



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CIVIL APPLICATION NO. NYERI 25 OF 2017

BETWEEN

STEPHEN KIBOWEN.....APPLICANT

AND

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

(An application to strike out a Notice of Appeal from the judgment of the Environment and Land Court sitting at Nakuru (Munyao, J.) dated 19th March 2015.

In

HC.ELC NO. 218 OF 2014)

RULING OF THE COURT

The property known as **Lembus/Kilombe/157** was charged to the respondent Agricultural Finance Corporation to secure a loan. The mortgagor was unable to meet his obligations to the respondent and the property was sold by public auction to the applicant Stephen Kibowen who was the highest bidder at the sale. There were problems in transferring the property to the applicant and this led to litigation being Nakuru ELC Case No. 218 of 2014 **Stephen Kibowen vs Agricultural Finance Corporation** which was heard by Munyao, J. In a decree that followed given on 19th March, 2015 the respondent was *inter alia* ordered to release to the applicant title documents for the said property dully discharged and all other documents required for the registration of the applicant as the owner of the property. The respondent was further restrained from dealing with the property at all. An application for stay of execution pending appeal followed and the said Judge ordered on 13th May, 2015 that judgment be executed but that upon transfer of the property to the applicant the applicant not to re-transfer or encumber the title in any way pending hearing and final determination of an intended appeal. The applicant was duly registered as the owner of the property on 11th August 2015.

There is a contest between the parties on whether any or any proper Notice of Appeal was filed or served.

That was the position until the applicant brought this Notice of Motion under various provisions of law praying in the main that we strike out a Notice of Appeal dated 30th March, 2015 or in the alternative that we order that that Notice of Appeal be deemed as having been withdrawn by the respondent. In the grounds set out and in an affidavit of the applicant it is stated that the Notice of Appeal was not served in accordance with our Rules; that the letter bespeaking proceedings was not

copied to the applicant as required; that the respondent was notified by the Deputy Registrar of the Land and Environment Court that proceedings were ready for collection on 25th June, 2015 but that the respondent had not taken any action to file an appeal. The respondent filed what is called Preliminary Objection where it is said that the motion is grossly defective and incompetent; that the motion does not comply with procedural requirements and that it is an abuse of the process of the court. There is a replying affidavit by the Chief Manager Legal Services of the respondent which gives the history of the matter. Two curious averments appear in that affidavit as follows:

“13. That I am informed by our advocate on record which information I verily believe to be true that from the above decision, the appeal had been technically rendered nugatory and useless and any further pursuit of the same would have been an exercise in futility.

14. ...

15. That I am advised further by our Advocate on record the advice I verily believe to be true that the said Notice of Appeal remained just as an intention to file the appeal which was overtaken by events thus should be deemed as withdrawn or in the alternative as an abandoned intention to file an appeal.

16. ...

The motion came for hearing before us on 30th May, 2017 and was urged by learned counsel Mr. Wilfred Konosi but was opposed by learned counsel Mr. Eurry Mabonga. Both counsel repeated what is stated in the rival affidavits. Mr. Mabonga, however, conceded that the intended appeal had been overtaken by events.

We agree with learned counsel for the respondent that the application should have been brought within 30 days of service of Notice of Appeal which as we have said is a contested issue here. The main prayer in the event cannot succeed in striking of the Notice of Appeal.

In this case we have not seen evidence of service of a Notice of Appeal and we have noted the letter from the Deputy Registrar informing counsel for the respondent that proceedings were ready for collection way back in 2015. Proceedings were not collected and the respondent has not taken any other step after the conditional order of stay which was granted by the High Court. It is also conceded by the respondent in the replying affidavit and even in submissions before us that the intended appeal has been overtaken by events. In the event we agree

with the applicant that Notice of Appeal be and is hereby deemed as having been withdrawn. We grant costs of the application to the applicant.

Dated and delivered at Nakuru, this 12th day of July, 2017.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR