



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA.)**

**CIVIL APPEAL (APPLICATION) NO. 81 OF 2016**

**BETWEEN**

**TRUPHOSA CHEREDI MUDEMBEI.....FIRST APPLICANT**

**NEVIN EGESA JEDEVERA.....SECOND APPLICANT**

**AND**

**JOHN. K. MALEMBI.....RESPONDENT**

*(Application to strike out the Appeal lodged in the sub registry at Eldoret*

*on the 21<sup>st</sup> September, 2016 from the judgment and decree of the High*

*Court of Kenya at Eldoret, (Kimondo, J.) dated 17<sup>th</sup> November, 2015*

**in**

**CIVIL SUIT NO. 248 OF 2000)**

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**RULING OF THE COURT**

[1] By a notice of motion dated 19<sup>th</sup> October, 2016, **Trufosa Cheredi Mudembei** and **Nevin Egesa Jedevera** (*herein the applicants*) are seeking to have an appeal against a judgment dated 17<sup>th</sup> November, 2015 in Eldoret HCCC No. 248 of 2000 struck out. The appeal was filed by **John K. Malembi** (*herein the respondent*) through a notice of appeal lodged in the registry on 24<sup>th</sup> November, 2015.

[2] The motion was premised on an affidavit sworn by Truphosa Cheredi Mutembei on 19<sup>th</sup> October, 2016 and another sworn by Nevin Egesa Jedevera on the same date, as well as grounds stated on the face of the motion. In short, it is contented that the respondent's appeal is incompetent and defective, as the memorandum and record of appeal were lodged out of time and without leave. Secondly, that there is no certified copy of the decree included in the record of appeal. Learned counsel, Mr. Onyinkwa who appeared for the applicants urged the Court to allow the application.

[3] The respondent objected to the application through a replying affidavit sworn on 27<sup>th</sup> January, 2017.

In the affidavit, the respondent explains that his advocate requested for typed proceedings on 20<sup>th</sup> November, 2015 for purposes of the appeal and that it was not until 5<sup>th</sup> August, 2016 when communication was received from the Deputy Registrar of the court that the proceedings were ready. A certificate of delay was subsequently issued on 29<sup>th</sup> September, 2016.

[4] The respondent denied that there was a Certificate of Delay issued on 21<sup>st</sup> September, 2016. He conceded that the record of appeal did not include a certified copy of the decree but maintained that the omission was not fatal as a supplementary record of appeal could be filed with leave of the Court.

[5] Learned counsel, Mr. Maathai who appeared for the respondent reiterated that the certified copy of the decree could be introduced in the record under **rule 92 and 98 of the Court of Appeal Rules**. He urged the Court to be guided by **Article 159(2)(d)** of the Constitution and not allow technicality to take priority over substance. Counsel drew the Court's attention to the annexures to the respondent's affidavit, that showed that the respondent's advocate wrote a letter on 20<sup>th</sup> November, 2015 bespeaking proceedings; and that a Certificate of Delay was issued on 21<sup>st</sup> November, 2015. He explained that they were only able to collect the Certificate of Delay on 21<sup>st</sup> September, 2015 because the file could not be traced earlier. Counsel argued that the record of appeal was in fact filed in time.

[6] We have considered this application and the submissions made by counsel. Under **Rule 82(1)**, an appellant is required to institute his appeal by lodging in the appropriate registry within 60 days of the date of his notice of appeal, a memorandum of appeal and a record of appeal. There is proviso where an application has been made for copies of the proceedings, and an appropriate copy of the letter bespeaking the proceedings served on the intended respondent for such time as may be certified by the Registrar as having been required for the preparation and delivery of the proceedings to be excluded from the computation of the 60 days.

[7] In this case, it is evident from the notice of appeal contained in the record of appeal that the applicant filed a notice of appeal on 23<sup>rd</sup> November, 2015 and served the respondent on 24<sup>th</sup> November, 2015. It is also evident from the record of appeal that it was filed in the sub registry at Eldoret on 20<sup>th</sup> September, 2016. The respondent maintains that the record of appeal was filed in accordance with **Rule 82**. The respondent has exhibited a copy of the letter bespeaking proceedings that was served on the respondent's counsel.

[8] The respondent has also exhibited a Certificate of Delay that confirms that although the respondent applied for copies of proceedings on 23<sup>rd</sup> November, 2015, it was not until 5<sup>th</sup> August, 2016 when the typed proceedings were ready for collection. Judgment having been delivered on 17<sup>th</sup> November, 2015, and the period between 23<sup>rd</sup> November, 2015 and 5<sup>th</sup> August, 2016 having been excluded from the computation of time, the filing of the record of appeal on 20<sup>th</sup> September, 2016 was within the 60 days.

[9] As regards, the omission to include a certified copy of the decree, this has been admitted. Much as we do not condone sloppiness on the part of parties, we are of the view that this is an omission that is not fatal. The document can be introduced through a supplementary record of appeal. Moreover the appeal has already been filed and it involves the emotive issue of land. It is only fair and just that the respondent be given an opportunity to ventilate his appeal so that it is determined on merit. We concur with the respondent that the Court has an obligation to administer substantive justice rather than disposing off matters on technicalities.

[10] For the above reasons, we dismiss the applicant's motion and although the respondent did not seek leave, we direct him to file a supplementary record of appeal introducing the decree within 7 days from the date hereof. We make no order as to costs.

Orders accordingly.

**DATED and Delivered at Eldoret this 27<sup>th</sup> day of July, 2017**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**