IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:MAKHANDIA, OUKO,& M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 35 OF 2015

BETWEEN

KIDHEKA MUTISYA NGATA ….……....…….APPLICANT

AND

EMMANUEL NGANDE NYOKA…….....…1ST RESPONDENT

SCHWARZ HELDI SIELDGLINDE…….....…….2ND RESPONDENT

GEORGE WINJIRA MUNYALO ……...…….3RD RESPONDENT

CHARO KITSAO TITO…….....……..4TH RESPONDENT

(Being an appeal against the Judgment of the Environment and Land Court of Kenya at Malindi (Angote, J.) dated 16th January, 2014

in

E.L.C.C. No. 5 of 2009)

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RULING OF THE COURT

By an application dated 14th June, 2015, the applicant moved this Court seeking to have the notice of appeal lodged in the High Court on 20th December, 2013 by the respondents deemed as withdrawn and the orders of stay of execution granted on 30th May, 2014 in favour of the respondents be vacated. The application is expressed to be brought under Rules **82(1)** and **83** of this Court's Rules. These prayers are premised on the grounds that the respondents has failed to take essential steps towards presenting the appeal to this Court and that it is in the interest of justice that the notice of appeal be deemed as withdrawn.

A brief background of the dispute is that the applicant was successfully sued by **Emmanuel Ngande Nyoka** in **Kilifi SRMCC No. 188 of 2005** for an order of specific performance in respect of a an agreement touching on **Plot No. Kilifi/Kijipwa/173** *"the suit premises"*. Dissatisfied with the outcome, the applicant lodged an appeal in the Environment and Land Court "*ELC"*, being **Malindi ELC No 5 of**

2009. However, during the pendency of that appeal, Emmanuel Ngande Nyoka subdivided and sold the suit premises to third parties including the respondents, prompting the applicant to file an application to have them joined in the appeal which application was allowed. In a judgment delivered on 19th December, 2013, the ELC allowed the appeal and set aside the decision of the trial court, and in lieu thereof ordered the rectification of the register by cancelling the subdivisions and the restoration of the original title of the entire suit premises to the applicant.

It is against the decision by the ELC that the respondents lodged the notice of appeal whose withdrawal, the applicant now seeks. Pursuant to the said notice the respondents subsequently successfully applied for an order of stay of execution of the decree on 30th May, 2014.

Urging the present application, **Mr. Maosa**, learned counsel for the applicant submitted that the respondents had failed to take essential steps to present the substantive appeal before this Court, even as they continue to enjoy orders of stay of execution of the decree. In particular, that the respondents had not attempted to extract the decree, and that they have failed to request for and follow up on the issuance of typed proceedings or pay any deposit for the typing of the same. It was also the applicant's contention that the respondents could not rely on the provisions of **Rule 82** of this Court's Rules, since there was no letter bespeaking proceedings. Counsel concluded by submitting that the respondents appear to have lost interest in prosecuting the appeal and as a result, it would be in the interest of justice that their notice of appeal be deemed as withdrawn.

Opposing the application, the respondent filed a replying affidavit sworn by their learned counsel, **Mr. Angima** on 19th October, 2015. By the said affidavit and also through their counsel's oral submissions, the respondents contend that they applied for typed proceedings through a letter dated 20th December, 2013, and that it is the High Court Registry that had delayed in typing and availing the proceedings. In addition, that the applicant was also partly to blame for the delay, given that he made an application for rectification of a typographical error in the judgment and the same had to be dispensed with first. In the premises, it was contended, the respondents could not have extracted the decree. Counsel finally submitted that he had procured a certificate of delay and shortly, the respondents would embark on applying for leave to file the appeal out of time.

Having carefully considered the application, the affidavits sworn in support of and in opposition to the application as well as rival submissions, this is our take on the application.

The procedure that is followed in instituting a civil appeal is set out in clear terms in **Rule 82** of this Court's Rules which provides *inter alia*:-

> **"82. Institution of appeals**
>
> **(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—**
>
> **(a) a memorandum of appeal, in quadruplicate;**
>
> **(b) the record of appeal, in quadruplicate;**
>
> **(c) the prescribed fee; and**
>
> **(d) security for the costs of the appeal:**
>
> **Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of**

such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent."

Thus where practicable, the appeal should be lodged within sixty days of filing of the notice of appeal. However, where this is not possible owing to delays in procuring typed proceedings, the time taken for the typing and certification of the proceedings is normally excluded in computation of time but only if the following two conditions have been met;

1. The application for the proceedings was made in writing within 30 days of the decision sought to be appealed from and;

2. A copy of the application for the proceedings has been served upon the respondent.

In this case, while the respondent may have met the first condition, no proof has been tendered to show that the letter of 14th February, 2014 bespeaking proceedings was ever served upon the applicant. This means therefore that even if the typed proceedings were to issue now, the respondents would nonetheless be disentitled to benefit from the provisions of **Rule 82(2)** aforesaid. The contention that a certificate of delay has since been issued has been made without any proof of the said certificate, given that none was tabled before us. Accordingly, the respondents appear to be operating outside the time lines set out in **Rule 82.** The repercussions and consequences of failure to comply with the timelines set as aforesaid are dire. Under **Rule 83** of this Court's Rules:

"83. ----------

If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. **The party in default shall be liable to pay the costs arising therefrom to any persons on whom the notice of appeal was served**." (emphasis added).

As earlier stated, the 60 day period for institution of the appeal has undoubtedly lapsed in the circumstances of this case. Given that the letter bespeaking proceedings was never served on the applicant, the respondents are ineligible to any exclusion of time in the certificate of delay envisioned by the proviso to **Rule 82(1).** As a consequence, the respondents deemed to have defaulted in instituting the appeal, the result being that the notice of appeal is now deemed as withdrawn within the meaning of **Rule 83.**

This Court has pronounced itself as regards Rule 83 in a string of cases, suffice to quote; **Christine Wangari Munga v David Mwaura & Another CA No. 196 of 2013,** as cited with approval in the case of **Salama Beach Hotel Ltd v. Mario Rossi [2015] eKLR.** In the latter case we observed:-

"…Rule 82(2) expressly disentitles an intended appellant who has failed to apply within the specified 30 days or to serve the opposite number the letter bespeaking proceedings from reaping the benefits of the proviso. In CHRISTINE WANGARI MUNGA V DAVID MWAURA & ANOTHER, CA. NO. 196 OF 2013, a similar question was raised and the court expressed itself thus:-

'We agree with the respondent's counsel that having failed to serve that letter as required by rule 82(2), the appellant cannot rely upon the proviso to rule 82(1) which allows the 60 days for filing of an appeal to exclude such time as is certified by the registrar to have been required to prepare the proceedings. In that eventuality, the appellant was obliged to file the appeal within 60 days of lodging the notice of appeal."

The court reiterated the same view in BENEDICT MWANZIGHE & ANOTHER V GASPER WALELE & 2 OTHERS, CA NO. 255 Of 2010 (MOMBASA), MUSYOKA

MUTIE MAKAU V PETER MUTIE MAKAU & ANOTHER, C.A. No. NAI 303 OF 2013, and **DEVELOPMENT BANK OF KENYA & ANOTHER V FRANCIS NDEGWA T/A MURUGU HOLDINGS LTD, CA. No. 28 OF 2013 (NYERI). In the above four cases, the court held that the parties could not rely upon the overriding objective to void prescribed time for filing the appeal. Indeed in RAMJI DEVJI VEKARIA V JOSEPH OYULA** (supra), **the court stated as follows when it was invited to invoke the overriding objective and ignore the fact that the appeal was filed out of time:-**

'Mr. Kitiwa urges us to exercise our discretion pursuant to the provisions of Sections 3A and 3B of the Appellate Jurisdiction Act. With respect, this is not a matter in which those provisions of the Rules, i.e. whether or not a party can file an appeal out of time and without leave. To invoke the provision of Section 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reason for following the rules of the court, even when they have been violated with impunity. Section 3A and 3B were not meant for that.'

In this case, the appellant readily admits that it did not serve upon the respondent a letter bespeaking the proceedings. In those circumstances the appellant cannot rely on the proviso to Rule 82(1) and was therefore obliged to file the appeal within 60 days of 16th May, 2014, when it filed the notice of appeal. Accordingly, the record of appeal ought to have been served on 15th July, 2014. Instead it was filed on 25th February, 2015, some seven months late…."

We reiterate that noncompliance with **Rule 82** cannot be cured by the overriding objective and as such, the position adopted by the respondents, that they can disregard the laid out procedure, fail to prove service of a letter bespeaking proceedings, fail to extract the decree, fail to pay and diligently follow up on the proceedings all the while enjoying orders of stay of execution, with the false bravado bordering on arrogance that they shall in any case seek and obtain leave to appeal out of time is disconcerting.

The application is allowed with costs to the applicant.

Dated and delivered at Mombasa this 26th day of February, 2016

ASIKE-MAKHANDIA

…….

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