IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: OKWENGU, KIAGE & MOHAMED, JJ.A.)

CIVIL APPEAL APPLICATION NO. 93 OF 2016

BETWEEN

WILLIE KIRITU KIGOTHO…….. APPLICANT/RESPONDENT

AND

FRESHIA WAMBUI MUIRURI……..…RESPONDENT/APPELLANT

(An appeal from the judgment of the Environment and Land Court of Kenya at Nakuru (L. N. Waithaka J., dated 19th September, 2014 in E.L.C. No. 29 of 2013)

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RULING OF THE COURT

By the motion dated 12th July 2016 and brought under **Rule 82** and **84** of the Court of Appeal Rules, the applicant **Willie Kiritu Kigotho** seeks to strike out ***"the appeal herein, having been instituted after the prescribed time."***

The grounds on which the motion is premised are;

> ***1. "That judgment in the ELC No. 29 of 2013 was delivered on 19th September 2014 by Hon. Lady Justice L.N. Waithaka in favour of the Applicant/Respondent.***
>
> ***2. That the Respondent/Appellant filed her notice of appeal and requested for typed proceedings dated 30th September 2014 but filed at the registry on 1st October 2014.***
>
> ***3. That there was delay in the preparation of the typed proceedings and a certificate of delay issued by the Deputy Registrar (ELC) on 8th March 2016.***
>
> ***4. That the Appellant/Respondent thereafter lodged the record of appeal at the registry on 3rd May 2016.***
>
> ***5. That record of appeal was lodged out of the prescribed time limit under Rule 83 of the Court of Appeal Rules.***

6. That it is therefore prudent and in the interests of justice and the preservation of the court's due procedure that the Appellant's/Respondent's appeal be struck out.

7. That the Respondent/Applicant has made this application without undue delay and prays the same be allowed".

Those same grounds are repeated in the applicant's affidavit in support of the motion which is expressed as sworn on 10th July 2016. We state right away that whereas at ground 7 the applicant states that he has brought this application without undue delay and prays that it be allowed, the time for bringing an application of this kind seeking to strike out an appeal or a notice of appeal for *inter alia*, the procedural defaults of failing to take a crucial step in the proceedings at all or within the prescribed time, is strictly prescribed.

Rule 84 contains proviso thus;

> ***"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 the record of appeal as the case may be."*** (Our emphasis).

That proviso is couched in unequivocal prohibitory terms. It forbids a party from bringing a striking out application outside of the thirty-day period and if a party is so forbidden, then the Court ought not to consider the application but should strike it out as incompetent.

But that fatal incompetence of the application aside, we think that even on the merits it is patently a non-starter. From the grounds we have set out at the beginning of this ruling, the applicant himself states that the respondent did request for typed proceedings on 1st October 2015 by a letter dated the previous day. That request was at most a dozen days after the delivery of the judgment the respondent sought to appeal against. On the issue of request for proceedings and the effect on time computation of any delay in providing the same, **Rule 82(1)** of the Court of Appeal Rules provides as follows:

> ***"(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." (our emphases)***

Mr. Kahiga makes the argument which is quite novel that the time lost between the date of the impugned judgment and the request for proceedings must be reckoned in computing the date by which the record of appeal should have been filed. From his perspective therefore, in so far as the respondent waited for eleven or so days before bespeaking the proceedings, then, it behoved him to lodge the appeal within sixty days less the eleven, after he received the proceedings. To him, the appeal herein was therefore instituted after 71 days, was accordingly out of time and ought to be struck out.

Mr. Kagucia the respondent's learned counsel, after assailing the application as incompetent and

deserving only of striking out, rejected outright the contention that he instituted the appeal out of time. He dismissed as ingenious the argument that he instituted the appeal after 70 or so days when, on the applicant's own showing, the same was after 59 days (which **Mr. Kagucia** thinks is actually 58 days) and therefore within time.

We think that **Mr. Kahiga's** argument may have a critical effect where the notice of appeal gets filed without a simultaneous request for proceedings copied to the respondent. In such a scenario the filing of the notice of appeal sets the clock ticking to be interrupted only by the time certified by the Registrar of Superior Court appealed from as necessary for the preparation of the proceedings. Once a copy of the proceedings is delivered to the appellant, the time that had been stopped by the request resumes and he is required to institute the appeal before the expiry of a cumulative sixty days.

As in the present matter the proceedings were requested on the same day the notice of appeal was lodged, no time was lost and so, without a doubt, the appeal was instituted within the sixty-day period. The argument by **Mr. Kahiga** that the days between the delivery of the judgment and the request for proceedings should be added to the 58 or so within which the appeal was instituted is untenable and is not borne out by the Rule. All that an intending appellant need do is ensure that he bespeaks the proceedings within the stipulated 30 days and that he copies the letter requesting the proceedings to the respondent as required by **sub-rule (2)** of the Rule.

The upshot is that the application before us fails. As we have pronounced ourselves on the merits as well, we order it dismissed with costs.

Dated and delivered at Nakuru this 8th day of December, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR