



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MURGOR, J. MOHAMMED & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 121 OF 2019

BETWEEN

SIOKWET TARITA LIMITED APPLICANT

AND

KISII UNIVERSITY.....1ST RESPONDENT

PROF. JOHN SORATHIA AKAMA..... 2ND RESPONDENT

DR. KIPYEGON KIRUI3RD RESPONDENT

(Being an application to strike out a Notice of Appeal against the decision of the Environment and Land Court at Eldoret (Ombwayo, J.) delivered on 26th July, 2017

in

ELC Petition No. 18 of 2016)

RULING OF THE COURT

In the Notice of Motion said to be brought under **rule 83** of the **Court of Appeal Rules, 2010, Sections 3A and 3B** of the **Appellate Jurisdiction Act, Articles 100, 48 and 50 (1)** of the **Constitution** and all other enabling provisions of law, it is prayed in the main that the notice of appeal dated 3rd August, 2017 filed by the respondents against the decision of the **Environment and Land Court at Eldoret** delivered on 26th July, 2017 in **ELC Petition No. 18 of 2018** be struck out. In prayer 4 it is prayed:

“4. THAT alternatively to prayer (3) above, if the Honourable Court is inclined to save the appeal, then in the interests of justice, the Honourable Court be pleased to order that the stay of proceedings in Environment and Land Court Petition No. 18 of 2018; Siokwei Tarita Limited vs. The Commission of University Education & The Kisii University be reviewed to only apply to restraining any enforcement of Conservatory Orders by way of applications for contempt, but the hearing, of the substantive Petition by the Applicant to proceed for hearing and urgent disposal.”

In grounds in support of the motion and in a supporting affidavit of the applicant, **Barnabas Bargarioria** sworn at Nairobi on 1st October, 2019 the following picture is painted: the respondents filed a notice of appeal against the decision made on 26th July, 2017; the respondents successfully applied for stay of proceedings of that court; since issue of those stay of execution orders and for a period of over 2 years the respondents had not filed an appeal; at (e) and (g) of the grounds; it was dated that:

“e. The stay of proceedings in place is causing, egregious prejudice to the Applicant; the Applicant cannot have its Petition determined, and the superior Court having ordered on 10th August 2018 that the central issue of payment of rent claim shall be determined in the Petition, the Applicant has been prohibited from having the matter determined in order for the Applicant to obtain payment of rent arrears, in order for the Applicant to in turn pay the bank to obviate the bank from exercising the Statutory Power of Sale to protect the suit property L.R. ELDORET MUNICIPALITY/BLOCK/7/162. The stay of proceedings in the Superior Court and the neglect to file the appeal, has emasculated the Applicant from obtaining justice, the Applicant is at the mercy of the Respondents, who have themselves lost interest in the appeal;

g. The present Notice of Motion Application is necessary to enforce the Applicant’s right to access justice guaranteed under Article 48 as read together with Article 159 of the Constitution of Kenya, and buttressed by Section 3A and 3B of the Appellant Jurisdiction Act and Rule 83 of the Court of Appeal Rules, wherefore unless the Honourable Court grants the reliefs sought herein, the Applicant’s fundamental right to access justice and to protection of its property L.R ELDORET MUNICIPALITY/BLOCK/7/162, shall continue to be egregiously violated.”

The Motion is opposed through a replying affidavit of **Amos Chirchir Kipruto**, an advocate of the High Court of Kenya practising in the law firm of **Nyairo & Company Advocates**, the lawyers on record for the respondents. It is deponed that the Motion is defective and incompetent; that notice of appeal was filed and served on time; that a letter bespeaking proceedings was delivered to court and was copied to the lawyers for the applicant; that various applications then followed at the Environment and Land Court; that the respondents’ lawyers had made various visits to the Registry of the trial court to follow up on the letter bespeaking proceedings; that the respondents were not responsible for delay in delivery of proceedings by the trial court and that there are weighty issues to be taken in the intended appeal.

There is no dispute that notice of appeal against the decision made on 26th July, 2017 was filed and served within the timeliness required by **rules 75 and 77 of the rules of this Court**. A letter dated 3rd August, 2017 to the Deputy Registrar of the Environment and Land Court, Eldoret, requested proceedings for purposes of appeal. That letter was copied to the lawyers of the respondent.

The proviso to **rule 82 of the rules of this Court** declares:

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

This Court stated in the case of **Mariamamu Abubakar Ileri & Anor v National Cereals & Produce Board Civil Application No. 92 of 2008 (ur)** cited in the case of **Kuguru Food Complex Limited v Mashreq Bank Limited [2016] eKLR**:

“... in view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant’s counsel, time prescribed for filing an appeal stopped running. The running of the time resumed on or about 3rd September when copies of proceedings were delivered to the respondent.”

Proceedings having been applied for on time by the respondents’ time stopped running as provided by **rule 82 of the rules of this Court**. We have seen various letters by the respondents to the trial court following up on the letter bespeaking proceedings and we observe that it is the duty of that court, not the respondents, to furnish proceedings to enable the respondents to file an appeal. The delay in furnishing proceedings is attributable to the trial court, not the respondents.

The prayer made in the alternative, that we review the order staying proceedings in the trial court is not available to the applicant in this Court. We have no jurisdiction to entertain that prayer as there is no notice of appeal against the orders made by the trial court on that issue. If review is desired the applicant is of course free to make a visit to that court and pray accordingly.

For purposes of the Motion before us we find no merit in it and we dismiss sit with costs to the respondents.

Dated and delivered at Nairobi this 10th day of July, 2020.

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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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