



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 64 OF 2017

BETWEEN

CHARLES K. WANGUHU.....1ST APPLICANT

JOHN WAWERU.....2ND APPLICANT

AND

COSMAS KITI & 46 OTHERS.....RESPONDENTS

(Being an application to strike out notice of appeal lodged on 9th March, 2016 arising

from the Judgment of the Environment & Land Court at Malindi (Angote, J.)

dated 6th March, 2015 in HCCC No. 76 of 2006)

RULING OF THE COURT

[1] Judges' work would be more pleasurable and less tedious if counsel who represent parties in court would try to acquaint themselves with the law and more specifically the Rules that govern matters in court. We say so because the response to the application before us has left us wondering whether learned counsel for the respondent understands the process and requirements of filing an appeal before this Court. The Court of Appeal Rules clearly set out the steps to be taken by a party who is desirous of filing an appeal to this Court including the timelines that must be complied with.

[2] Consider this, it is not disputed that **Malindi HCCC No. 76 of 2006** was heard and concluded and judgment rendered on 6th March, 2015. The respondents being aggrieved with the judgment moved this Court with dispatch and filed a Notice of Appeal on 9th March, 2015. Thereafter, they went to slumber only to be awoken by the Notice of Motion, the subject of this ruling which was filed on 17th November, 2017; more than 2 years after the filing of the Notice of Appeal.

[3] By the said application, the applicants urge the Court to invoke **Rule 83** of the Rules of this Court to deem the said Notice of Appeal as having been withdrawn because the respondents have taken no steps for the last two years to prosecute the appeal. According to the applicants, the respondents never served them with the letter bespeaking the proceedings and that fact is not disputed; nor have the respondents made any application for extension of time.

[4] In response to the application, Leonard Thuva Kenga one of the respondents on his own behalf and that of the other respondents, in an affidavit sworn on 12th October, 2018 deposes to what he says he has been informed by his advocates. The gist of his depositions however is that typed proceedings were applied for but they took long to get ready and have now been received. He avers that they still have 60 days to file and serve the record of appeal. The contents of the said affidavit are replicated almost word for word by learned counsel for the respondents in the written submissions filed on 12th October, 2018 in which counsel reiterates that they still have 60 days within which to file the record of appeal upon receipt of the certificate of delay from the deputy registrar of the High Court. He clearly misses the entire point. He makes no reference to any letter bespeaking the proceedings, and does not claim to have written any as prescribed by the Rules. All he says is that the proceedings had not been typed as the matter was pending taxation. The proceedings have now been typed and certified and so the advocates have now asked for a certificate of delay. That letter, dated 12th October, 2018 is not even copied to the applicant. It is important to note that the said Notice of Appeal was filed by learned counsel, and so is this application.

[5] Be that as it may, neither the said letter nor the annexed certified copy of proceedings have any relevance to this application. We say so because the only letter that would have assisted the respondents in this application is one bespeaking the proceedings had the same been sent to the Deputy Registrar of the Court and copied to the applicants' counsel within thirty days of filing the notice of appeal. That was not done. That inevitably means that the respondent cannot be availed the benefit of the proviso to **Rule 82(1) Court of Appeal Rules**. There is no certificate of delay that can be issued to him pursuant to that proviso. We reproduce here verbatim the provisions of Rule 82(1) to demonstrate the egregious non-compliance with the Rules on the part of the respondents.

“82(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –

(a) a memorandum of appeal, in quadruplicate;

(b) the record of appeal, in quadruplicate;

(c) the prescribed fee; and

(d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within 30 days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellants of such copy.”

(2) An appellant shall not be entitled to rely on the proviso to sub rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent. (Emphasis added).

[6] It is evident from the above self-explanatory Rule that the respondent cannot seek refuge under the above proviso. In his oral submission in Court, Mr. Otara learned counsel for the applicants seemingly oblivious of the above Rules urged us to dismiss the application saying that the proceedings are now ready and he is waiting for the certificate of delay to be issued to enable him file the record of appeal.

[7] There is no explanation whatsoever as to why the Notice of Appeal filed over 2 years ago should not be deemed as having been withdrawn. We say no more. This application has merit. The same is allowed with the result the Notice of Appeal dated 6th March, 2015 is hereby deemed as withdrawn. Costs of the application are awarded to the applicants.

Dated and delivered at Mombasa this 6th day of December, 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