



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 102 OF 2018

BETWEEN

ERNEST KAHIRO KIMANI..... APPLICANT

AND

MALINDI MUSKETEERS LIMITED.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

THE LAND REGISTRAR..... 3RD RESPONDENT

RONALD KAZUNGU KATANA..... 4TH RESPONDENT

TERRY Z. MAITHA.....5TH RESPONDENT

NZARD DIWANI6TH RESPONDENT

(Being an application for striking out the Notice of Appeal and Record of Appeal against the judgment and decree of the Environment and Land Court High Court at Malindi (Hon. A. O. Angote J.) dated 7th May 2018 and delivered by (Hon. J.O. Olola) on 25th May 2018 in **Malindi ELC Case No. 186 of 2011 (OS) consolidated with ELC Case No. 157 of 2012, 158 of 2012 and 160 of 2012**)

RULING OF THE COURT

Before us, is a notice of motion dated 22nd October, 2018 under **Rules 42, 47, 76, 77(1) 84 and 90** of the **Court of Appeal Rules**, substantively seeking orders that the Court be pleased to strike out the Notice of Appeal dated 5th June, 2018 and the record of appeal in Malindi Court of Appeal Civil Appeal No. 119 of 2018 filed in Court on 18th September, 2018 against the judgment and decree of the Environment and Land Court at Malindi (**A. O. Angote, J**) dated 7th May, 2018 and delivered by **Hon. J. O. Olola** on 25th May, 2018 in Malindi ELC Case No. 186 of 2011 (OS) consolidated with ELC Case No. 157 of 2012, 158 of 2012 and 160 of 2012 together with an attendant order that the costs of this application be provided for.

It is supported by grounds on its body and a supporting affidavit sworn by **Gikandi Ngibuini** together with annexures thereto. It has not been opposed as we have neither traced a replying affidavit in response to the application or written submissions in response to the Deputy Registrar's hearing notice and invitation to the respective parties herein notifying them of both the hearing date and inviting them to file written submissions, served on Tue, Mar 2, 2021 at 12.52pm. It was canvassed virtually through the applicant's sole pleadings in support of the application under consideration, in the absence of learned counsel for the respective parties and without oral highlighting.

In summary, it is the applicant's averments that the intended impugned judgment dated 7th May, 2018 was delivered on 25th May, 2018. The respondent timeously filed a notice of appeal dated 5th June, 2018 intending to appeal against that entire decision but failed to cause the said notice of appeal to be served upon them within seven (7) days of such lodging pursuant to the prerequisite in **Rule 77(1)** of the **Court of Appeal Rules**. Instead, the respondent purported to serve the impugned notice of appeal with the record of appeal lodged on 18th September, 2018 and served upon the applicant on 28th September, 2018. Likewise, the letter bespeaking proceedings lodged together with the record of appeal was also not served upon the applicant in contravention of **Rule 82(1) and (2)** of the **Court of Appeal Rules**. It is therefore the applicant's contention that **Rule 77(1)** of the Court's **Rules** couched in mandatory terms mandated the 1st respondent to serve the applicant with both the notice of appeal and the letter bespeaking proceedings within seven (7) and thirty (30) days of the lodging of the notice of intended impugned decision respectively, failing to which the appeal is rendered incompetent. Further, that **Rule 90** of the Court of Appeal

Rules obligated the 1st respondent to serve the applicant with the record of appeal within seven (7) days of lodging of the said record which prerequisite was not complied with.

The applicant also purported to champion the rights of other parties who according to them are necessary parties to the appeal and which we find does not fall for consideration in an application of this nature. We find it prudent to skirt and say no more about it.

We have considered the record in light of the above sole pleadings. Our invitation to intervene on behalf of the applicant has been invoked substantively under **Rules 77, 82(1) and (2), 84 and 90(1) and (2)** of the **Court of Appeal Rules. Rule 77(1)** provides as follows:

77(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal: Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.

The applicant's contention that the 1st respondent herein failed to serve the applicant timeously with both the notice of appeal and the letter bespeaking proceedings and only served them with the record of appeal containing both processes outside the statutory seven (7) and thirty (30) days stipulated for in the above **Rules** has not been controverted by the 1st respondent. It is therefore sustained as being well founded.

This 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**; 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 Njoroge 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.

In light of the above exposition noncompliance with the prerequisite in **rule 77(1)** renders the notice of appeal lodged on 5th June, 2018 invalid. It cannot therefore form anchor for the record of appeal thus making both of them liable for striking out.

The above conclusion notwithstanding, we find it prudent to interrogate consequences for noncompliance with the prerequisite on failure to serve the applicant with the letter bespeaking proceedings. **Rule 82(1)** requires the letter bespeaking proceedings to be lodged and served within thirty (30) days of the decision intended to be impugned. In default, a party cannot find succor in the proviso to **82(1)** of the Court's **Rules**. The 1st respondent's failure to comply with the above prerequisite meant that for them to progress their intended appellate right they had to lodge their record of appeal within sixty (60) days of 5th June, 2018 which fell on 2nd August, 2018. It therefore follows that a record of appeal filed on 18th September, 2018 was filed outside the timeline provided for in the rules. The same is also invalid and therefore a proper candidate for striking out.

The conclusion reached above now leads us to interrogate applicant's complaint anchored on **Rule 90(1) and (2)** of the **Rules** of the Court. It provides:

90(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79.

2. The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint.

Grounds 3 and 4 of the grounds in support of the application are explicit that the record of appeal was lodged on 18th September, 2018 and served upon them on 28th September, 2018 a period of ten (10) days from the date of lodging clearly outside the seven (7) days stipulated in **Rule 90** of the Court's **Rules**. The record therefore stands vitiated.

Turning to **Rule 84** cited as the access provision, provides as follows:

"84. 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."

Our construction of this rule is that it affords succor to the applicant herein as there is demonstration that he filed his application within thirty (30) days of service which was on 28th September, 2018 as the application under consideration is dated 22nd October, 2018 and therefore within the timeline provided in the said **Rule** as the timeline within which to seek relief. We are therefore properly seized of the same.

In light of the above assessment and reasoning, the application is meritorious. Consequently, we allow the application. Accordingly, both the

notice and the record of appeal be and are hereby struck out with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

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