



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CIVIL APPLICATION NO. 35 OF 2016

BETWEEN

JOHN BENJAMIN WANYAMA..... APPLICANT

AND

KENYA COMMERCIAL BANK..... RESPONDENT

(An Application to strike out the respondent's Notice of Appeal, dated 18TH June 2015, and lodged in court on 24th June 2015, in the intended appeal from the Judgment and decree of the High Court of Kenya at Kakamega, of Chitembwe, J. and read by Sitati, J. and delivered on 16th June, 2015 in HCCC NO. 97 OF 1999)

RULING OF THE COURT

The applicant's notice of motion dated 5th May 2016 seeks to strike out the respondent's notice of appeal lodged on 24th June 2015. The application was supported by an affidavit sworn by **John Wanyama Benjamin**, the applicant herein.

The applicant has deponed that the respondent's notice of appeal dated 18th June 2015 was lodged in the registry on 24th June 2015, and that contrary to the requirements of **Rule 76 (1)** of this Court's Rules such notice had not been served upon him up to the time of filing this application. The applicant further deponed that in accordance with **Rule 82** a party that failed to file an appeal within the period specified was deemed to have withdrawn the appeal. As a consequence, on account of the respondent's failures and omissions the applicant urged the Court to find that the respondent's notice of appeal was incompetent and to strike it out.

In a replying affidavit sworn by **Wilson Kimeli Matinkwony**, the respondent's Operations Manager, it was averred that the applicant has been litigating over the same subject matter since 1994 which had culminated in contradictory decisions in two appeals involving the same subject matter, namely, **Kakamega HCCA 97 of 1999** and **Kakamega No 50 of 2003**.

It was deponed that a notice of appeal was filed together with a memorandum of appeal, and thereafter on 18th June 2015 the respondent's advocates applied for certified copies of the proceedings and the judgment, which were yet to be supplied by the registry despite reminders.

Mr. Matinkwony further deponed that the applicant's application was flimsy and fictitious and intended to defeat the ends of justice; that the applicant was on a shopping spree as he has filed more than six matters in different courts in respect of the same subject matter; and that the application was premature as the record of appeal was yet to be compiled and lodged. For those reasons he urged us to find that the application has no merit and dismiss it with costs.

In his submissions before us, the applicant, who appeared in person, reiterated the contents of the supporting affidavit and added that he had yet to be served with the letter bespeaking of proceedings. It was also his submission that having himself obtained a certified judgment on 19th June 2015, the applicant had no reasonable ground for failure to file the appeal in time.

On his part, **Mr. Osango**, learned counsel for the respondent, opposed the application. It was submitted that the applicant had refused to accept service of the notice of appeal. Counsel also sought to argue that lack of service on the applicant was not in any way prejudicial either to the applicant or to the appeal and cited ***Shabbir Ali Jusab vs Anaar Osman Gamrai & Another [2013] eKLR*** in support of this contention. Counsel further submitted that the certified copies of the proceedings and judgment have yet to be supplied, but conceded that though the letter applying for the proceedings is addressed to the deputy Registrar, it was not copied to the applicant. Counsel concluded that the application was therefore premature and ought to be dismissed.

In his response, the applicant contended that the record of appeal merely comprised of the parties' submissions and therefore the contention that the proceedings were not ready was not correct.

We have considered the application and the parties' submissions. The applicant has brought this application under **rules 77(1), 82 and 84** of the Court of Appeal Rules and seeks to strike out the respondent's notice of appeal on the basis that this Court's Rules had not been complied with.

Rule 77 (1) stipulates:

“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”

It is not in dispute that the notice of appeal was lodged within the stipulated time. However, on the face of it, there is nothing to show that it was served on the applicant. The respondent on the one hand has stated that the applicant deliberately refused to accept service of the notice, but on the other, conceded that there was no affidavit of service on record to support this contention.

Furthermore, with respect to filing of the record of appeal, **Rule 82** requires that the memorandum of appeal and the record of appeal be filed within sixty days from the date when the notice of appeal was lodged. The provision further provides that, where an application for copies of the proceedings has been made, in computing the time within which the appeal is to be instituted, the time that may be certified by the registrar as having been required for preparation and delivery to the appellant of the proceedings would be excluded.

As was stated by this Court in ***James Mayaka Mong'are vs Everline Kerubo Makini & another Civil Application No 66 of 2015***:

“An appellant cannot rely on the proviso to sub-rule (1) of rule 82 unless his application for the proceedings was in writing and a copy of it was served upon the respondent. We believe that the objective of this rule was to obviate a situation where a party, confronted with an application of this nature, and having failed to request for proceedings within thirty days after delivery of a decision, would prepare a letter addressed to the court and purport to have requested for the proceedings in good time. We cannot consider this rule a mere procedural technicality in the spirit of Article 159 (2) (d) of the Constitution.”

As the respondent has conceded that no such letter was served upon the applicant as required by the rules,

it cannot benefit from the proviso by having time to file the record of appeal extended. Given this scenario, it follows that **rule 84** of this Court's Rules would become applicable to the circumstances of this case.

Rule 84 further stipulates:

“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”.

Clearly, there have been several missteps in initiating the appeal, given the failure by the respondent to comply with the provisions of **rules 77 and 82** of this **Court's Rules**. Consequently, and in terms of **rule 84**, the notice of appeal lodged on 24th June, 2015 is hereby struck out. The respondent shall pay the applicant's costs arising therefrom.

DATED and delivered at Kisumu this 11th day of October,2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR