



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MUSINGA, OUKO & M'INOTI, J.J.A.

CIVIL APPLICATION NO. 276 OF 2016

BETWEEN

**GEOFFREY MBUGUA DEDAN..... 1ST
APPLICANT**

**HANNAH NJOKI GATHUKU & JOSEPH MBURU GATHUKU (SUING AS THE
LEGAL REPRESENTATIVES OF THE ESTATE OF GATHUKU GACHURU
(DECEASED).....2ND APPLICANT**

AND

**JOSEPH MBUGUA DEDAN GACHUMI..... 1ST
RESPONDENT**

**JAMES MBUGUA DEDAN..... 2ND
RESPONDENT**

(An application to deem withdrawn the Notice of Appeal filed on 11th March 2014 from the Judgment of the High Court of Kenya (Mutungi, J.) dated 28th February, 2014 in HCCC NO. 268 OF 1997)

RULING OF THE COURT

On 28th February 2014, the High Court (*Mutungi, J.*) entered judgment in favour of *Hannah Njoki Gathuku* and *Joseph Mburu Gathuku* who were litigating as the legal representatives of the estate of *Gathuku Gachuru (Deceased)*. The Court ordered the respondents, *Joseph Mbugua Dedan Gachumi* and *James Mbugua Dedan* to transfer to the said legal representatives *Title No. Limuru/Ngecha/1239*. Similarly the court ordered them to excise from *Title Nos. Limuru/Ngecha /1240* and *Limuru/Ngecha 1241* each, a portion of 0.85 of an acre and transfer the same to the 1st applicant, *Geoffrey Mbugua Dedan*. The respondents were further ordered to ensure that the last two excisions were adjacent to the 1st applicant's home, along the common boundary with *Title Nos. Limuru/Ngecha /1240* and *Limuru/Ngecha 1241*. In default, the court directed the Deputy Registrar to execute all the necessary documents to give effect to the court order.

Aggrieved by the decree, the respondents filed a notice of appeal on 11th March 2014 and served the same on the applicants' advocates two days later. The rather sketch record before us does not indicate whether and when the respondents applied for certified copies of proceedings as contemplated by *rule 82*

of the Rules of this Court. Because none of the parties has raised the issue, we will take it that the respondents did apply for proceedings within the time and in the manner required by the rule.

Subsequently the respondents applied for stay of execution of the decree of the High Court, pending the hearing and determination by this Court, of their intended appeal. On 18th June 2015 the High Court acceded to the application and stayed execution of its decree.

The record shows that on 22nd October 2015, the Deputy Registrar wrote to the advocates of all the parties and notified them that the proceedings were ready for collection upon payment of **Kshs 5,880**. The respondents did not collect the proceedings and on 16th December 2016, the applicants applied for this Court to deem the respondents' notice of appeal as withdrawn for failure to file the appeal within the prescribed period. In support of the application the 1st applicant swore an affidavit on 16th December 2016 in which he set out the background we have narrated above and prayed for the respondents' notice of appeal to be deemed to have been withdrawn for failure to take essential steps within the prescribed time. He also urged us to discharge the order of stay of execution that is in force.

The respondents opposed the application vide a replying affidavit sworn by the 2nd respondent on 21st July 2017 in which he deposed that he had visited his advocates' offices severally and was informed that the advocates were still waiting for notification from the Court that the proceedings were ready for collection and that severally the said advocates had been informed that the file was still at the tying pool. Regarding the letter from the Deputy Registrar, the 2nd respondent deposed that his advocates had not received the same and that they were now ready to collect the proceedings after learning through service of this application that the proceedings were ready.

We have considered the application, the submissions by the parties and the law. We have already stated that we take it the respondents had duly complied with rule 82 as regards application for certified proceedings. That rule provides that where an appellant has, within 30 days from the date of the decision he intends to appeal, applied in writing for proceedings and served upon the respondent the letter, he is to file the appeal within 60 days from the date the proceedings are available. Ordinarily under rule 82(1) an appeal must be filed within 60 days from the date of lodging the notice of appeal. (See **Linda Watiri Muriuki v. Neville Patrick Gibson & others, CA No. 327 of 2010**).

In this case, the record indicates that the Deputy Registrar notified the parties on 22nd October 2015 that the proceedings were ready for collection upon payment of Kshs 5,880. That means the respondents were obliged to file the appeal by 21st December 2015. It is common ground that today, more than one year and seven months from when the respondents were due to file the appeal, none has been filed.

The respondents claim that their advocates did not receive the letter dated 22nd October 2016. We note that the letter was copied to those advocates through their correct physical and postal addresses. More importantly, we expected the advocates themselves, if indeed they did not receive the letter, to swear an affidavit to that effect and to specify the efforts they had made towards obtaining the proceedings. It cannot fall for the respondents to purport to depose to those facts, which are not within their knowledge, without any kind of explanation as to why the advocates could not swear the affidavit. Again, other than the bare statement that the said advocates have been following on the proceedings, there is no evidence, for example in the form of letters of inquiry to the court.

On the basis of the record, the evidence is that the respondents' advocates were notified that the proceedings were ready for collection on 22nd October 2015 and to date they have not filed the appeal. The respondents have not placed before us any material from which we can conclude that they have been diligent and serious about pursuing their intended appeal. Even after they were served with this application, which contains a copy of the letter from the Deputy Registrar about 20 days before the hearing of the application, they did not make any effort to collect the proceedings. They have simply failed to take an essential step within the prescribed time. In such a case, rule 83 empowers this Court, on the application of any party or on its own motion, to deem the notice of appeal as withdrawn.

The overriding objective in Section 3A and 3B of the Appellate Jurisdiction Act demands, among others,

that appeals be heard and determined in a timely and expeditious manner. In addition, Article 159 (2) (b) of the Constitution also demands that justice shall not be delayed. In our view, this is one case where the other limbs of the overriding objective and Article 159 which de-emphasize technicalities in favour of substantive determination of appeals should not be invoked. As this Court stated in **Mradura Suresh Kantaria v. Suresh Nanalal Kantaria, CA No. 277 of 2005**, the overriding objective is not a panacea for all ills and in every situation and that a foundation for its application must be properly laid. And in **Walter Mboya Onyango v Elisha Juma Owuor & another, CA No. 46 of 2010** this Courts stated:

“Sections 3A and 3B cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to the Court.”

We find that this application has merit and allow it. The notice of appeal dated 11th March 2014 is hereby deemed to have been withdrawn. The orders of stay of execution granted by the High Court on 18th June 2015 are hereby vacated. The applicants shall have costs of this application. It is so ordered.

Dated and delivered at Nairobi this 29th day of September, 2017

D. K. MUSINGA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR