2019 and the Appeal against the judgment and decree of the Environment and Land Court at Embu (Y.M.Angima, J.) dated 19th December, 2019 in ELC JR No. 32 of 2015)

RULING OF THE COURT

By the motion dated 12th June 2020 brought under **Rule 84** of this **Court's Rules**, the applicant, **Kahareri Buri Karugu** seeks to strike out the notice of appeal dated 19th December 2019 and the appeal itself. The motion is predicated on grounds on the face of it and the applicant's supporting affidavit dated 12th June 2020.

During the hearing, conducted virtually due to the prevailing Covid 19 Pandemic, learned counsel for the applicant, **Mr. Ombachi**, highlighted that there was no proper appeal in place since essential steps had not been taken in lodging the appeal. The notice of appeal was filed on 19th December 2019 but the 6th respondent was served on 3rd February 2020, outside the 7 days stipulated period. The applicant further avers in his supporting affidavit that since court proceedings were ready on 13th March 2020, the appeal ought to have been lodged on or before 13th May 2020, a period of 60 days thereof.

Learned Counsel for the appellant, **Ms Njeru**, while opposing the application admitted that indeed the notice of appeal was served out of time. Concerning the delay in filing the record of appeal, **Ms Njeru** attributed the same to the scaling down of court operations due to the pandemic. In a replying affidavit sworn on 7th July 2020, the appellant deposes that even though the typed court proceedings were ready on Friday 13th March 2020, on Monday 16th March 2020, court operations were scaled down due to the COVID-19 pandemic hence the period when court operations were scaled down ending 21st April 2020 should not be counted in the 60 days' period within which an appeal is to be

lodged. She conceded, as she had to, that the record of appeal was filed on out of time on 2nd June 2020, and without leave of Court.

Learned Counsel further pointed out during the hearing that by motion dated 9th November, 2020 brought under **Rule 5(2)(b)** of this **Court's Rules**, the appellant seeks to join two parties to the appeal. The two became proprietors to the suit property after judgment had been issued in the matter at the court below. She also submitted that the appellant seeks to stay two suits filed in the Magistrate's Court at Siakago by the two proposed interested parties.

In response, Mr. Ombachi contended that execution of the impugned decree had already taken place, a fact that was conceded by the appellant. In a replying affidavit sworn by **Peter Njiru Mugeki**, the 2nd proposed interested party, it is averred on behalf of both proposed interested parties that they are innocent purchasers for value, and that through two suits filed at Siakago, they obtained injunctive orders to prevent the appellant from interfering with their land.

We have carefully considered the application before us, the rival affidavits and submissions, the **Rules** of this Court and the law. **Rule 84** of the **Court of Appeal Rules** enables a person affected by an appeal to apply for striking out of the notice or the appeal itself, if already instituted, if an essential step in the proceedings was not taken or was not taken within the prescribed time. It is by dint of this **Rule** that the applicant contends that the appellant's notice of appeal and the appeal itself should be struck out for failure of the appellant to serve him with the notice of appeal within the stipulated 7 days and for failure to lodge the appeal within 60 days.

It is admitted by the appellant that the notice of appeal was not served upon the applicant within the time stipulated by this **Court's Rules**. The appellant further conceded that the record of appeal was not lodged within the stipulated 60 days' period. She, however, attributed the delay to the scaling down of the court operations due to the COVID-19 pandemic.

While it is true that the Hon. Chief Justice via a presser on 15th March 2020 ordered the scaling down of court operations for two weeks, he also issued **PRACTICE DIRECTIONS ON ELECTRONIC CASE MANAGEMENT** on 4th April 2020 which provided for e-filing and e-service system to be adopted by courts. Additionally, the Hon. Ouko, JA, President of the Court issued **PRACTICE NOTES FOR THE CONDUCT OF COURT BUSINESS DURING THE GLOBAL CORONAVIRUS PANDEMIC** on 21st April 2020, which were complimentary to the directions earlier issued by the Chief Justice. The directions highlighted the e-filing of documents, e-payment and e-service of documents using email and WhatsApp platforms. They did not, however, suspend the timelines contained in the Rules of Court. Nor could they.

In light of the foregoing, we find the reason proffered for delay to be unbelievable and unsatisfactory, and quite misplaced in a **Rule 84** application which is concerned with the arithmetic task of reckoning time. The appellant had occasion to file the record of appeal as soon as the practice directions were issued, yet chose not to. Coupled with the admission that the notice of appeal was served out of time contrary to **Rule 77(1)** of the **Court's Rules**, we have no difficulty finding that the notice of appeal and the appeal itself stand incompetent and amenable to striking out. The Court has been consistently categorical on the need for parties to adhere to the timelines in the Rules. See, **MAE PROPERTIES LIMITED vs. JOSEPH KIBE & ANOR [2017] eKLR**.

In effect the appellants' prayer for joinder of the two proposed interested parties also fails because the two cannot be enjoined to an incompetent, non-existent appeal. It is also common ground that the impugned decree having already been executed, the prayers for inhibition/injunction/stay of proceedings pending appeal, even had there been an appeal, are overtaken by events and would not have been grantable in any event.

Ultimately, we find the applicant's motion dated 12th June 2020 to be irresistible and we allow it. The notice and record of appeal are accordingly struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR