



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), GATEMBU & KANTAL, J.J.A)

CIVIL APPLICATION NO. 23 OF 2020

BETWEEN

ROSELYNE ADHIAMBO HUMPHREYS.....APPLICANT

AND

ALICE AFANDI EBOYL.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Being an application to strike out two separate Notices of Appeal of both the 1st and 2nd respondents dated 16th February, 2018 and 15th March, 2018 respectively, lodged in relation to the Judgment of the Environment and Land Court at Kisumu (S.M. Kibunja, J.) dated 31st January, 2018

in

Kisumu ELC Case No. 720 of 2015)

RULING OF THE COURT

This application is predicated upon **Rules 75, 83 and 84** of this Court's Rules. The applicant is seeking to have the notices of appeal dated 16th February, 2018 and 15th March, 2018 filed by the 1st and 2nd respondents respectively, struck out or deemed as having been withdrawn.

By a judgment rendered on 31st January, 2018 the Environment and Land Court (ELC) found that the 1st respondent's registration as the proprietor of **KISUMU/MUNICIPALITY/BLOCK 8/309** was irregular having obtained it from the Government of Kenya without following due process. As a result of this determination, the ELC rejected her claim for the balance of the purchase price, together with her counterclaim against the applicant. Instead, the applicant was directed to make payment of the balance of the purchase price to the 2nd respondent within 30 days of the date of the judgment, failing which, the suit property would revert to the Government of Kenya.

This aggrieved the 1st respondent who lodged a notice of appeal on 16th February, 2018, which, according to the applicant, was 16 instead of 14 days from the date of the decision appealed against contrary to the provisions of **Rule 75(2)** of this Court's Rules; that the 1st respondent has failed to regularize this by obtaining leave; and that the 2nd respondent, who was named in the proceedings as the 3rd party obtained leave of the ELC, which deemed its notice of appeal, lodged on 15th March, 2018 to have duly been filed and served within time.

The thrust of the applicant's argument is that, by the provisions of **Rules 82 and 83** of this Court's Rules, both the 1st and 2nd respondents ought to have filed their respective records of appeal within sixty (60) days from the respective dates when they lodged their notices of appeal; that having failed to do so for over 2 years, it is in the interest of justice that this application be allowed.

The respondents have not filed replying affidavits in response to this application, though served with both the application. They were

similarly served with the hearing notices through their email addresses on 29th September, 2020 but failed to participate in the arguments of this application.

Having given this application, the affidavit in support of the application as well as submissions due for consideration, it is common ground that the impugned judgment was rendered on 31st January, 2018. The respondents lodged their notices of appeal on 16th February, 2018 and 15th March, 2018 respectively. The 2nd respondent, unlike the 1st respondent, obtained leave which deemed its notice to have been duly filed within time. The 1st respondent's notice was filed one day late contrary to **Rule 75(2)**. It is also not in dispute that by dint of **Rule 82(1)** of this Court's Rules, the records of appeal by the respondents ought to have been lodged within sixty (60) days thereafter, but were not. In fact, no record of appeals had been instituted as at the date of the filing of the motion, some 2 years later.

This Court has expressed on numerous occasions that;

“...the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.” See: Mae Properties Limited vs. Joseph Kibe & another [2017] eKLR.

Rule 83 of this Court's Rules, which is invoked by the applicant, provides thus;

“83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.” (Our emphasis).

Further, in the case of Ramji Davji Vekaria vs. Joseph Oyula, [2011] eKLR, this Court held that lodging an appeal out of time is not a procedural technicality which can be cured by the Court invoking the overriding principle.

In the instant circumstances, the respondents, having failed to bring their respective appeals within 60 days of lodging the notice of appeal, rendered their appeals to be deemed as having been withdrawn. Accordingly, this application succeeds and is allowed with costs to the applicant.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

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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