



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 85 OF 2016

BETWEEN

KARL WEHNER CLAASEN.....APPELLANT/RESPONDENT

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE REGISTRAR OF TITLES.....2ND RESPONDENT

THE COMMISSIONER OF PRISONS.....3RD RESPONDENT

THE ATTORNER GENERAL.....4TH RESPONDENT

KIPAGENGE OF KALENJIN ESTATES LIMITED...5TH RESPONDENT/APPLICANT

(Being a Notice of Motion Application to strike out the record of Appeal filed on 26th September 2016)

RULING OF THE COURT

[1] This is an application under Rule 82(1), 82(2), 84 and other relevant Court of Appeal Rules for an order that the appeal filed herein be struck out on the ground that the letter bespeaking the proceedings was not served on the applicant’s advocates. The application is made by the 5th Respondent in the appeal.

[2] The background to the application is as hereunder. Sometime in 2013 Nicholas Hendrick Claasen filed a Constitutional Petition in the High Court at Eldoret being No. 1 of 2013 which was later transferred to the Environmental and Land Court and registered as Constitutional Petition No. 7 of 2015. The Petitioner alleged, amongst other things, that his constitutional right to protection of property had been contravened by the Respondents by acquisition of his several parcels land measuring a total 4,638 acres and valued at Kshs.13,914,000,000.00 which he claimed from the applicants. However, the Petitioner died on 26th April 2014 before he prosecuted the Petition. Karl Wehner Claasen and the son and legal representative of the deceased Petitioner applied to be substituted in the Petition for the deceased. However the application was dismissed by the Court in February 2016. His advocates filed a notice of Appeal within the prescribed time. They also applied for a copy of the proceedings by a letter dated 15th February 2016 which is shown to have been copied to the applicant’s advocates. By a letter

dated 8th August 2016, the Deputy Registrar of the Court notified the Respondent's advocates that the proceedings and ruling were ready for collection and proceeded to issue a certificate of delay certifying that the time for preparation and supplying the certified copy of the proceedings was from 15th February 2016 to 8th August 2016. Thereafter, the Respondent's advocates filed the Appeal on 26th September 2016.

[3] By Rule 82(1), an appeal should be filed within 60 days of the date when the notice of appeal is lodged. However, the proviso to Section 82(1) excludes from computation of time the period that may be certified by the Registrar as having been required for the preparation and delivery of a copy of the proceedings if the application for a copy is made in writing within 30 days of the date of the decision and if the copy of the letter is served upon the Respondent.

[4] The Applicant's advocates states that the copy of the letter requesting for the proceedings was not served on them and therefore the time certified by the Registrar as having been required for the preparation and delivery of the proceedings should not be excluded from the computation of time meaning that the Appeal was filed outside the stipulated 60 days. The Respondents counsel appeared at the hearing of the application and stated that he was not served with the application.

[5] The appeal raises an important constitutional issue, in essence, whether a constitutional petition seeking compensation for alleged unconstitutional deprivation of property can be continued by a legal representative after the death of the Petitioner. The Respondent has substantially complied with the rules regarding the institution of appeals. He filed the Notice of Appeal in time; he applied for a copy of proceedings in time and indicated that the letter was copied to the applicant's advocates. He obtained the certificate of delay from the Registrar. By the certificate of delay the time up to 8th August 2016 is excluded from computation of time going by the certificate of delay, the appeal was filed within 60 days. The only essential step omitted is failure to serve a copy of the letter requesting for proceedings upon the applicant's Advocates. By Rule 1(2), the Court has inherent jurisdiction to make orders as may be necessary for the ends of justice even when the procedure is breached. In addition, it is also a constitutional imperative under Article 159(2)(d) that justice shall be administered without undue regard to technicalities of procedure. The Applicant does not claim that it has suffered any undue prejudice. In the circumstances, it would be a drastic step to strike out the appeal and the Court should exercise its discretion in favour of sustaining the appeal.

[6] Accordingly, the application is dismissed. The appeal filed on 26th September 2016 is deemed to have been filed within the prescribed time. The Respondent/Appellant to pay the costs of this application to the applicant.

Dated and delivered at Eldoret this 5th day of October, 2017

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR