



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 202 of 2018

BETWEEN

JOYCE NSIZA.....APPELLANT

AND

AMUGA & CO. ADVOCATES.....RESPONDENT

*(Appeal from the Ruling/Order of the High Court of Kenya (Ochieng J.) dated 17<sup>th</sup> July 2017*

in

**Nairobi Miscellaneous Civil Suit No. 12 of 2014)**

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**JUDGMENT OF THE COURT**

1. The dispute in this appeal relates to taxation of advocate client Bill of Costs. On 4<sup>th</sup> August 2014, the Deputy Registrar of the High Court taxed the advocate client Bill of Costs at Ksh. 11,894,926 in favour of the respondent firm of advocates. Judgment was entered against the appellant for this amount. On 15<sup>th</sup> January 2016, the Deputy Registrar in a ruling made a settlement of terms towards satisfaction of the judgment/decretal sum. In the ruling, the Deputy Registrar issued a warrant for sale by public auction of all that property known as **Nairobi LR No. 209/7196/113**, Harambee Estate registered in the name of the appellant and other judgment debtors. The property was to be sold at a reserve price of not less than Ksh. 6 million. The net proceeds to be paid directly to the respondent advocate the decree holder in this matter.
2. Aggrieved by the Deputy Registrar's ruling, the appellant filed a Notice of Appeal to the High Court dated 28<sup>th</sup> January 2016. The main appeal was lodged at the High Court on 15<sup>th</sup> February 2016. In response to the appeal, a Notice of Preliminary Objection was filed by the respondent advocate. The preliminary objection was to the effect that the appeal in the High Court had been lodged out of time and should be struck out.
3. Before the learned judge, the appellant avowed the appeal was filed in good time without delay. Conversely, the respondent submitted that pursuant to **Order 49 rule 7 (2)** of the **Civil Procedure Rules**, an appeal arising from the decision of the Deputy Registrar must be lodged within seven (7) days of the date when the Deputy Registrar delivers her/his decision; that in this matter, considering the impugned ruling was delivered on 15<sup>th</sup> January 2016, the appeal should have been filed by 22<sup>nd</sup> January 2016. To this end, it was urged that the appeal in the High Court was filed 31 days late on 15<sup>th</sup> February 2016.
4. The learned judge upon hearing the parties, upheld the preliminary objection, struck out the appeal and expressed himself as follows:

*“It is the client’s contention that there was no delay in filing the appeal. That contention is factually inaccurate as the rule stipulates that appeals arising from the decisions of the deputy registrar, should be filed within seven days of the decision. In this case, neither the Notice of Appeal nor the Reference to the High Court were filed within 7 days of the decision. I appreciate the fact that the client is not an advocate and she was acting for herself.....However, the client has not asked the court for any extension of time. She has also not tendered any explanation for the delay in filing both the Notice of Appeal and the Reference to the High Court..... Therefore, even though the client could possibly have had an arguable appeal, she arrived at the airport after her designated flight had already taken off.....Accordingly, I uphold the preliminary objection and do now strike out the Reference to the High Court or the appeal filed on 15<sup>th</sup> February 2016. The client will pay to the Advocate the costs of the appeal together with the costs of the Notice of Preliminary Objection.”*

5. Aggrieved, the appellant has lodged the instant appeal citing the following grounds:

*“(i) The judge erred in finding the appellant did not tender an explanation for being late in filing both the Notice of Appeal and the Reference.*

*(ii) The judge erred in finding the appellant’s appeal did not meet the requirements of Order 49 rule 7 (2) and (3) of the Civil Procedure Rules.*

*(iii) The judge erred in striking out the Reference.*

*(iv) The judge erred by refusing to judicially exercise his discretion to allow the Taxation Reference filed by the appellant.*

*(v) The judge erred by likening the appellant’s case to a passenger who arrives late at the airport only to find the flight has already taken off.*

*(vi) The judge erred by failing to take judicial notice the appellant is a lay person.*

*(vii) The judge erred in upholding the preliminary objection.”*

6. At the hearing of the appeal, the appellant appeared in person while the respondent was represented by Mr. P. R. Amuga Advocate.

7. When the Notice of Appeal was filed before this Court, the respondent lodged a Notice of Motion on 17<sup>th</sup> July 2018 pursuant to **Rule 84** of the **Rules** of this Court seeking an order to strike out the Notice of Appeal on the ground that the same was filed out of time. Subsequently, when the main appeal was filed, the respondent lodged another Notice of Motion on 18<sup>th</sup> August 2018 seeking an order to strike out the appeal on the ground that there is no right of appeal against the impugned ruling of High Court without leave of court; that the appellant did not obtain leave to appeal.

8. The record shows that during case management, it was directed that the two Motions be heard together with the main appeal.

9. Both the appellant and respondent filed written submissions and list of authorities in this matter.

#### **APPELLANT’S SUBMISSIONS**

10. The appellant submitted an appeal against the impugned ruling of the High Court lies as of right and no leave is required. It was submitted that the ruling by the learned judge arose from a preliminary objection on a point of law; that under **Order 2 rule 9** of the **Civil Procedure Rules**, a point of law can be raised in a pleading and if an appeal is to be preferred against an order relating to a point of law, it effectively means the appeal lies as of right by the fact that **Order 2** of the **Civil Procedure Rules** falls within the ambit of **Order 43 rule 1 (b)** of the said Rules.

11. The appellant further submitted that by a ruling dated 6<sup>th</sup> March 2018, the learned judge granted leave to appeal; that the ruling by the judge delivered on 6<sup>th</sup> March 2018 is valid in law until set aside. The appellant submitted leave to appeal having been granted on 6<sup>th</sup> March 2018, the present appeal is properly before this Court.

12. On the merits of the appeal, the appellant submitted that the judge correctly made a finding that the appeal was lodged late by some three weeks. However, the judge erred as he did not consider how a delay of three (3) weeks offended the overriding objective to administer justice without undue regard to procedural technicalities as enunciated in **Article 159 (2)** of the Constitution and **Sections 1A, 1B** and **3A** of the **Civil Procedure Rules**. The appellant concluded her submissions by urging that the Judge misapprehended the law by failing to appreciate the fundamental principle that substantive justice ought to be administered instead of procedural justice.

#### **RESPONDENT’S SUBMISSIONS**

13. The respondent submitted that the Motions lodged on 17<sup>th</sup> July 2018 and 18<sup>th</sup> August 2018 respectively sought to strike out the notice of appeal and the main appeal filed in this matter. Counsel submitted that an appeal from the impugned ruling of the High Court delivered on 17<sup>th</sup> July 2017 can only be lodged with leave of the court; that the Notice of Appeal lodged on 19<sup>th</sup> July 2017 is invalid as no leave was sought or obtained within 14 days as provided under **Order 43 rule (3) of the Civil Procedure Rules**; since leave to appeal was not obtained, the main appeal cannot be sustained. In support, counsel cited the case of **Peter Nyaga Muvake -v- Joseph Mutunga [2015] eKLR**.

14. In further opposition to the instant appeal, counsel noted the High Court Judge in a ruling delivered on 6<sup>th</sup> March 2018 granted the appellant leave to appeal; that by the time leave was granted, there was no valid Notice of Appeal on record; that the appellant could only lodge a competent notice of appeal and a competent appeal after obtaining leave to extend time to lodge a fresh Notice of Appeal and a fresh appeal; that no valid appeal can be anchored on the invalid Notice of Appeal lodged on 19<sup>th</sup> July 2017; that before the learned judge of the High Court there was no application for extension of time; the judge erred in granting an order that was neither prayed for nor pleaded.

15. On the merits of the appeal, it was submitted the appeal before the learned judge was filed after a delay of 31 days; the appellant did not make an application for extension of time; the appellant maintains she filed the Notice of Appeal on time; this contention is not supported by the facts and evidence on record; the fact that the appellant is acting in person is not an excuse for failure to follow laid down procedures;

there was no explanation for delay in lodging the appeal.

16. The respondent further submitted that the appeal serves no purpose as the order by the Deputy Registrar to attach and sell the suit property was issued on 21<sup>st</sup> September 2015; the order attaching the suit property has never been appealed against by the appellant or other judgment debtors; the decree has never been appealed against and continues to accrue and attract interest. Counsel urged us to dismiss the instant appeal with costs.

#### **ANALYSIS and DETERMINATION**

17. Before us are two Motions and the main appeal. We shall first consider and determine the two Motions and then if need be, consider the main appeal.

18. The Motions before us is by the respondent. The Motions seek to strike out the Notice of Appeal and Record of Appeal on the ground that the same were filed out of time and without leave of court as required by **Order 49 rule 3** of the **Civil Procedure Rules**.

19. In support of submission to strike out the instant appeal, the respondent cited dicta from the case of **Peter Nyaga Muvake -v- Joseph Mutunga [2015] eKLR, Civil Appeal No. (Nairobi) 86 of 2015** where while making reference on failure to seek leave to appeal from an order, this Court expressed itself thus:

**“Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules; the procurement of leave to appeal is *sine qua non* to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”**

20. In opposing the instant Motion to strike out, the appellant submitted the present appeal lies as of right, and in any event, leave was obtained from the learned judge in a ruling delivered on 6<sup>th</sup> March 2018.

21. On our part, we have examined the Record of Appeal. There is Ruling No. 2 dated 6<sup>th</sup> March 2018 whereat paragraph 53 and 54 thereof, the judge granted leave to appeal against the ruling delivered on 17<sup>th</sup> July 2017. In granting leave, the judge expressed himself as follows:

**“53. Reverting to the issue of leave sought, I find the law firm would not be prejudiced by the grant of leave, which would enable the appellant lodge her appeal out of time.**

**54. Therefore, Joyce is hereby granted leave to appeal against the ruling dated 17<sup>th</sup> July 2017.**

22. Going by the record of appeal, we are satisfied the appellant obtained leave to appeal against the ruling dated 17<sup>th</sup> July 2017. The ruling by the judge dated 6<sup>th</sup> March 2017 has not been appealed against; the respondent cannot be allowed to impugn and challenge the ruling of 6<sup>th</sup> March 2017 when no notice of appeal has been filed against the ruling. We find the instant appeal is properly before us. We now consider the merits of the appeal.

23. As to whether an appeal filed out of time is competent, we refer to the persuasive decision of the High Court in **Shalimar Limited -v- Sadrudin Kurji Khurti & another [2016] eKLR** where the learned Judge expressed as follows:

**“The appellant seeks to appeal against the order of the Deputy Registrar of 30<sup>th</sup> September 2014 issuing a warrant of arrest against him. Order 49 Rule 7(3) of the Civil Procedure Rules provides that where a party seeks to appeal against the order of the Deputy Registrar, they must file a memorandum of appeal setting out the grounds of appeal within 7 days from the day of the decision of the Deputy Registrar. In this matter the Deputy Registrar’s decision was made on 30<sup>th</sup> September 2014. If the appellant intended to appeal against the decision, a memorandum of appeal ought to have been filed by 7<sup>th</sup> October 2014. The memorandum of appeal in this case was filed on 13<sup>th</sup> October 2014 as an exhibit annexed to the appellant’s affidavit in support of the Chamber Summons. No leave of the court was sought to file the memorandum of appeal out of time. Instead, what was sought was the leave of the court to file the appeal which in any event was unnecessary as the appellant had an automatic right of appeal. It is the finding of this court that there is no competent appeal before the court as the memorandum of appeal was filed out of time.”**

24. In the instant appeal, to enable us determine whether the appeal before the learned judge on Reference was competent, we must examine *the ratio decidendi* of the impugned ruling dated 17<sup>th</sup> July 2017. The impugned ruling was delivered after a preliminary objection was raised by the respondent to the effect that the Notice of Appeal and the Reference before the High Court was filed out of time. In upholding the preliminary objection, the learned judge established as a matter of fact that the Notice of Appeal was filed outside the prescribed time of 7 days as prescribed by **Order 49 rule (7) (3)** of the **Civil Procedure Rules**; the judge found there was no application to extend time to file the Reference before the High Court. **Order 49 rule 7(3)** stipulates that:

**“The memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of the registrar.”** (Emphasis supplied)

25. The *ratio decidendi* of the impugned ruling dated 17<sup>th</sup> July 2017 is that neither the Notice of Appeal nor the Taxation Reference to the High Court were filed within 7 days of the decision as required by **Order 49 rule 7 (3)** of the **Civil Procedure Rules**. From this *ratio decidendi*, it follows the only issue for our determination in this appeal is whether the judge erred in finding that the notice of appeal and the Reference were filed out of time and no extension of time had been granted.

26. We have perused the record. It is not in dispute that the notice of appeal and record of appeal were filed out of time. It is not controverted that no application for extension of time was made before the High Court. These are findings of fact supported by the evidence on record. Even if the learned judge were to exercise his discretion to extend time, he could not do so in the absence of an application for extension of time. Whereas a lay person acting in person may be a relevant factor to be taken into account in an application for extension of time, such a factor can only be considered if there is an application to extend time. In the absence of an application for extension of time, the learned judge could not start considering reasons for delay and explanations for delay and the judge could not make a determination if the delay was inordinate.

27. In the persuasive decisions of the High Court in **Governors Balloon Safari Limited -v- Skyship company Limited and Another [2015] eKLR** and **Evans Thiga Gaturu Advocate -v- Kenya Commercial Bank Limited [2012] eKLR**, it was held that if reasons for taxation are available in the ruling by the taxing officer, the reference must be filed within fourteen (14) days after the taxation ruling or else the reference would be incompetent, if filed fourteen (14) days after the delivery of the ruling.

28. In this appeal, the appellant has not placed before us any material that shows the learned judge erred in invoking and applying the provisions of **Order 49 rule 7 (3)** of the **Civil Procedure Act and Rules**. The appellant further submitted that the judge erred in failing to exercise his discretion to extend time and allow the Reference to be heard on merit; the judge erred in laying emphasis on procedural rather than substantive justice contrary to **Article 159 (2) (d)** of the Constitution; the judge failed to take into account the overriding objectives in civil litigation.

29. We have considered the appellant’s submission and we find it opportune to restate the dicta in **Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** where this Court stated:

**“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1 B of the Civil Procedure Act Cap 221 and Section 3 A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.”**

30. In the final analysis, the facts on record show the appeal and Reference before the High Court were filed outside the prescribed time. The record shows there was no application for extension of time to file the Reference before the High Court. From the facts on record and the express provisions of **Order 49 (7) (3)** of the **Civil Procedure Rules**, we find this appeal has no merit and it is hereby dismissed with costs.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of June, 2019.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**