



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MURGOR & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. NAL. 93 OF 2018

BETWEEN

SOUTH EASTERN KENYA UNIVERSITY.....APPLICANT

AND

UKAMBA AGRICULTURAL INSTITUTE.....1ST RESPONDENT

DUBAI BANK LIMITED.....2ND RESPONDENT

(Being an application to strike out the Notice of Appeal dated 21st December, 2017

from the Ruling of the High Court of Kenya at Nairobi (Nzioka, J.)

dated on 18th December, 2017 in H.C.C.S. No. 172 of 2012)

RULING OF THE COURT

[1] Before us is a notice of motion dated 28th March, 2018 by **South Eastern Kenya University** (applicant) seeking to strike out the notice of appeal dated 21st December, 2017 which was filed by **Ukamba Agricultural Institute** (1st respondent). The application is supported by the grounds stated on its body thereto and matters deposed to in the supporting affidavit sworn by **Robai Musilive** on 28th March, 2018.

[2] Briefly, the applicant contends that on 18th December, 2017 the High Court dismissed the 1st respondent's notice of motion dated 5th October, 2015. That on 21st December, 2018 the 1st respondent filed a Notice of Appeal but only served the applicant on 1st March, 2018 which is outside the period provided under **Rule 77 (1)** of the Court of Appeal Rules which requires an intended appellant to serve all persons directly affected by the appeal within seven (7) days. The 1st respondent did not serve the applicant with a letter bespeaking the proceedings of the High Court as required by the said rules and as if that was not enough, the 1st respondent has not filed a record and memorandum of appeal which are required to be filed within sixty (60) days. It is now over two (2) years and no appeal has been filed.

[3] The aforesaid motion was fixed for a virtual hearing before us on 11th June, 2020 following the Court's Practice Directions to mitigate the COVID 19 Pandemic. We have taken note of the written submissions by the 1st respondent which were filed by their counsel **M/s Nzamba Kitonga**. Counsel takes issue with the applicant who he accuses of being "a busy body" as the suit before the High Court was between the 1st respondent and **Dubai Bank** (2nd respondent) but the applicant applied to be enjoined in the suit. Counsel therefore states that the applicant has no *locus standi* to challenge the notice of appeal. Secondly, on the merit of the notice of motion, counsel argued that since the substantive suit in the High Court which had given rise to the notice of appeal and the impugned ruling which was being appealed against was dismissed for want of prosecution, it was not necessary to file the present application as the said notice of appeal was rendered redundant. Counsel was of the view that the instant application was overtaken by events as the High Court suit no longer exists, it was a waste of court's time during this difficult period when the court services are constrained by COVID 19 Pandemic.

[5] The record shows that when counsel for the applicant was served with the 1st respondent's submissions indicating that the notice of appeal was overtaken by events, he wrote a letter to **M/s Nzamba Kitonga** which was copied to the Registrar of the Court indicating that the notice of appeal could be struck out with no order as to costs. However, the parties did not file a consent to that effect and therefore unless the notice of appeal is withdrawn or struck out it will remain in the Court records.

[6] In the circumstances we have considered the motion, which as stated above is not opposed by the 1st respondent, who confirms that the notice of appeal sought to be struck out is indeed otiose as the substantive suit was dismissed and given also that the steps provided by this Court's Rules regarding filing and service of the notice and record of appeal were not followed, we allow the application and order the notice of appeal be struck out.

[7] As the applicant was willing to forego costs in the said letter, we make no order as to costs.

Dated and delivered at Nairobi this 9th day of October, 2020.

M. K. KOOME

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR