



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 15 OF 2018

BETWEEN

MUNIR ABUBAKAR MASOUD

(As member of TAWHEED MUSLIM ASSOCIATION).....APPELLANT

AND

ALI ABDALLA SALIM.....1ST RESPONDENT

ALI YISLAM ALI BASHAMAKH.....2ND RESPONDENT

(As Trustees of the TAWHEED GIRLS SECONDARY SCHOOL TRUST)

(An application to strike out the Record of Appeal from the Judgment of the Environment and Land Court (Angote, J.) delivered on 5th October, 2017

in

E.L.C Case No. 78 of 2015.)

RULING OF THE COURT

1. In a judgment delivered on 5th October, 2017 **Angote, J.** allowed the respondents' originating summons and dismissed the appellant's counter-claim in E.L.C Case No. 78 of 2015. In a nutshell, the Environment and Land Court (ELC) declared the respondents as the legitimate Trustees of Tawheed Girls Secondary School Trust; and issued an order restraining the appellant from interfering, obstructing or otherwise impeding with the running and management of the said school.
2. The appellant was not pleased and he intimated his desire to appeal against the impugned judgment by lodging a Notice of Appeal on 13th October, 2017. He had also requested for certified copies of the proceedings orally in court when the judgment was delivered and subsequently, in writing on 11th October, 2017. Thereafter, the Record of Appeal was filed on 13th February, 2018 and served upon the respondents' advocate on 19th February, 2018.
3. It is this appeal that the respondents challenge as being incompetent because as far as they were concerned, the Record of Appeal had been filed out of time without leave of the Court. Initially, the respondents stand was that the Record ought to have been filed on 13th December, 2017. Later on, through their counsel they indicated it should have been filed on 3rd February, 2018.
4. In response, the appellant was steadfast that the Record had not been filed out of time. He claimed that the respondents had failed to take into account the Christmas vacation in computing the time within which the Record should have been filed. He also deposed that the Record was presented for filing on time, that is, on 8th February, 2018 but the Court's officers manning the registry declined to accept the same on the ground that it did not comply with the Court's Practice Direction Rules.
5. He complied with the directions and lodged the Record on 13th February, 2018. According to him, if there was any delay it was not more than 2 days hence the same could not be termed as inordinate delay or occasion any prejudice to the respondents. He believed that the

respondents were attempting to take advantage of a procedural technicality to drive him away from accessing justice. The appellant urged the Court to pay regard to **Article 159 (2)(d)** of the **Constitution** which calls for substantive justice over procedural technicalities. In any event, he intended to make an application for extension of time to file the Record but the respondents beat him to it.

6. In his address, Mr. Mogaka, learned counsel for the respondents, reiterated the grounds which had been advanced by his clients in support of striking out of the Record. He added that since the certified proceedings were ready on 16th November, 2017 the Record was filed 10 days late. The delay coupled with the absence of leave to file out of time rendered the appeal incompetent and susceptible to striking out.

7. The appellant who was in person strenuously opposed the application and submitted that he had filed the Record two days late which was not inordinate. He also sought leave to file the Record of Appeal in question out of time.

8. We have considered the application, submissions by the appellant and the respondents' counsel as well as the law. It is common ground that an appellant is required to file the Record of Appeal within 60 days of lodging the Notice of Appeal. See **Rule 82(1)** of the **Court of Appeal Rules** (the Rules). Equally, it is not in dispute that the proviso to **Rule 82** stipulates the exclusion of any period certified by the Registrar of the court as having been expended to prepare and deliver proceedings to the appellant in computation of such time.

9. In this case, the certificate of delay issued by the Deputy Registrar of the ELC read in part:

“An oral request was made for certified proceedings immediately after delivery of the judgment by Munir Abubakar Masoud ...

1) A written application for same proceedings was made on 11th October, 2017. sic

2) The proceedings were paid for vide receipt No.8678565 of 16th November, 2017.

3) The court took 42 days to prepare and supply certified copies of the proceedings.”

10. This means that the proceedings were ready on 16th November, 2017 and as such, it is then that time begun to run since the Notice of Appeal was filed on 13th October, 2017 after the request for those proceedings had been made. By the time the Christmas vacation began on 21st December, 2017, 35 days had lapsed. Time resumed running from 13th January, 2018 after the said vacation ended on 12th January, 2018. See **Section 26(1) (c)** of the **Court of Appeal (Organization and Administration) Act, 2015**. Consequently, the appellant should have filed the Record on or before 6th February, 2018. It is therefore, without doubt that the Record of Appeal which was filed on 13th February, 2018 was out of time. Equally, it is not in dispute that the appellant had not sought leave of this Court to file the same out of time. What is the consequence thereof?

11. The foregoing question was succinctly addressed by this Court in ***Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR*** as follows:

“In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.”

12. As a result, the undeniable fate of the Record which was filed out of time without leave of the Court is to be struck out. However, in the interest of justice we hereby suspend the order of striking out the Record and by extension the appeal herein for a period of two months from the date hereof to enable the appellant to file the requisite application for extension of time under **Rule 4** of the Rules. In the event that the appellant succeeds in obtaining extension of time within the next two months, his appeal will be deemed to have been filed within time. If he does not succeed the appeal herein will stand struck out with costs. The costs of this application are awarded to the respondents.

Dated and delivered at Mombasa this 8th day of November, 2018

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR