



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. 70 OF 2018

BETWEEN

SOSIANI BUILDERS LTD.....APPLICANT

AND

NIRMAL SINGH SIDHU RAGHBIR

SINGH SIDHU (Suing as the Executor of the will and

administrator of the Estate of the late JAGIR SINGH SIDHU.....1ST RESPONDENT

MARY CHEPKIRUI.....2ND RESPONDENT

THE COMMISSIONER OF LANDS..... 3RD RESPONDENT

THE CHIEF LAND REGISTRAR.....4TH RESPONDENT

THE UASIN GISHU DISTRICT LAND REGISTRAR.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

(Being an intended appeal from the judgment/decision of the Environment & Land Court of Kenya at Eldoret (Ombwayo, J.) dated 30th May, 2018 In

E. L. C. No. 618'B' of 2012)

RULING OF J. MOHAMMED JA

BACKGROUND

- 1. By a judgment delivered at the Environment and Land Court (ELC) at Eldoret on 30th May 2018, Ombwayo, J. found that Sosiani Builders Ltd (the applicant) is the legally registered proprietor of Eldoret Municipality Block 8/12 (the suit property).
2. Nirmal Singh Sidhu (the 1st respondent) being dissatisfied with the said judgment filed a notice of appeal dated 31st May 2018 against the entire judgment.
3. Mary Chepkirui (the 2nd respondent) being also dissatisfied with the judgment filed a notice of appeal dated 4th June 2018 against the entire judgment.
4. The applicant filed a notice of motion dated 16th July 2018 seeking to strike out the two notices of appeal dated 31st May 2018 and 4th June, 2018 on the grounds: -

1) "THAT the Notice of Appeal dated 31.5.2018 is defective hence should be struck out.

- 2) THAT the Notice of Appeal dated 31.5.2018 was lodged and served after the expiry of 4 days as by law required.
- 3) THAT the Notice of Appeal dated 4.6.2018 is defective hence should be struck out.
- 4) THAT the Notice of Appeal dated 4.6.2018 does not bear a receiving stamp from the Registry of the Court.
- 5) THAT the Notice of Appeal dated 4.6.2018 does not have a date in which it was lodged at the registry.
- 6) THAT Notices of Appeal were never served as required by law.”

5. The motion is expressed to be brought under **Rule 84** of the **Court of Appeal Rules** (this Court’s Rules). In support of the motion, **Joseph K. Songok**, learned counsel for the applicant swore an affidavit which essentially challenges the said two notices of appeal dated 31st May, 2018 and 4th June, 2018 respectively. Counsel entreats the Court to strike out the two Notices of Appeal for being defective.

6. There was no replying affidavit filed by counsel for the 1st respondent in response to the instant application.

7. In a replying affidavit dated 28th February, 2019, **Mr. David Rioba Omboto**, learned counsel for the 2nd respondent depones that the impugned judgment was delivered on **30th May, 2018** and not on **25th May 2018**; that at the time of filing the notice of appeal dated **4th June, 2018**, the Deputy Registrar (Hon. Munyekenye) had been transferred and replaced by Hon. Sitati; that the delay in filing the notice of appeal was caused by the aforesaid transfer; that the 2nd respondent should not be punished for the error of omission by the Deputy Registrar; that the overriding objective in Civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice; that the overriding objective in civil litigation mandates the court to consider issues such as the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the impugned notice of appeal; that **Article 159 (2) (d)** of the Constitution mandates the Court to dispense justice to the parties without undue regard to technicalities of procedure; that the court in exercising its discretion to strike out an appeal has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party; that the prejudice that the 2nd respondent is likely to suffer if the notice of appeal is struck out is graver than the prejudice that the applicant will suffer if the appeal is heard on its merits; that it will therefore be just and fair that the instant application be dismissed with costs and the intending appellants be allowed to canvass their appeal on merit.

Submissions

8. When the application came up for hearing, learned counsel **Mr. Songok**, represented the applicant, learned counsel **Mr. O. H. Aseso** represented the 1st respondent, **Mr. N. Tororei** was holding brief for **Mr. Omboto** learned counsel for the 2nd respondent, while **Mr. Murunga** was holding brief for **Mr. Odongo** learned counsel for the 3rd, 4th, 5th and 6th respondents.

9. Urging the motion before us, **Mr. Songok** submitted that the notice of appeal dated 31st May 2018 filed by the 1st respondent was lodged on 28th June 2018; that there has been no plausible explanation by the 1st respondent why the notice of appeal was not served and filed within time; that the claim by the 1st respondent’s counsel that the Deputy Registrar had been transferred was not plausible as there was no vacuum in the court to justify the delay in filing the impugned notice of appeal within time; and that the 1st respondent should have filed an application for extension of time within which to file and serve the notice of appeal.

10. On the notice of appeal dated 4th June 2018, filed by the 2nd respondent, counsel submitted that the same does not indicate the date that it was lodged; and that the replying affidavit filed by the 2nd respondent does not explain this omission. Counsel urged us to allow the application with costs.

11. **Mr. Aseso**, learned counsel for the 1st respondent submitted that the impugned judgment was delivered on 30th May 2018; that the 1st respondent’s notice of appeal was filed on 31st May, 2018; that the notice of appeal remained with the Deputy Registrar until it was signed and sealed on 26th June 2018; that the notice of appeal was served on counsel for the applicant on 27th June 2018; that the Deputy Registrar was transferred but was yet to be replaced which resulted in a delay in the signing and sealing the notice of appeal. Counsel urged us to dismiss the application to strike out the notice of appeal.

12. **Mr. Tororei**, counsel for the 2nd respondent also opposed the application. Counsel submitted that the impugned notice of appeal is dated 4th June 2018 and was lodged on 11th June 2018; that the notice of appeal was therefore lodged within time; that the Court of Appeal Rules require the Notice of Appeal to be served within seven (7) days from the date of the impugned judgment or ruling; that the impugned Notice of Appeal was collected from the Court Registry on 18th June 2018 and served on counsel for the applicant on 22nd June, 2018; that the Notice of Appeal filed by the 2nd respondent is therefore competent and the application to strike it out should be dismissed.

13. **Mr. Murunga**, informed the Court that he does not oppose the application and would not make any submissions.

Determination

14. I have considered the application, the rival affidavits, and submissions by counsel; the relevant annexures, the authorities cited and the law. The issue for determination is quite simple and straightforward. Are the notices of appeal dated 31st May 2018 and 4th June 2018 competent? **Rule 84 of the Court Rules** is the basis upon which an application for striking out a notice or record of appeal can be made. It provides:

“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.

15. Further, **Rule 75 (1) & (2)** of the Rules provides as follows:-

“75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

16. From the record, the impugned judgment was delivered on 30th May 2018 and not on 25th May 2018 as indicated by counsel for the applicant. The two notices of appeal should therefore have been filed on or before 13th June, 2018.

17. Regarding the notice of appeal filed by the 1st respondent, I note from the record that the same is dated 31st May, 2018 and was lodged on 26th June, 2018. The notice of appeal was therefore filed out of time without leave of the Court. There has been no application for extension of time within which to file the notice of appeal.

18. The instant application was filed on 16th July, 2018. The notice of appeal filed by the 1st respondent was served on counsel for the applicant on 27th June, 2018. Accordingly, the applicant filed the application to strike out the notice of appeal filed by the 1st respondent within 30 days from the date of service of the notice of appeal on counsel for the applicant. The instant application therefore complied with the proviso to Rule 84 of this Court's Rules.

19. In the circumstances, the notice of appeal dated 31st May, 2018 and filed by the 1st respondent was out of time, incompetent and amenable to be struck out.

20. Regarding the Notice of Appeal filed by the 2nd respondent, the same is dated 4th June, 2018 but does not have a court stamp to indicate when it was filed at the Court Registry.

21. The notice of appeal dated 4th June 2018 bears no rubber stamp of the ELC, nor does it have any other endorsement of the ELC. Counsel for the 2nd respondent have not explained this authentication deficiency. This Court in ***Daniel Nkirimpa Monirei vs. Koilel and 4 others, Civil Appeal (Application) No. 140/2015*** stated as follows:

“It is imperative to note also that the said service must be within seven (7) days of filing of the Notice of Appeal. In the matter before us, the annexed Notice of Appeal bears no rubberstamp of the High Court, nor does it have any other endorsement by the Registrar of the High Court. This glaring authentication deficiency has not been explained by learned counsel for the applicant. In our view, this document does not pass muster. The Notice of Appeal therefore, fails the test.”

Accordingly, I find that the notice of appeal dated 4th June, 2018 is not competent and amenable to be struck out.

22. On the issue of service, counsel for the applicant submitted that the notices of appeal dated 31st May, 2018 and 4th June, 2018 were served out of time. I note that the notice of appeal dated 31st May, 2018 filed by counsel for the 1st respondent is indicated on the notice of appeal to have been served on counsel for the applicant on 27th June, 2018. The notice of appeal dated 4th June, 2018 filed by counsel for the 2nd respondent is indicated to have been served on counsel for the applicant on 22nd June, 2018.

23. Rule 77(1) of this Court Rules 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.”

24. Pursuant to Rule 77(1) of this Court's Rules, the notices of appeal should have been served within seven (7) days after lodging the notice of appeal. The notices of appeal should therefore have been filed on or before 1st June, 2018. There was no application for enlargement of time to serve the notices of appeal outside the seven (7) days provided by this Court's Rules. The two notices were therefore both served out of time.

25. This Court in ***Daniel Nkirimpa Monirei vs. Koilel and 4 others***, (supra) stated as follows:

“The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms.”

26. From the above analysis, it is clear that the two notices of appeal do not muster and are therefore not competent. Accordingly, the notices of appeal dated 31st May 2018 and 4th June 2018 by the 1st and 2nd respondents respectively are hereby struck out with costs to the applicant.

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

J. MOHAMMED

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JUDGE OF APPEAL

RULING OF H. OKWENGU JA

I have read the draft ruling prepared by J Mohammed JA and I am in agreement with the conclusion that the applicant's notice of motion seeking the striking out of the respondents' notices of appeals should be allowed. Although the applicant indicated on the face of his motion that the date of the judgment intended to be appealed against was delivered on 25th May, 2018, the judgment which is annexed to the motion is indicated as actually having been dated and delivered on 30th May, 2018. The notices of appeal were dated 31st May, 2018 and 4th June, 2018 respectively, but neither of the notices were lodged in Court on or before 13th June, 2018, which would have been the last day for lodging the notice.

The explanation given by the respondents for the delay in lodging the notices has not been substantiated. In any case, the respondents ought to have sought leave of the Court to appeal out of time under Rule 4 of the Court Rules, using that explanation to invoke the Court's discretion. This was not done. In the circumstances Rule 84 of the Court Rules that empowers the Court to strike out the notices is applicable as the respondents did not lodge their notices in time nor did they serve the notices in time.

The final orders shall therefore be that the applicant's notice of motion dated 16th July, 2018 seeking the striking out of the respondents' notices of appeal shall be and is hereby allowed, and the notices of appeal dated 31st May 2018 and 4th June, 2018 filed by the 1st and 2nd respondents respectively are hereby struck out with costs to the applicant.

This ruling is delivered under Rule 32(3) of the Court Rules as Githinji JA has since retired from service.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

Signed

DEPUTY REGISTRAR