



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, AZANGALALA & SICHALE, JJ.A)

CIVIL APPLICATION NO. NAI 187 OF 2011

BETWEEN

SHABA TRUSTEES LIMITED APPLICANT

AND

ROSE NJOKI KING'AU 1ST RESPONDENT

MICUGU WAGATHARA 2ND RESPONDENT

CITY COUNCIL OF NAIROBI 3RD RESPONDENT

(An Application for striking out a notice of appeal of an intended appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Sitati, J) dated 29th April, 2011

in

CIVIL SUIT NO. 200 OF 2007)

RULING OF THE COURT

The applicant, **SHABA TRUSTEES LIMITED**, filed a Notice of Motion in this Court dated 18th July, 2011 seeking the following orders:

- “1. THAT the notice of appeal dated 30th April, 2010 and filed on 30th April, 2010 filed by the firm of Njenga Mbugua & Nyanjua Advocates on behalf of the 1st and 2nd Respondents be struck out.***
- 2. THAT the order of the Honourable Court made on 22nd October, 2010 in Civil Application Number NAI 111 of 2010 (UR 82 OF 2010) staying the execution of orders made on 29th April, 2011 in High Court Civil Suit Number 986 of 2006 – Rose Njoki King’au and Micugu Wagathara vs Shaba Trustees and City Council of Nairobi striking out the plaintiff’s suit and entering judgment in favour of the 1st defendant be set aside and or discharged.***
- 3. THAT the Honourable Court be at liberty to issue further orders and/or directions as the***

honourable Court may deem fit and just to owing to the circumstances of this case.

4. **THAT the costs of and incidental to the Application abide by the result of the application.”**

In the motion, Rose Njoki King’au, Micugu Wagathara (the then 1st, 2nd plaintiffs) and City Council of Nairobi (the then 2nd defendant) were named as the 1st, 2nd and 3rd respondents respectively. The motion was supported by the affidavit of **BRIAN KIPTOO KIPLAGAT**, a director of the applicant. He deponed that on 29th April, 2010 Sitati, J dismissed the 1st and 2nd respondents’ suit in HCCC NO. 986 of 2006 filed against the applicant and 3rd respondent and entered judgment in favour of the applicant’s counter claim; that on 30th April, 2010 the 1st and 2nd respondents filed a Notice of Appeal of the same date in this Court; that on 22nd October, 2010 the 1st and 2nd applicants obtained an order of stay in Civil Application No. NAI 111 of 2010 pending the determination of their intended appeal; that no appeal has since been filed and that the delay in filing an appeal is inordinate.

The 1st and 2nd respondent’s response is contained in an affidavit dated 1st March, 2016 sworn on their behalf by Wandugi K. K. Karathe Advocate, in which he deponed that the 1st and 2nd respondents were represented by the firm of Mutuli & Apopo Advocates who filed a Notice of Appeal and successfully prosecuted an application for stay of execution; that the two partners in the firm namely Mutuli Patrick Lubaya Erick and Apopo Joab were suspended from practice; that subsequently Mr. Mutuli was struck off the roll of advocates and Mr. Apopo suspended as evidenced by the practicing status of the two as published by the Law Society of Kenya; that on learning these, the 1st and 2nd respondents instructed the firm of Wandugi & Co. Advocates who have now filed an application to file the Memorandum of Appeal out of time; that in the interest of justice all parties should be given a hearing so as to determine the matter on merits.

Mr. Karisa Iha, the Director of Legal Service of the 3rd respondent, swore an affidavit on 9th March, 2016 in response to the applicant’s Notice of Motion. He deposed that the 1st and 2nd respondents have been indolent in lodging the record of appeal. He supported the applicant’s motion for the dismissal of the Notice of Appeal filed by the 1st and 2nd respondents.

When the matter came up for hearing before us on 20th April, 2016, Mr. Maosa for the 3rd respondent was absent inspite of service of the hearing notice upon him on 23rd March, 2016.

Mr. Bundotich on behalf of the applicant urged the motion. He contended that it had been 6 years since the Notice of Appeal was filed and that the period to file an appeal lapsed on 30th June, 2010. He relied on rule 84 of this Court’s Rules which provides as follows:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.”

In response Mr. Karoki learned counsel holding brief for Mr. Wandugi for the 1st and 2nd respondents reiterated the contents of the affidavit of Mr. Wandugi sworn on 1st March, 2016.

We have considered the record, the Notice of Motion and the affidavit in support thereof, the affidavit sworn on behalf of 1st and 2nd respondent’s in opposition to the motion as well as the 3rd respondent’s affidavit in support of the motion.

The facts of the matter are fairly straight forward. The 1st and 2nd respondents filed HCCC No. 986 of 2006 against the applicant (the then 1st defendant) and the 3rd respondent (the then 2nd defendant) in September, 2006. Contemporaneously with the main suit, the 1st and 2nd respondents filed a chamber summons application seeking a temporary injunction pending the hearing of the suit. On its part, the applicant filed a counter-claim and a chamber summons seeking to strike out the 1st and 2nd respondent's suit under the then Order VI Rule 13 (1) (b) and

(d) and for summary judgment under the then Order XXV r. 1 (1) of the Civil Procedure Rules.

On 29th April, 2011 Sitati, J ruled in favour of the applicants on the basis that they had a superior title and issued orders to have the 1st and 2nd respondents vacate the disputed plot. The 1st and 2nd respondents were aggrieved by that decision and filed a Notice of Appeal dated 30th April, 2010 on 5th May, 2010. They also successfully applied for an order of stay which was granted by this Court. In the suit in the High Court and in the application for stay before this Court, the 1st and 2nd respondents were represented by the firm of Mutuli & Apopo Advocates. However, according to the records from the Law Society of Kenya, Mr. Mutuli Patrick Lubanga Erick and Apopo Joab were struck off and suspended respectively from practice. The records indicate that Mr. Mutuli remained suspended in 2013 and 2014 before being struck off the roll of advocates in the year 2015. On the other hand Mr. Apopo has remained suspended from 2013 to-date.

It is apparent that ever since the 1st and 2nd respondents obtained an order for stay on 30th October, 2000; no further step has been taken to advance the appeal.

The 1st and 2nd respondents' explanation is that their then advocates were struck off and suspended from practice, a fact that they were not aware of. They do not explain when they became aware of the striking off and suspension of their then counsel.

Be that as it may, the 1st and 2nd respondents have now instructed the firm of S. K. Wandugi Advocate to prosecute the appeal. Mr. S. K. Wandugi advocate in his affidavit has explained that they have filed an application seeking orders to file an appeal out of time.

It is our considered view that in the interest of justice and considering the circumstances of the case, and in view of Article 159 of the Constitution and the overriding principle in Sections 3A & 3B of the Appellate Jurisdiction Act Chapter 9 of the Laws of Kenya and so as not to be fettered by technicalities, we are constrained to dismiss the motion. This is not to say that the 1st and 2nd respondents did not act prudently in not checking with their counsel as had they done so, they would have discovered that the two advocates were no longer in practice. However, it is important that the 1st and 2nd respondents are not shut out of justice because of their then advocates ceasing and/or being suspended from practice. Due to the lack of prudence on the part of the 1st and 2nd respondents in following up the progress of their appeal, we shall award costs of this motion to the applicant. It is so ordered.

Dated and delivered at Nairobi this 17th day of June, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR