



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: W. KARANJA, KOOME & OTIENO-ODEK, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 27 OF 2018

BETWEEN

NAKUMATT HOLDINGS LIMITED.....1<sup>st</sup> APPELLANT

ATUL SHAH.....2<sup>nd</sup> APPELLANT

AND

IDEAL LOCATIONS LIMITED.....RESPONDENT

*(Being an application to strike out the Record of Appeal and the Supplementary Record of Appeal under Rule 84 of the Court of Appeal Rules, 2010 from the ruling of the High Court of Kenya at Mombasa (C. Yano, J.) dated 5<sup>th</sup> March, 2018*

in

*MSA ELC. C. No. 400 of 2017)*

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RULING OF THE COURT

1. At all material times in this matter, the 1<sup>st</sup> appellant company ***Nakumatt Holdings Limited*** had been and is the tenant of the Respondent company ***Ideal Locations Limited***. The 2<sup>nd</sup> appellant ***Atul Shah*** is the Managing Director of the 1<sup>st</sup> appellant company.
2. By a ruling made on 5<sup>th</sup> March 2018, the trial judge (C. Yano, J.) in Mombasa ELC Case No. 400 of 2017 issued an order directed at the 1st appellant company to immediately vacate the premises owned by respondent situate on the building known as “***City Mall***” erected on ***Land Reference No. 14407 and 16088 Section 1, Mainland North Mombasa Municipality (C.R. 42055) and (C.R. 46440)***. The Judge issued a further order granting the court’s approval to the respondent company to exercise its right of forfeiture and peaceable re-entry into the premises occupied by the 1<sup>st</sup> appellant in all that building known as City Mall in Mombasa Municipality.
3. Aggrieved by the said ruling and orders, the appellants filed a Notice of Appeal dated 8<sup>th</sup> March, 2018. A record of appeal was subsequently filed on 15<sup>th</sup> March, 2018. Two supplementary records of appeal (Volume 2) both dated 11<sup>th</sup> June 2018 were filed by the appellants. One supplementary record was filed on 11<sup>th</sup> June, 2018 and the other on 3<sup>rd</sup> July, 2018. The main appeal is ***Civil Appeal No. 27 of 2018***.
4. Upon being served with the record of appeal as well as the supplementary records of appeal, the respondent filed two applications by way of Notice of Motion to strike out both the Record of Appeal and the Supplementary Record of Appeal. This ruling relates to the two applications.
5. By Notice of Motion dated 11<sup>th</sup> July, 2018, the Respondent ***Ideal Locations Limited*** moved this Court under the provisions of ***Rule 84*** of the Rules of this Court seeking an Order that the appeal be struck out and or dismissed. The ground in support of the application was that the appeal had been overtaken by events and the said appeal did not lie any more as the appellants had obtained an order from the trial court for reinstatement into the suit premises; that this Court should not act in vain and waste precious judicial time in considering what had already been granted; that it is in the interest of justice that the appeal should be struck out. The respondent’s application to strike out the appeal is supported by an affidavit dated 11<sup>th</sup> July, 2018 deponed to by ***Mohammed Talsam Mohamed Salim***.

6. By a separate Notice of Motion dated 1<sup>st</sup> August, 2018, the respondent moved this Court seeking an order to strike out the supplementary record of appeal (Volume 2) dated 11<sup>th</sup> June, 2018 and filed by the appellant on 3<sup>rd</sup> July, 2018. The ground in support of the application is that the supplementary record of appeal dated 11<sup>th</sup> June 2018 and filed on 3<sup>rd</sup> July 2018 was filed without leave of the Court and that the said supplementary record of appeal contains a further amended memorandum of appeal filed without leave of the Court.
7. The two applications were simultaneously urged and heard by this Court on 20<sup>th</sup> September, 2018. This ruling disposes and determines the two applications.
8. At the hearing of the applications, learned counsel Mr. Willis Oluga appeared for the Respondent Company which is the applicant in the applications. Learned counsel Mr. Mutiso Ngonze appeared for the appellants who are respondents in the applications.
9. In this Ruling, we shall first consider and determine the Notice of Motion dated 1<sup>st</sup> August, 2018 seeking an order to strike out the supplementary record of appeal dated 11<sup>th</sup> June, 2018 and filed on 3<sup>rd</sup> July 2018.
10. In his submission to strike out the supplementary record of appeal, counsel for the applicant submitted that on 7<sup>th</sup> June, 2018, the trial court granted the respondent leave to file an amended memorandum of appeal and a supplementary record of appeal within five days; that the appellants filed a supplementary record of appeal (Volume 2) dated 11<sup>th</sup> June, 2018 on the same date within the time allowed by the court; that subsequently, on 3<sup>rd</sup> July 2018, the appellant filed another supplementary record of appeal (Volume 2) dated 11<sup>th</sup> June, 2018; that the supplementary record of appeal filed on 3<sup>rd</sup> July, 2018 contains a further amended memorandum of appeal which is at variance with the amended memorandum of appeal contained in the supplementary record of appeal (Volume 2) filed on 11<sup>th</sup> June, 2018; that the supplementary record of appeal (Volume 2) filed on 3<sup>rd</sup> July, 2018 was filed out of the time allowed by the Court of Appeal Rules and that the respondent applicant has been highly prejudiced by the appellant's conduct in filing one supplementary record of appeal after another.
11. Learned counsel Mr. Ngonze in responding to the application to strike out the supplementary record of appeal filed on 3<sup>rd</sup> July, 2018 conceded that the said Supplementary Record was filed out of time without leave court. He however submitted that there was an inadvertent error in the amended memorandum of appeal which necessitated the filing of a further amended memorandum of appeal as contained in the supplementary record of appeal filed on 3<sup>rd</sup> July 2018. Counsel conceded that as at the date of hearing of the present application, no application seeking leave of court or extension of time had been filed.
12. We have considered the grounds in support of the Notice of Motion dated 1<sup>st</sup> August, 2018. We have also considered submissions by counsel and the timeline of five days that had been granted to the Appellants to file a supplementary record of appeal. **Rule 84 of the Rules of this Court** permits an application to strike out a record of appeal on the ground that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. **Rule 84** provides as follows:
- “84. 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.”**
13. In view of the provisions of **Rule 84**, we are satisfied that the Supplementary Record of Appeal (Volume 2) dated 11<sup>th</sup> June, 2018 and filed on 3<sup>rd</sup> July, 2018 was filed out of time without leave of the Court. Accordingly, we hereby order and strike out the supplementary record of appeal (Volume 2) dated 11<sup>th</sup> June 2018 and filed on 3<sup>rd</sup> July, 2018 together with the further amended memorandum of appeal dated 11<sup>th</sup> June, 2018. The appellants shall pay the costs of the Motion.
14. We now turn to consider the Notice of Motion dated 11<sup>th</sup> July, 2018 seeking an order to strike out and or dismiss the main appeal in this matter. The application is grounded on **Rule 84** of the **Rules** of this Court.
15. The application to strike out the record of appeal is premised on the ground that no appeal lies as it has been overtaken by events. Counsel for the applicant submitted that the two issues for determination in the appeal have been overtaken by events because the first issue, which is reinstatement of the appellant to the suit premises and the second, a determination whether the appellant owes the respondent any rent arrears have been determined by the trial court.
16. In support that the two issues have already been determined, Counsel submitted that the main appeal arises from the ruling and decree of the trial court made on 5<sup>th</sup> March, 2018. That subsequent to the ruling, the appellants made an application before the trial court for review of the ruling and decree of 5<sup>th</sup> March, 2018. That the application for review was made by Motion dated 7<sup>th</sup> March, 2018. That upon hearing the Motion, the trial court in a ruling dated 17<sup>th</sup> May, 2018 issued a conditional order reinstating the appellant to the suit premises. The reinstatement was on condition that the appellants were to pay the respondent the outstanding rent arrears within 30 days and in default, the respondent be at liberty to allow a new tenant to take up occupation of the suit premises.
17. Counsel submitted that to date, the appellants had not fulfilled the condition and the respondent has exercised its right to re-enter and take possession of the suit premises. That no appeal has been lodged against the ruling delivered on 17<sup>th</sup> May, 2018; that the respondent has since intimated to the appellants that the outstanding rent arrears is Ksh.74,438,765.42 and that since the trial court already granted an order reinstating the appellant to the suit premises, it was manifestly clear that the appeal has been overtaken by events.

18. Counsel for the applicant further submitted that the question whether the appellant is liable to pay the outstanding rent arrears has been urged and will be determined by the trial court. That the question is presently pending a ruling by the trial court; that when the appellant sought review before the trial court, it interfered with the substratum of the main appeal and that this Court should not waste precious judicial time in hearing issues that have either been resolved by the trial court or pending ruling by the trial court. Counsel urged us to interpret **Rule 84** widely and hold that where a party reviews an order or ruling of the trial court, the substratum of the appeal has been interfered with and the appeal has been overtaken by events and no appeal lies.

19. In opposing the application to strike out the appeal, Mr. Ngonze submitted that the appeal had not been overtaken by events. That the appeal still lies and the instant application does not come within the ambit and grounds specified under **Rule 84** of the Rules of this Court; that an application to strike out an appeal under **Rule 84** should be that some essential step had not been taken within the prescribed time lines and that in the instant matter, the record of appeal was filed within time and all requisite steps have been taken within prescribed time lines. Counsel urged that the submissions by the applicant are inviting this Court to delve into the merits of the appeal and that delving into merits can only be done at the hearing of the appeal.

20. We have considered the application to strike out the appeal and the grounds in support thereof. **Rule 84** of the **Rules** of this Court expressly limit the grounds upon which an application to strike out an appeal can be made. In this matter, the applicant is urging us to strike out and or dismiss the appeal on the ground that no appeal lies. In substantiating this ground, the applicant submitted that the appeal had been overtaken by events.

21. In our considered view, **Rule 84** is a summary procedure rule. A party invoking **Rule 84** must demonstrate the facts, and the law, relied upon in support of the application. The facts relied upon in an application under **Rule 84** must be clear, uncontroverted and uncontestable. For instance, generally, an appeal does not lie if there is no right of appeal. Another example is the general principle, subject to limited exceptions, that no appeal lies from a consent order. In such cases, an applicant under **Rule 84** must clearly demonstrate that no appeal lies as a matter of law. Circumstances under which an appeal can be struck out were outlined by this Court in **Luther Peter Muia & Another vs. Zuena Ngando Kababu [2015] eKLR**, as hereunder:-

***“In our view, rule 84 cannot apply to the circumstances of this case as it is intended to apply to situations where, for instance, it is contended that the notice of appeal has been lodged or served out of time or, where leave to appeal is required and has not been sought and obtained or where no appeal lies or where a step precedent to lodging the notice of appeal or appeal has not been taken.”*** [Emphasis added]

(See also this Court’s decision in **Christopher Orina Kenyariri vs. Salama Beach Hotel Limited & 3 others) Malindi Civil Application No. 9 of 2018**). It follows that whether an appeal lies is both a jurisdictional and substantive question - it is not a procedural question.

22. In the instant application, whether the main appeal lies or has been overtaken by events is a substantive and contentious matter. There is neither a common ground nor consensus by the parties that the appeal has been overtaken by events. In the absence of consensus, we are of the view that it is only upon hearing of the main appeal that an informed, reasoned and considered determination can be made as to whether the appeal lies or has been overtaken by events. A party to an appeal may allege but has no authority to determine that an appeal does not lie. In this matter, the applicant asserts that the appeal does not lie. Conversely, the respondent asserts the appeal lies. Such a contestation cannot be resolved through an application under **Rule 84** of the Rules of this Court. Given the facts of this case, whether an appeal lies is a merit based determination and **Rule 84** is an unsuitable procedure for such a determination. For the foregoing reasons, we dismiss the Notice of Motion dated 11<sup>th</sup> July 2018 with costs in the appeal.

**Dated and delivered at Mombasa this 8<sup>th</sup> day of November, 2018**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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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**