



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 44 OF 2017

IN THE MATTER OF THE ESTATE OF KATANA KARISA MADAGO ALIAS KATANA KARISA VENGO (DECEASED)

BETWEEN

KADZO MADAGO.....1ST APPLICANT

NYEVU KENGA.....2ND APPLICANT

VERSUS

CHARO KATANA KENGA.....RESPONDENT

(Being an application to strike out the record of appeal filed by the respondents on 5th July, 2017 in respect of the Judgment of the High Court at Malindi (Chitembwe, J.) delivered on 31st October, 2016

in

H.C. Succ. Cause No. 106 of 2014.)

RULING OF THE COURT

[1] The application before us seeks to strike out the record of appeal filed on 5th July, 2017 by Charo Katana Kenga, (respondent) on the grounds that the appeal was filed out of time. On the outset, we must state this application was slovenly drawn as the applicants invoked the wrong provisions of the law by predicating it under **sections 1A, 1, 3, 3A, 63 (e)**, of the Civil Procedure Act and **section 80** of the Appellate Jurisdiction Rules and all the enabling provisions of the law. This sloppiness resumably based on the practice of copy pasting must be deprecated. Nonetheless, in the spirit of looking at the bigger picture in the administration of justice being the substantive justice of the matter as ordained under **Article 159(2) (d)** of the Constitution, we will overlook those procedural missteps as the application can generally be located within the provisions of **Rule 84** of the Court of Appeal Rules which provides as follows:-

“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.”

[2] The application is supported by the affidavit of Kadzo Kenga Madago, 1st applicant, apparently sworn with the authority of Nyevu Kenga, the 2nd applicant. To give a glimpse of the factual background of this matter from what we can decipher from the ruling of the High Court delivered on 22nd February, 2017, the respondent was granted the following orders;

“1. That the petitioner (in this matter the respondent) to deposit the original title deed in court for plot No KILIFI/MTONDIA/160 within seven days hereof.

2. That the petitioner to file his record of appeal before the Court of Appeal with 60 days hereof.

3. That should the petitioner fail to deposit the original title deed within seven days hereof, the application dated 29th November, 2016 shall be deemed to have been dismissed with costs to the respondents.

4. That the objectors to continue residing on the suit land until the appeal is heard and determined.”

[3] The applicants’ grievance/problem with the respondent is that he failed to file the appeal within 60 days as ordered above, thus the record of appeal filed on 5th July, 2017 was filed out of time and without leave of the court. This application was filed on 20th July, 2017 which is within the provisions of **Rule 84** of the Court of Appeal Rules as stated above. Both counsel for the applicants and respondent filed written submissions and fixed the date for hearing during the case management conference. Although the respondent filed his submissions, neither he nor his counsel appeared during the hearing on 3rd October, 2018. However, there will be no prejudice as the applicants too relied on their written submissions.

[4] The respondent does not deny that he filed the record of appeal late, a matter he attributes to financial constraints. This is how he puts it in his written submissions;

“The appellant complied with all the other conditions, except, he was late on the filing of the record of appeal, an inadvertent mistake caused by financial constraints as shall elucidate and thus the consequences of which he was late in filling of the record of appeal.”

He also contends that before he was served with the instant application he had already prepared an application seeking enlargement of time within which to file the record of appeal. Thus, the respondent seems to be arguing that there was delay in filing the record of appeal, but it was not inordinate; that the appeal has good chances of success and that the applicants will not suffer any prejudice. With respect, those arguments are not for the application before us, they are to be made before a single Judge according to the provisions of **Rule 4** of this Court’s Rules.

[5] What is before us is an application to strike out the record of appeal because an essential step being filing it within the time was not followed. The respondent having conceded the appeal was filed late, it is *ipso facto*, an incompetent appeal that cannot be sustained in the absence of leave to do so. The respondent was putting the cart before the horse by asking us to enlarge time or spare the application until he seeks leave. Unfortunately, there being no competent appeal, he has to follow the procedure of first seeking leave to enlarge time. We therefore, order the appeal to be and is hereby struck out with no order as to costs.

Dated and delivered at Mombasa this 7th day of February, 2019

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR