



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI 340 OF 2019

BETWEEN

PETER MATHENGE GITONGA T/A

MATHENGE GITONGA & CO. ADVOCATES.....APPLICANT

AND

NJOROGE KIBATIA & SIMON MAINA KARUGA

T/A KIBATIA & COMPANY ADVOCATES.....RESPONDENT

(Being an Application for striking out the Notice of Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Milimani Commercial Court) (J. A. Makau, J.) delivered on 18th October, 2018

in

H.C.C No. 2484 of 1994)

RULING OF THE COURT

1. By a motion on notice dated 28th October, 2019 pronounced to be premised on **Rules 42** and **84** of the Court of Appeal Rules and an affidavit in support of even date, the applicant herein sought orders, *inter alia*, that: time provided under **Rule 84** Court of Appeal Rules 2010 for filing and service of an application to strike out a Notice of Appeal be extended and this Honourable Court strike out the Notice of Appeal.

2. A brief background to the application is that the applicant herein was engaged by several clients to represent them in several separate land transactions, whereby its clients were the sellers of 88 parcels of land, which parcels were separate and of different sizes. The purchaser in the transaction was represented by the respondent herein. In order to facilitate the transaction, the respondent issued the applicant with an unconditional professional undertaking. It was on this basis that the applicant moved the court vide an Originating Summons seeking orders to have the respondent, honour their irrevocable and unconditional professional undertaking and pay the applicant, a sum of Kshs. 278,690,000 together with interest at a rate of 18% per annum from 12th March, 2017 till payment in full.

3. The court after carefully considering the pleadings and the evidence adduced, crystallized the issues arising for determination before the court as: whether the sale Agreement upon which the professional undertaking was issued was valid; whether the court should have answered the question of ownership of the property; whether the undertaking was pegged on the compliance of terms and conditions of the agreement, whether the undertaking was premised on the applicant herein conducting due diligence to ensure the vendor had capacity to offer the properties; whether the applicant was acting as an agent of the vendor in the undertaking, and whether the undertaking should have been enforced.

4. The High Court in its judgment delivered on 18th October, 2018 agreed with the applicant and issued among others orders that: the respondent herein be given 30 days from the date of the judgment to honour their professional undertaking given on 6th February, 2017 to the applicant by paying Kshs. 278, 690,000 together with interest as from the time the amount was due for payment at court rates as no particular rate of interest was contracted in the undertaking and in default of payment as ordered, the applicant be at liberty to enforce the undertaking.

5. Being dissatisfied with the whole decision, the appellant (respondent herein) filed before this Court a notice of appeal dated the 25th October, 2018 triggering the appeal process. He then wrote to the registrar of the High Court requesting to be supplied with the proceedings as required under the Rules of this Court. It is worth of note that both parties herein are advocates but trading as firms of advocates which go by their personal names, and reference to the firm and not the person and vice versa can at times be confusing.

6. Having sent the letter bespeaking the proceedings to the deputy registrar of the court, and having copied and served the same on the respondents, the rules required the appellant to lodge the record of appeal either within 30 days from the date of filing the notice of appeal, or within 60 days of the date on the certificate of delay issued by the deputy registrar in accordance with the Rules of Court. In this case none of this appears to have happened, prompting the filing of this application.

7. In the application, the applicant seeks extension of time for filing and service of an application to strike out a Notice of Appeal and that the Honourable Court be pleased to strike out the Notice of Appeal on grounds that: judgment was entered on 18th October, 2018; Notice of Appeal was filed on 25th October, 2018; the Deputy Registrar wrote on 4th July, 2019 confirming that the typed proceedings were ready for collection; since the said date 60 days have elapsed yet the main appeal is yet to be filed and served; the failure to file the record of appeal within the statutory timelines rendered the Notice of Appeal incompetent and that Equity does not aid the indolent.

8. In response to the application, the respondent filed a replying affidavit sworn by a Partner in the respondent Law Firm, Moses Maina Karuga on the 29th November, 2019. In the said affidavit, the deponent averred that the purported notification by the Deputy Registrar that proceedings were ready for collection was addressed to the applicant in person and was not served upon the Firm of Advocates on record for the parties; that the notice is irregular and was procured by the applicant in person without regard to due process to create confusion and cause prejudice to the respondent's appeal; that they have never been served with the notice that proceedings were ready for collection; that time to appeal froze and can only start running once a proper notice that proceedings are ready for collection is served upon them and certificate of delay issued.

9. The deponent further deposed that an application to strike out a notice of appeal should be filed within 30 days of service of the notice of appeal and the applicant is grossly out of time; that the omission to file the application within time is fatal and rendered the application incompetent and fit for dismissal. According to the respondent, the applicant has failed, refused or neglected to disclose to the Court the existence of a suit between the parties where the High Court had granted conservatory orders restraining further payment of the balance of the purchase price to the individual sellers or the re-transfer of the parcels of land to the individual sellers.

10. The applicant filed a supplementary affidavit deponing that it wrote to Triple OK Law Advocates, who are on record for the respondent, and attached thereto a copy of a notice from the Deputy Registrar; that Triple OK Law Advocates has never written to the Deputy Registrar to complain about not being notified about the availability of proceedings; that the instant application firstly seeks enlargement of time and thereafter the striking out of the notice of appeal therefore it is not defective or without merit as alleged by the respondent.

11. We have considered the application along with the rival affidavits for and against the application. We have also taken into consideration the rival submissions and oral highlights made by Kyalo Mbobu and William Muthee, learned counsel for the applicant and respondent herein respectively. We appreciate that both parties are advocates who are well versed with the law and we shall not therefore spend too much time explaining the law pertaining to filing of appeals.

12. We need however to point out that if a party who has applied for proceedings is made aware that the proceedings are ready for collection, whether it is by the opposing side, a court clerk, the registrar etc, it behoves that party, if in doubt, to contact the registrar officially to confirm availability of the said proceedings and then take the necessary action. It is logical, prudent and judicious to do so instead of folding their hands and waiting until the registrar realizes, like alleged in this case, that although the notice was actually received by the correct party, it was actually sent to the advocate himself and not the firm and so neither the advocate nor the firm can act on the same.

13. That said, we now come to the merits or otherwise of the application. To start with, we note that this ruling is not predicated on rule 4 of the Rules of this Court. Applications for extension of time are provided for under that rule which clearly stipulates that such applications should be heard by a single judge and not by a 3 Judge bench in the first instance. To that extent therefore, the prayer for extension of time in the same application for striking out is not properly before us and it is for striking out. Where does that leave the application itself?

14. In **Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya & Another [2016] eKLR**, this Court held:-

“It is not at all in dispute that this application was filed outside the period of 30 days after the notices sought to be struck out were lodged and served. The above proviso is couched in mandatory terms and we have no discretion to second guess what was intended by the framers of the Rules when they gave a time frame. See the case of Gichuki King’ara & Co Advocates v AL Jalal Enterprises Ltd & Others, Civil Appl. No. NAI 211 of 2012(unreported) where this Court stated in reference to Rule 84 as follows;

“The applicant did not file its application within the stipulated period of thirty days.... It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

15. The application for striking out having not been filed within 30 days as provided by rule 84 of the Court of appeal Rules is bad in law and is inevitably one for dismissal, as it does not lie in light of the proviso to rule 84. Accordingly, this application is hereby dismissed. Nonetheless, in view of the circumstances surrounding this matter, we order that the record of appeal be filed and served within 30 days from the date hereof, failing which the appeal shall stand struck out. Costs of the application to abide by the outcome of the appeal.

Dated and delivered at Nairobi this 18th day of June, 2021.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR