



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPLICATION NO. 16 OF 2016

BETWEEN

DAUGLAS NGUNCHIRI WAINCHUNGO.....APPELLANT

VERSUS

PAUL LAGAT.....1ST RESPONDENT

FREDRICK GICIMU KURIA.....2ND RESPONDENT

SIMON KAMAU NG'ANG'A.....3RD RESPONDENT

PETER JUMA MWANDA.....4TH RESPONDENT

RICHARD WAFULA.....5TH RESPONDENT

JACKSON KOSKEI.....6TH RESPONDENT

FRANCIS MWARA.....7TH RESPONDENT

JOSEPH KIRWA CHUMO.....8TH RESPONDENT

DANIEL KIPLAGAT.....9TH RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Kitale (E. OBAGA, J.) dated 10TH December, 2014

in

H.C.C.C NO. 92 OF 2004)

RULING OF THE COURT

1. In his application dated 18th February 2016 presented to Court under Rule 84 of the Rules of this Court, the applicant, Dauglas Ngunchiri Wainchungo, seeks an order that the respondents' appeal filed on

11th January 2016 and served on 19th January 2016 be struck out. It was indicated at the hearing of the application that the subject appeal is Eldoret Civil Appeal No. 48 of 2015.

2. In support of the application, learned counsel for the applicant, Mr. D. M. Wanyama, referred us to the grounds in support thereof on the face of the application and the supporting affidavit sworn by Aggrey Lucas Kidiavai. He urged, that although the respondents' appeal is against a judgment of the High Court delivered on 10th December 2014 in respect to which a notice of appeal was filed, the respondents' grievance is with respect to a decision of the High Court given on 17th September 2014 in which the court rejected the respondents' application for adjournment of the hearing of the case. In relation to the decision declining adjournment, counsel stated, there is no notice of appeal. None of the grounds of appeal in the memorandum of appeal touch on the judgment appealed from, counsel added, and for that reason, counsel submitted that the appeal is incompetent and it should be struck out.

3. Though served with notice of hearing of the application, there was no appearance for the respondents.

4. We have considered the application and submissions by counsel. Rule 84 of the Rules of the Court provides that:

"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." [Emphasis]

5. To succeed in his application under that rule, the applicant needs to demonstrate 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. The applicant has not done that. The complaint by the applicant goes to the substance of the appeal; it relates to the merits or demerits of the appeal itself. That is a matter to be addressed in due course during the hearing of the appeal.

6. The application is devoid of merit. It is accordingly dismissed.

7. As the respondents did not appear to oppose the application, we make no orders as to costs.

Dated and delivered at Eldoret this 27th day of April, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR