



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, MUSINGA & SICHALE, JJ.A]

CIVIL APPLICATION NO. 7 OF 2021

BETWEEN

HELLEN CHEMELI KENDUIYWA.....APPELLANT

AND

MATHEW KENDUIYWA.....1ST RESPONDENT

SUSAN JEBET.....2ND RESPONDENT

(An application to strike out the Notice of Appeal against the Judgment of the High Court of Kenya at Kitale (H. Chemitei, J.) Dated 21/2/2020

in

Kitale H.C. P&A No. 85 of 2004)

RULING OF THE COURT

The Applicant's notice of motion dated **20th January, 2021** seeks the following orders:

“

- 1. That the Honourable court be pleased to strike out the Notice of Appeal lodged on the 21/12/2020.**
- 2. That costs of this application be borne by the respondents”.**

The motion is supported by the affidavit of **Hellen Chemeli Kenduiywa**, the applicant herein, sworn on **20th January, 2021** wherein she deposes that the Notice of Appeal dated **21st December, 2020**, lodged at Kitale High Court Registry contravenes **Rule 75(3)** of this Court's Rules; that the said Notice of Appeal does not take the format stipulated in **Rule 75(b)** of this Court's Rules and that it does not disclose the part of the decision that the respondents are dissatisfied with.

Mathew Kenduiywa, the 1st respondent has sworn a replying affidavit in which he explains that he is only dissatisfied with part of the judgment in which the ELC court failed to grant his prayer for resurvey to be done and that this is what he intends to appeal against.

On **8th March, 2021**, the motion came up before us for hearing “*on written submissions, No appearance of counsel*”. However, there was no written submissions filed by either party. Be that as it may, we have considered the motion, the supporting affidavit and the law.

The applicant's motion seeks to strike out the Notice of Appeal for failure to comply with Rule 75(3) of the Court of Appeal Rules, which requires that where an appellant seeks to appeal only part of the judgment he should specify the part complained of. Article 159 of the Constitution provides as follows:

“

159(1) *Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) ...

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted ...”.

The applicant’s grievance is on the “*form*” of the notice of the appeal, rather than the substance. The applicant is not in any way prejudiced as the notice of appeal will be followed by a memorandum of appeal setting out the grounds of appeal from which it would be clear to the applicant what the appellant is dissatisfied with in the judgment. The failure to specify in the notice the part of the judgment complained of is a mere technicality curable under Article 159 (d) above, in our view, it would be unfair to strike out the Notice of Motion on the basis that it does not disclose the “*part*” of the decision the respondents are dissatisfied with as this would go against the spirit and letter of Article 159 of the Constitution.

It is for this reasons that we find the motion to be frivolous. Accordingly, the motion dated **20th January, 2021** is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR