



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL (APPLICATION) NO. 66 OF 2017

BETWEEN

ARON KIBIWOT CHEPSIROR.....APPLICANT

VERSUS

FLORENCE CHEMONGES.....RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court at Kitale, (E. Obaga, J) dated 7th November 2016 in Environment & Land Case No. 14 of 2008)

RULING OF THE COURT

[1] This is an application under Rule 84 of the Court of Appeal Rules for an order that the appeal herein be struck out with costs on the grounds, firstly, that the appeal was filed out of time, and, secondly, the record of appeal was served out of time.

[2] The ground that the appeal was filed out of time is, as the supporting affidavit shows, based on the allegation that the respondent did not serve a letter bespeaking the proceeding on the applicant and that no such letter exists. Rule 82 (1) of the Court of Appeal Rules provides that an appeal shall be instituted within sixty days of the date when the notice of appeal was lodged. However, the proviso to that Rule provides that where an application for a copy of the proceedings has been made within 30 days of the date of the decision the time certified by the Registrar of the court appealed from as having been required for preparation and delivery of such copy to the appellant shall be excluded from computation of time.

Rule 82 (2) provides that an appellant shall not be entitled to rely on the proviso unless the application for a copy of the proceedings was in writing and a copy of it was served on the respondent.

The respondent states in the replying affidavit that although a copy of the letter requesting for proceedings may not be traced such a letter was filed and relies on the receipt for payment of the typing charges and two other subsequent letters to the Registrar of the court inquiring the progress of the preparation of the proceedings.

[3] The Judgment appealed from was delivered on 7th November, 2016. The copy of a court receipt dated 18th November, 2016 shows that the respondent paid Shs.450 as typing charges.

The certificate of delay issued by the Registrar on 20th April, 2017 states in the first paragraph;

“An application for certified copies of proceedings. Judgment and decree was made in writing on 18th November, 2016 which was within 30 days of that ruling desired to be appealed from.”

Thus, although the respondent did not provide a copy of the letter, the Registrar has certified that a copy of the letter requesting for the proceedings was received in court within the 30 days stipulated by the rules.

That certification is sufficient proof for purposes of this application that a request was made in writing within the stipulated time.

[4] However, there is no evidence that the letter requesting for a copy of the proceedings was served on the applicant's counsel.

The certificate of delay certifies time upto 25th April, 2017 as required for the preparation and delivery of the copy of the proceedings.

The appeal which relates to a land dispute was filed on 12th June, 2017 which is within 60 days of the receipt a copy of the proceedings.

The respondent has substantially complied with the Rules in lodging the appeal. Rule 1 (2) of the Court of Appeal Rules provides;

“Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.”

So, although the copy of a letter requesting for the proceedings was not served on the applicant’s advocates, the court has inherent power for the ends of justice to waive that condition and sustain the appeal.

Besides failure to serve the copy of the letter has not caused any prejudice to the applicant. The omission to serve the copy of the letter is not a substantial breach of the rule and is a mere procedural technicality which under Article 159 (2) (d) of the Constitution does not make the appeal fatally defective or prevent the court from administering substantial justice. Costs will be sufficient compensation for the minor breach of the Rules.

[5] For those reasons the application is dismissed with costs to the applicant.

Dated and delivered at Eldoret this 1st day of March, 2018.

E. M. GITHINJI

.....

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