



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 216 OF 2016

BETWEEN

THE COUNTY GOVERNMENT OF BOMET.....APPLICANT

AND

MOI UNIVERSITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

HON. PROF WILFRED LESIAN

HON. STEPHEN MUTAI

HON. CECILIA NGETICH

HON DR. JOYCE LABOSO

HON. SAMMY KOECH

HON. BERNARD BETT & HON. RONALD TONU.....4TH RESPONDENTS

(An Application to strike out the Civil Appeal No. Nakuru 32 of 2016 being an appeal from the Ruling and Decree of (Martin Muya, J) dated 8th June 2016

in

BOMET H. C. PETITION NO. 3 OF 2016)

RULING OF THE COURT

On 9th September, 2016, the **COUNTY GOVERNMENT OF BOMET**, the appellant herein filed an

appeal dated 9th September, 2016 against the judgment of Muya, J. delivered on 8th June, 2016 wherein a negative finding was rendered on the question of alleged infringement of **Articles 1, 2, 3, 6, 10, 42, 62, 67 70, 189 (A) (B)& (C) and 232 of the Constitution and Sections 1 and 5 of the Land Commission Act, Section 6 (1) of the County Government Act and Section 2 (2), 12 (7), 14 (1), 14 (4, 5, 6) of the Land Act** as contended by the appellant. At the heart of the dispute before the trial court was the appellant's assertion that the 3rd Respondent, acting in conjunction with the District Land Registrar Bomet District had purported to issue a certificate of lease to the 1st Respondent without involving the National Land Commission and the appellant. **MOI UNIVERSITY, THE ATTORNEY GENERAL, THE CHIEF LAND REGISTRAR** were named as the 1st, 2nd and 3rd respondents, respectively whilst **HON. PROF. WILFRED LESSAN, HON. STEPHEN MUTAI, HON. CECILIA NGETICH, HON. DR. LABOSO, HON SAMMY KOECH, HON. BERNARD BETT and HON RONALD TONUI** were all named as 4th respondents.

During the pendency of the appeal, the 1st respondent filed a Notice of Motion dated 11th November, 2016 and sought the following orders:

“(a) The Appellant’s Memorandum of appeal and record of appeal filed on 19th September 2016 be struck out.

(b) The Appellant’s Notice of appeal dated 22nd June, 2016 and lodged on 23rd June, 2016 be struck out.

(c) The appellants appeal be struck out with costs to the respondents.

(d) Costs of this application and the appeal be borne by the appellant.

(e) Such other orders be made as are just and expedient.”

The motion was supported by the affidavit of the 1st respondent's Legal Officer, **ERICK LIYALA** sworn on 11th November, 2016 in which he deposed that on 23rd June, 2016 the appellant lodged a notice of appeal against the decision of Muya J delivered on 8th June, 2016; that the said notice was served upon their counsel on record, Z. K. Yego on 30th June, 2016 who received it under protest as it was served out of time; that the record of appeal which was filed together with the memorandum of appeal was served upon them on 24th October, 2016 and further, that the memorandum of appeal and record of appeal were filed on 19th September, 2016, well outside the 60 days period from the date when the notice of appeal was lodged.

In opposition to the motion, **HON. ISAAC RUTTO** swore an affidavit dated 30th January, 2017 and denied having filed the notice of appeal out of time and averred that: **“... a simple mathematical calculation by any official bystander would reveal that as between 8th June, and 23rd June there were 15 days. The exclusion of the two Sundays that fell on the 12th June, 2016 and 19th June, 2016 shows that the notice of appeal was filed within 13 days well within the fourteen days contemplated under Rule 75 (2) the Court of Appeal Rules.”**; that on 29th June, 2016 the appellant applied for proceedings which proceedings were supplied to the appellant on 1st September 2016; that the appellant filed the memorandum of appeal within 75 days of filing the notice of appeal and **“that the delay herein was neither inordinate nor unreasonable as the same was filed 15 days after the 60 days time line stipulated under Rule 82...”**

A similar application dated 10th December, 2016 seeking to strike out the appeal was filed by the 4th respondent. The motion sought the following order, *inter alia*:-

“(1) That Civil Appeal No. NAK 32 of 2016 be struck out.”

The motion of 10th December, 2016 was supported by the affidavit of **DR. JOYCE LABOSO** sworn on her own behalf and on behalf of “... ***other members of Parliament of Constituent sub counties***” on 10th December, 2016. She deponed that the appellant’s filing of the notice of appeal on 23rd June, 2016 and the record of appeal on 19th September, 2016 were well outside the stipulated timelines.

In opposition to the motion dated 10th December, 2016, **HON. ISAAC RUTTO** swore an affidavit dated 30th June 2016 and refuted the averments of the supporting affidavit of the motion of 10th December, 2016.

On 24th April, 2017 the 1st respondent’s motion dated 11th November, 2016 and the 4th respondent’s motion dated 10th December, 2016 came before us for hearing. There was no representation on behalf of the 2nd and 3rd respondents inspite of service of the hearing notice upon the Attorney General on 31st March, 2017 and we directed that the two motions proceed to hearing inspite of the absence of the Attorney General.

In urging the motion dated 11th November, 2016, Mr. Yego learned counsel for the 1st respondent and Mr. Karanja learned counsel for the 4th respondent reiterated the contents of the affidavits in support of the two motions. Mr. Karanja, however conceded that the motion dated 10th December, 2016 was filed outside the 30 days period provided under **Rule 84** of this Court’s rules.

In opposition to the two motions, Mr. Biko learned counsel for the appellant pointed out that the motion dated 10th December, 2016 filed by the 4th respondent was outside the 30 days rule as provided by Rule 84 of this Court’s rules. He refuted the contentions by the 1st and 4th respondents that the notice of appeal and the record of appeal were filed outside time. In the alternative, it was his contention that even if they were, which contention he denied, then the lapses were excusable.

On our part, we have considered the two motions and their supporting affidavits, the appellant’s affidavits in opposition to the motion, the written submissions of the appellant, the rival oral submissions made before us, the authorities cited as well as the law. The common theme running through the two motions dated 11th November, 2016 and 10th December, 2016 is that the Notice of Appeal, the Record of Appeal and or the Memorandum of Appeal filed by the appellant had either not been lodged or served within time. Consequently, the 1st and 4th Respondents are urging the Court to strike out the appeal with costs. On its part the appellants have maintained that the 1st and 4th respondent’s contentions are unfounded as “... ***the exclusion of two Sundays that fell on the 12th June 2016 and 19th June 2016 show that the notice of appeal was filed within 13 days well within the fourteen days contemplated under Rule 75 (2) of the Court of Appeal Rules.***”

Suffice to state that the issue for our consideration and determination hinges on computation of time.

Rule 3 of this Court’s Rules provides as follows:

“3. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions-

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;

(b) If the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or

taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where any act or proceedings is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; or

(e) unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.”

In our view it is clear that in computation of time one does not exclude the weekends except only if the last day of the period is either a Sunday or a public holiday.

Having set out the relevant legal provisions as to time, it would be worthwhile to turn to the motions now before Court, with a view to ascertaining whether the same are meritorious, and by so doing determine whether the appeal as a whole is for striking out or not. It would be in order to arrange events herein sequentially commencing with the impugned judgment of the High Court delivered on 8th June, 2016. Any party (such as the appellant) who is aggrieved by a judgment is at liberty to lodge a **Notice of Appeal** within **14 days** from the date of the decision intimating an intention to appeal in line with **Rule 75 (2)** of the Rules which provides as follows:

“Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

In the matter before us, the appellant’s Notice of Appeal, although dated 22nd June, 2016, was endorsed by the High Court Registry as **23rd June, 2016**, hence a delay of one day in filing. Be that as it may and assuming that the Notice of Appeal was lodged within time on 23rd June, 2016 the appellant had 60 days from 23rd June, 2016 to file its record of appeal (**Rule 82 (1)** of this Court’s Rules. The 60 days lapsed on 23rd August, 2016. Clearly therefore, the appellants record of appeal filed on 19th September, 2016 was outside the 60 days period.

The two motions present a situation where the appellant has wrongfully computed time and has failed to take advantage of **Rule 4** of this Court’s Rules which provide that a litigant may seek extension of time. It does not matter whether the Notice of Appeal was filed a day late or that the record of appeal was filed 15 days later. All that a litigant is required to do is to take advantage of the provisions of Rule 4 of this Court’s Rules in seeking extension of time, a position that the appellant seems not to want to pursue.

Although the 4th respondent raised similar complaints as the 1st respondent, the Notice of Appeal having been filed on 23rd June, 2016 and the record of appeal having been served upon them on 28th October, 2016, their motion was filed outside the 30 days stipulated under **Rule 84** of this Court’s Rules. **Rule 84** of the **Rules** prescribes striking out of a Notice of Appeal or an appeal in its entirety at any time, either before or after the institution of the appeal by a person affected by an appeal on grounds that:-

(i) No appeal lies;

(ii) Some essential step in the proceedings has not been taken; or

(iii) Has not been taken within the prescribed time.

Such an application has to be brought **within 30 days** from the date of service of the notice of appeal or the record of appeal. The 1st and 4th Respondents invoked the said Rule, with the desired outcome being the striking out of the appeal. However, the distinguishing feature between the motion dated 10th December, 2016 and that dated 11th November, 2016 is that the motion dated 10th December, 2016 was not lodged within 30 days of the filing and service of either the Notice of Appeal or the Record of Appeal. The motion of 10th December, 2016 does not therefore stand the test of time.

In view of the foregoing, the orders that commend themselves to us are that the Motion dated 10th December, 2016 is hereby dismissed with no order as to costs, while the motion dated 11th November, 2016 is allowed. Accordingly the appeal is struck out with costs to the 1st respondent. It is so ordered.

Dated and delivered at Nakuru this 31st day of May, 2017.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR