



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 27 OF 2015

BETWEEN

JAMES BUNDI GITAMO.....APPELLANT

AND

EZEKIEL NYAMWENO.....RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya

at Kisii, (Muchelule, J.) dated 11th November, 2009

in

H.C.C.C. NO. 51 OF 1992)

RULING OF THE COURT

[1] This is an application by **Ezekiel Nyamweno**, the respondent in the appeal under **Rule 84** of the Court of Appeal Rules for an order that the appeal herein be struck out on the ground that the appeal was lodged out of time and without the leave of the Court.

The application is supported by the affidavit of the applicant. The respondent did not file a replying affidavit.

[2] The appeal, the subject matter of the application is against the Ruling of the High Court (*A. O. Muchelule, J.*) dated 11th November, 2009 dismissing an application seeking to set aside the report of the District Land Registrar Kisii relating to the boundary between land titles **Nos. West Mugirango/Bosamaro East /598** owned by the applicant herein and **West Mugirango/Bosamaro East/597** registered in the name of **James Bundi Gitamo**, the respondent herein.

[3] The appeal was filed on 31st March, 2015. The certificate of delay issued by the Deputy Registrar of the High Court on 20th February, 2014, states in paragraph 3 thus:

“The time taken by this Court to prepare and supply the copies of the proceedings and ruling was from 11th November, 2009 to 12th August, 2011, that is over 2 years.”

[4] By **Rule 82 (1)** of the Court of Appeal Rules, an appeal should be lodged within sixty days of the date of lodging of the notice of appeal. However, by the proviso to that rule, the time certified by the Registrar of the High Court as having been required for the preparation and delivery to the appellant a copy of proceeding is excluded from the computation of time subject to the conditions specified therein. Since the Deputy Registrar of the High Court certified the time required for the preparation and delivery of the copy of the proceeding up to 12th August, 2011, the appeal should have been filed within sixty (60) days from 12th August, 2011. Even if time is computed from 20th February, 2014, when the certificate of delay was issued, then the appeal should have been filed within 60 days – that is on or about 21st April, 2014.

As already stated, the appeal was filed on 31st March, 2015. It is clear, and **Mr. Masese**, learned counsel for the respondent concedes, that the appeal was filed out of time. His plea is however that the appeal should be heard on the merits.

It is trite law that a court cannot entertain incompetent proceedings. The respondent had an opportunity to formally apply for extension of time within which to file the appeal before or after lodging the appeal but did not make such an application.

[5] This application is competent since it was filed within 30 days of the service of the record of appeal.

[6] For the foregoing reasons, we find that the appeal is incompetent having been lodged long after the stipulated time without such time having been extended by the Court.

Accordingly, the application is allowed with costs to the applicant. The appeal - **Civil Appeal No. 27 of 2015**, is struck out with costs to the respondent.

Dated and Delivered at Kisumu this 22nd day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR