



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 76 OF 2019

BETWEEN

NOREEN GULAM.....APPLICANT

AND

PETER MBOGHO MWANGOMBE.....1ST RESPONDENT

ZAHARA ADAM.....2ND RESPONDENT

JAPHET MWASI MWAMBINGO.....3RD RESPONDENT

(Being an application for extension of time to file this application and this application dated 13th August 2019 be deemed to have been duly filed on time)

RULING

1. This ruling relates to an application dated 13th August 2019 presented to Court on 14th August 2019 by Noreen Gulam, the applicant seeking an order that the application be deemed to be duly filed. The applicant had in the same application sought an order to strike out a notice of appeal dated 29th May 2019 filed by the 1st respondent, Peter Mbogho Mwamgombe. However, the prayer to strike out the notice of appeal was withdrawn by consent of counsel for the parties during the hearing of the application on 4th December 2019 upon realization by counsel for the applicant that a single judge had no jurisdiction to hear an application to strike out a notice of appeal in view of Rule 53(2) of the Court of Appeal Rules.
2. I have considered the application and the supporting affidavit sworn by the applicant on 14th August 2019; the replying affidavit sworn by the 1st respondent in opposition to the application; and the submissions by learned counsel, **Mr. Kalimbo** for the applicant and **Miss. Nyaboke** for the 1st respondent.
3. The background in brief is that in a ruling dated 8th May 2019 and delivered on 16th May 2019, the Environment and Land Court at Mombasa in ELC Case No. 105 of 2011 dismissed the 1st respondent's application in which he had sought to set aside orders of interim stay that had previously been granted by the court. In the same ruling, the court ordered the cancellation or nullification of a sale of a property known as L.R. No. 1956/966 Title No. 30456 Voi in favour of the 3rd respondent and directed the Registrar of Land, Voi to cancel the registration of the same.
4. Aggrieved by that ruling, the 1st respondent filed a notice of appeal at the Environment and Land Court on 29th May 2019 and served the same on the applicant's advocates on 11th July 2019. It is that notice of appeal that the applicant intends to apply to have the same struck out on grounds that it was filed and served outside the timelines provided under Rules of the Court.
5. The applicant considers that her present application to strike out the notice of appeal is itself late in light of the proviso to Rule 84 of the Court Rules. Rule 84 of the said Rules provides that:

“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. [Emphasis]

6. It seems to me that the application for extension of time to present the application to strike out the notice of appeal is based on a misapprehension. The notice of appeal having been served on the applicant on 11th July 2019, under the proviso to Rule 84, the applicant had 30 days from 11th July 2019 within which to apply to strike the notice of appeal. In effect the applicant had until 19th August 2019 within which to present the application to strike out the notice of appeal on grounds of the same having been served outside the stipulated 7 days. Consequently, the application having been presented to Court on 14th August 2019, it was within the time stipulated under the proviso to Rule 84. The result is that the prayer for extension of time is in my view unnecessary. As stated by the Court in **Nyokabi Karanja & 3 others vs. Kamuingi Housing Co Limited [2006] eKLR** “courts do no act in vain” and to grant the order for extension of time in the present case would be precisely that in my view.

7. I accordingly decline the applicant’s application dated 13th August 2019. It is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 3rd day of April, 2020.

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