IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & G.B.M KARIUKI JJ.A)

CIVIL APPEAL (APPLICATION) NO. 258 OF 2014

BETWEEN

TRUSTEES OF THE KENYA ASSEMBLIES OF GOD..…...APPELLANT/RESPONDENT

VERSUS

SURESH KUMAR SOFAT……………………….....…....1ST RESPONDENT/APPLICANT

SADINA SOFAT………………………………….....…..2ND RESPONDENT/APPLICANT

NAIROBI CITY COUNCIL………………...………..……..……….3RD RESPONDENT

(Application to strike out Record of Appeal lodged on 9th September 2014 in an appeal from the orders of the High Court of Kenya at Nairobi (Lady Justice Pauline Nyamweya) dated the 3rd March 2014 and amended on 19th March 2014 in E.L.C. No. 402 of 2013

JUDGMENT OF THE COURT

[1] The proceedings leading to the motion now before us commenced in the High Court at Milimani ELC through a plaint filed on 25th March 2013. Suresh Kumar Sofat and Sadina Sofat who are now the 1st and 2nd respondents in the appeal, and the 1st and 2nd applicants in the motion before us filed the plaint. They sought *inter alia* a permanent injunction restraining Trustees of the Kenya Assemblies of God (*who is now the appellant and the respondent in the motion*), and Nairobi City Council (*now the 3rd respondent in both the appeal and the motion*), from trespassing, transferring, developing or in any way interfering with the 1st and 2nd applicant's peaceful possession of property known as LR No. 209/11251, and an order directing the appellant to yield vacant possession of that property to the 1st and 2nd applicants. Filed contemporaneously with the plaint was a notice of motion in which the 1st and 2nd applicants sought interlocutory orders pending the inter parte hearing of the suit.

[2] The orders sought in the notice of motion were as follows:

> ***"(a) spent***
>
> ***(b) spent***
>
> ***(c) THAT the defendants either by themselves, their agents, proxies and/or any other persons***

purporting to act under them be restrained from trespassing, transferring, constructing, developing and/or interfering in any way with the plaintiffs' peaceful possession of all that property identified as L.R. No.209/11281, situated along Kabithi Road off Mombasa Road pending the hearing inter partes of this suit;

(d) THAT the 1st defendant be directed by this honourable court to yield vacant possession of all that property identified as L.R No. 209/11281, situated along Kabithi Road off Mombasa Road"

[3] Both the appellant and the 3rd respondent filed a defence to the 1st and 2nd applicant's claim and opposed the 1st and 2nd applicant's notice of motion, the applicant through a replying affidavit sworn by Reverend Fredrick M Kibuga and the 3rd respondent through grounds of opposition. On 3rd March 2014 the High Court having heard the application gave a ruling wherein it allowed the notice of motion and issued the orders sought. On 19th March 2014, the 1st and 2nd applicants by an application dated 7th March 2014 successfully applied for the suit property to be amended to read LR 209/11281 instead of LR 209/11251. It is the ruling of 3rd March 2014 as amended on 19th March 2014 that was the subject of ***Civil Appeal No. 258 of 2014*** in respect to which the appellant filed a notice of appeal on 10th March, 2014 and followed it up with a record of appeal that was filed on 9th September, 2014.

[4] On 30th September 2014, the 1st and 2nd applicants filed a notice of motion seeking an order to strike out the record of appeal filed on 9th September 2014 in regard to ***Civil Appeal No. 258 of 2014***. The grounds upon which the motion was anchored was that the appellant lodged the record of appeal out of time, time for filing the record of appeal having expired on 10th May, 2014. In regard to the certificate of delay, it was contended that the time taken to supply the certified copies of proceedings being 39 days, the extended time expired on 19th June, 2014.

[5] In a replying affidavit sworn by Fredrick M. Kibuga, the appellant maintained that the record of appeal was filed within time as the proceedings were certified by the court on 13th May, 2014 and availed to the appellant for collection on 4th June, 2014; that the certificate of delay was only availed to the appellant in September, 2014; and that it was thereafter that the appellant lodged the record of appeal. The appellant urged the court to apply the principle of overriding objective and substantial justice under **Article 159 (2)(d)** of the **Constitution.** In its view substantial justice was to be found in the appeal being heard on merit rather than being struck out on a technicality.

[6] During the hearing of the motion, learned counsel Mr. Muchiri appeared for the 1st and 2nd applicants while learned counsel Mr. Jaoko appeared for the appellant. There was no representation for the 3rd respondent. Mr. Muchiri submitted that the notice of appeal having been filed on 10th March, 2014, the record of appeal should have been filed by 10th May, 2014, but that this was not done. As for the delay in obtaining certified copies of the proceedings and judgment, counsel submitted that the certificate of delay exhibited showed that the proceedings were available on 23rd May 2014, but that the appellant did not file any record of appeal until 9th September 2014.

[7] Relying on **Salama Beach Hotel Ltd vs Mario Rossie (2015) eKLR**, counsel argued that the purpose of the provision for filing the record of appeal within a specified time was to give meaning to the constitutional value in **Article 159(2)** that justice shall not be delayed. **Ramji Davji Vekaria vs Joseph Oyula [2011] eKLR** was cited for the proposition that lodging an appeal out of time is not a matter of procedural technicality on which the court may invoke the overriding objective principles. Also cited was **Muradura Suresh Kantaria vs Suresh Nanalal Kantaria** ***Civil Appeal No. 277 of 2005*** (*unreported*) where the Court of Appeal warned that the overriding principle is not the panacea of all ills and in every situation, and that a foundation for the application of the principle must be properly laid and the benefits of its application judicially ascertained.

[8] Further, Mr. Muchiri maintained that taking into account the delay in obtaining certified proceedings and judgment the record of appeal ought to have been filed by 8th August, 2014. He urged the Court to

distinguish ***Civil Appeal No. 130 of 2008*** **Joseph Kiangoi vs Wachira Waruru & 2 Others [2010] eKLR,** that was relied upon by the appellant, as unlike the Kiangoi case where service of the notice of appeal was not effected on only one of the respondents, in this case the record of appeal was not filed within the prescribed time and no reason has been given for the delay. The Court was therefore urged to strike out the record of appeal.

[9] On his part, Mr. Jaoko learned counsel for the appellant submitted that the original 60 days within which the appellant could file the record of appeal did not expire on 10th May 2014 as there were holidays that should have been excluded in the computation; that there was no evidence that the appellant was notified of the typed proceedings being ready for collection; that the certificate of delay was collected on 3rd September, 2014; and that the court should be guided by a broader sense of justice in applying **Article 259(d)** of the **Constitution**.

[10] We have considered the notice of motion, the affidavit in support, the affidavit in reply, the respective submissions made by learned counsel and the authorities cited. In our view the issue herein is quite simple. That is, whether the record of appeal was filed out of time, and if so, whether the same should be struck out.

[11] ***Rule 84*** *of the Court of Appeal Rules* 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.*** *[Emphasis added]*
>
> ***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."***

[12]Based on that rule, an appellant can seek an order to strike out a notice of appeal or the appeal on three grounds; first that no appeal lies; secondly that an essential step in the proceedings has not been taken, and thirdly, an essential step has not been taken within the prescribed time. In the matter before us the 1st and 2nd applicants seek to have the appellant's record of appeal struck out on the grounds that it was not filed within the stipulated time, that is, that an essential step was not taken within the prescribed time.

[13] **Rule 82** of the **Court of Appeal Rules** that deals with the institution of appeals states as follows:

> ***"82 (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;***
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> ***(b) the record of appeal in quadruplicate;***
>
> ***(c) …………..***
>
> ***(d) ………….***
>
> ***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."***

[14] The impugned ruling was delivered on 3rd March 2014. The appellant lodged a notice of appeal on 10th March 2014. On 25th June, 2014, the Deputy Registrar issued a certificate of delay stating, *inter alia*:

> ***"1. The application for typed and certified copies of proceedings were made by Nchoe Jaoko & Company Advocates on 13th March, 2014 which was within time of the judgment/decision desired to be appealed against.***
>
> ***2. By a letter dated 24th April, 2014, the firm of M/s Nchoe, Jaoko & Company Advocates made a further request to be issued with the typed and certified copies of proceedings.***
>
> ***3. The typed and certified copies of proceedings were available as of 23rd May 2014 and were collected by M/s Nchoe, Jaoko & Company Advocates on the same date.***
>
> ***4. The time taken by this court to prepare and supply the certified copies of the proceedings was from 27th March 2014 to 23rd May 2014 which is 39 days.***
>
> ***5. This certificate of delay was prepared and was ready for collection this 25th day of June 2014."***

[15] According to **Rule 82 (1)** (above quoted) the appellant ought to have filed the record of appeal before 23rd July 2014, that is within 60 days after the 23rd May 2014 when the certified copies of proceedings and judgment were availed to it.

In the case of **George Mwai Mburu v Mary Wamaitha Kaitany & another** **[2015] eKLR**, this court held as follows:-

> ***"We note that on 24th July, 2013, counsel for the respond ents were informed that certified copies of proceedings and the impugned judgment were ready for collection. Counsel for the respondents collected the same on the same date.***
>
> ***Pursuant with proviso to rule 82 the respondent ought to have filed his appeal within 60 days of the receipt of proceedings. The proceedings were received on 24th July, 2013. The record of appeal ought to, therefore, have been filed on or about 25th September, 2013. The same was filed on 7thNovember, 2014.***
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> ***Counsel for the respondent submitted that they were awaiting certified copies of the decree and certificate of delay to enable them file the record of appeal.***
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> ***Rule 88** provides:*
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> ***"Where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the deputy registrar on application."***
>
> ***In compliance with proviso to rule 82, the respondent ought to have filed the record of appeal within 60 days from the date of receipt of a copy of the proceedings. The present appeal was filed on 7th November, 2014, over one year after the receipt of the proceedings. Thereafter, pursuant to rule 88, the respondent should have filed a certified copy of decree and certificate of delay in a supplementary record of appeal. Time taken to obtain a certificate of delay is not excluded by proviso to rule 82."***

[16] We reiterate the same reasoning and find that the appellant's record of appeal was filed out of time and that the delay in securing the certificate of delay cannot exonerate the appellant as that certificate

could have been filed later through a supplementary record of appeal. The appellant argued that by virtue of **Article 159 (2) (d)** of the **Constitution** and the overriding objectives formulated by **Section 3A** and **3B** of the **Appellate Jurisdiction Act**, the court should disregard procedural technicalities and sustain this appeal. In this regard the Supreme Court in **Hon. Lemanken Aramat –vs- Harun Meitambei Lempaka & 2 others** **–** ***Petition No. 5 of 2014*** while considering whether an Election Petition which was filed out of time could be sustained expressed itself as follows:-

> ***"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances when the Constitution links certain vital conditions to the power of the Court to adjudicate a matter. This is particularly true in the context of Kenya's special electoral dispute-resolution mechanism.***
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> **……………………………………….**
>
> ***Those who filed election petitions outside the 28-day requirement of the Constitution cannot, in our perception, avoid the consequence of their dilatoriness; for it is the prescribed time-frame that opens the jurisdiction of the Courts. And this being such an elemental constitutional requirement, it stands out by itself, irrespective of the averments made by parties in their pleadings. To this question, the general discretion provided for in Article 159 would not apply, as this is not an ordinary issue of procedural compliance."***

[17] In the case of **Patrick Kiruja Kithinji vs Victor Mugira Marete, [2015] eKLR**, this Court stated:

> ***"In our view whether or not an appeal is filed on time goes to the jurisdiction of this court. It is trite that this court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the court.***
>
> ***To hold otherwise would upset the established clear principles of institution of an appeal in this court. Consequently, we find that an appeal filed out of time is not curable under Article 159."***

[18] Needless to state, the appellant can find neither a foothold under the overriding objective principle nor under the substantial justice argument to save his appeal, the record of appeal having been filed outside the stipulated period. The notice of motion application dated 26th September 2014 must therefore succeed. In conclusion we take the liberty to bring to the attention of the parties and especially the appellant the decision of this court ***in*** **Civil Application No. Nai. 337 of 1996 - Jedida Alumasa & 3 Others v SS Kesitany, *[1997]* eKLR**, where Bosire, Ag. J.A (as he then was) held: -

> ***"It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures provided he can be able (sic) to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal."***

[19] The upshot of the above is that we allow the motion by the 1st and 2nd respondents and do therefore strike out the record of appeal filed on 9th September 2014 under **Rule 84** of the **Court Rules**, with the result that the appeal is struck out for being incompetent. We award cost of the application to the respondents. Orders accordingly

Dated and delivered at Nairobi this 29th day of July, 2016.

W. KARANJA

……………………………

JUDGE OF APPEAL

H. M. OKWENGU

……………..……………..

JUDGE OF APPEAL

G.B.M. KARIUKI

…………..…….…………

JUDGE OF APPEAL

I certify that this is a true copy of the original

<u>DEPUTY REGISTRAR</u>