



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPLICATION NO. 100 OF 2017

(IN THE MATTER OF AN INTENDED APPEAL)

BETWEEN

KENYA INDUSTRIAL ESTATES LIMITED.....APPLICANT

AND

ANNE CHEPSIROR.....1ST RESPONDENT

SAMACK GENERAL SUPPLIES LIMITED....2ND RESPONDENT

ULTRA EUREKA FARM LIMITED.....3RD RESPONDENT

CUSTOM CREDIT MANAGEMENT LTD.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

(Being an application to strike out Notice of Appeal from the judgment/decision of the

High Court of Kenya at Eldoret, (Munyao, J.) dated 30th day of January, 2015

in

ENVIRONMENT AND LAND COURT CASE NO. 71 OF 2013)

RULING OF THE COURT

[1] This is an application by **Kenya Industrial Estates** for an order that the respondents' Notice of Appeal dated 4th February, 2015 be struck out with costs on the ground that no steps have been taken to file the intended appeal. The application is brought under various provisions of the Court of Appeal Rules, 2010 including **Rules 80(1), 82(1), 82(2), 83, 84** and **sections 3A and 3B** of the Appellate Jurisdiction Act.

[2] The applicant is the decree holder pursuant to the judgment of the Environment and Land Court (*ELC*), (**Munyao Sila, J.**) delivered on 30th January, 2015. By the judgment, the court, *inter alia*, cancelled the titles of the 1st to 5th respondents herein to **Eldoret Municipality/Block 8/592, 594, 595, 596 and 597**, ordered the respondent to vacate the suit premises and permanently restrained the 1st – 5th respondents from entering into the suit premises.

[3] On 5th February, 2015, the 1st, 4th and 5th respondents lodged a notice of appeal dated 5th February, 2015 through the firm of **J.N. Njuguna & Co. Advocates** signifying an intention to appeal against the judgment. Similarly, the 2nd and 3rd respondents had filed a Notice of Appeal dated 4th February, 2015 one day earlier, through the firm of **Nyaundi Tuiyott & Co. Advocates** evincing an intention to appeal against the same judgment.

[4] Thereafter the 2nd and 3rd respondents filed an application in the ELC dated 6th February, 2015 for stay of execution of the judgment pending, *inter alia*, the hearing and determination of the appeal. The ELC granted interim orders on 9th February, 2015 pending the hearing of the application *inter partes*.

Similarly, the 1st, 4th and 5th respondents filed an application dated 9th February, 2015 in the ELC for stay of execution of the judgment and decree pending, *inter alia*, the hearing and determination of the intended appeal and interim orders were issued on 10th February, 2015 pending the hearing of the application *inter partes*.

Apparently, the applications were later heard and the ruling reserved. Before the determination of the application, the 1st, 4th and 5th respondents filed an application dated 16th November, 2015 seeking various reliefs including review and setting aside of the judgment dated 30th January, 2015, an order that the ruling which was pending be held in abeyance pending the hearing of the application, and an order that the interim orders do remain in force pending the hearing of the application *inter partes*.

[5] The present application was filed on 23rd November, 2017. The applicant states in support of the application that the respondents have not filed the appeal for the last 2 years and 9 months; that the respondents continue to enjoy possession of the suit premises on the strength of the orders of stay of execution; that the delay in filing the appeal is unreasonable, inordinate and inimical to justice and fairness.

[6] The 1st, 4th and 5th respondents have filed a replying affidavit sworn by the 1st respondent. The 1st respondent states, amongst other things, that, the ruling on the application for stay of execution was delivered on 9th February, 2018; that during the pendency of the application for stay of execution parties consented to go for mediation which took some time; that the advocates on record applied for proceedings by a letter dated 5th February, 2015; that the file was in the custody of the learned judge in chambers during the pendency of the ruling and that 1st, 4th and 5th respondents have always been eager to pursue the appeal.

[7] The 2nd and 3rd respondents also filed a replying affidavit sworn by **Jackson K. Chebet** who deposes, amongst other things, that, the delay in filing the appeal was due to the fact that the ruling was pending.

[8] We have considered the application, the respective replying affidavits and submissions of the counsel. By **Rule 82(1)** of the Court of Appeal Rules, 2010, an appeal is required to be instituted within sixty days from when the notice of appeal was lodged. However, by proviso to that rule, the time certified by the registrar as having been required for preparation and delivery of a copy of proceedings is excluded from computation of time if an applicant applies in writing for a copy of proceedings within 30 days of the judgment and copies to, and, serves on the respondent the letter bespeaking the proceedings.

Further, by **Rule 83**, the notice of appeal is deemed as withdrawn if the appeal is not instituted within the prescribed time.

[9] It is clear from the application that the application relates to the notice of appeal dated 4th February, 2015 filed by **Samack General Supplies Limited** and **Ultra Eureka Farm Limited**, the 2nd and 3rd respondents herein, through the firm of Nyaundi Tuiyott & Co. Advocates. The applicant states in the body of the application that the notice of appeal dated 5th February, 2015 filed by **Anne Chepsiror, Custom Credit Management Limited** and **Tajakos Enterprises**, the 1st, 4th and 5th respondents herein, through the firm of J.N. Njuguna & Co. Advocates is deemed to be a notice of address of service by dint of **Rule 80(1)** of the Court of Appeal Rules, 2010.

The said **Rule 80(1)** provides:

“where two or more parties have given a notice of appeal from the same decision, the second and all subsequent notices to be lodged shall be deemed to be notices of address for service within the meaning of rule 79 and the party or parties giving those notices shall be respondents in the appeal.”

The respective notices of appeal show that the intended appeal is from the same decision of Munyao Sila, J. dated 30th January, 2015.

We agree with the applicant that for purpose of the intended appeal, the operative notice of appeal is the one dated 4th February, 2015 and lodged on the same day by the 1st, 4th and 5th respondents.

[10] By the time the application to strike out the notice of appeal dated 4th February, 2015 was filed, more than 2 years and 9 months had elapsed since the notice of appeal was filed and no appeal had been filed. Had the 1st, 4th and 5th respondents applied for a copy of the proceedings as stipulated in the proviso to **Rule 82(1)** and fulfilled the conditions stipulated therein, and proceedings had not been delivered, and the Registrar had issued a certificate of delay, then time required for preparation and delivery of a copy of proceedings would have been excluded from the computation of time. However, the 1st, 4th and 5th respondents did not apply for a copy of the proceedings for purpose of appeal and did not claim to have done so. The fact that the ruling in the application for stay of execution was pending is not a ground for excluding time for filing an appeal. In any case, the 1st, 4th and 5th respondents applied for the postponement of the delivery of the ruling and proceeded to apply for the review of the decision that they initially intended to appeal against. This is an indication that they intended to seek the remedy for review rather than the remedy of an appeal.

In the premises, there are no valid reasons which would justify the delay in filing the appeal within the stipulated time. We are satisfied that the 1st, 4th and 5th respondents failed to take an essential step – that is, filing the appeal within the stipulated time.

[11] As regards the notice of appeal filed by the 2nd and 3rd respondents on 5th February, 2015, the notice of appeal is, as we have stated

above, deemed as a notice of address of service.

Moreover, although the 2nd and 3rd respondents applied for a copy of proceedings by a letter dated 5th November, 2015, they did not pay a deposit for typing charges or take any further action to ensure that proceedings were supplied. Instead, and, as admitted by the 2nd and 3rd respondents, they pursued mediation before the National Land Commission and it is only when the mediation failed that they, in February, 2018, re-applied for a copy of the proceedings and paid a deposit for typing charges. Furthermore, Mr. Njuguna for the 2nd and 3rd respondents conceded in his submissions, that they asked the court to suspend the ruling on an application for stay of execution pending mediation. Lastly, the delay of nearly three years is inordinate and the 2nd and 3rd respondents have not obtained a certificate of delay from the Registrar to indicate that the delay in filing the appeal was due to delay in typing the proceedings. Similarly, we find that there is no valid reason for failing to institute the appeal within the stipulated time.

[12] For the foregoing reasons, the Notice of Motion dated 23rd November, 2017 filed by the applicant is allowed. Consequently, the Notice of Appeal dated 4th February, 2015 filed by the 1st, 4th and 5th respondents is struck out with costs to the applicant.

We so order.

DATED and delivered at Eldoret this 20th day of September, 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.