



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & OUKO, JJ.A.)

CIVIL APPLICATION NO. NAI 209 OF 2012

BETWEEN

HARRISON MUNYI.....APPLICANT

AND

DOUGLAS MBUGUA MUNGAI.....RESPONDENT

(An application for striking out the Notice of Appeal filed in the Court of Appeal

on 30th March, 2009 from the judgment of the High Court of Kenya

at Nairobi (Ojwang, J.), dated 25th March, 2009

in

CIVIL CASE NO. 2091 OF 1998 (O. S)

RULING OF THE COURT

This is an application under Rules 57(2), 83 and 84 of the Court of Appeal Rules, 2010 for orders that the notice of appeal filed by the respondent be struck out and further that the order of stay of execution granted on 23rd October, 2012 be vacated. The application is supported by the affidavit of the applicant and the annexed documents.

The application is opposed by the respondent who has filed a replying affidavit, to which various correspondence was annexed.

The dispute in the High Court related to the ownership of Land Reference No.Dagoretti/Riruta/S.15. The land was registered in the name of **Beatrice Njeri Mungai**. Upon her death in 1993, the respondent who is a son of the deceased caused himself to be registered as proprietor in 1996 through transmission. The applicant who had been in possession of the land, as the High Court found, since 1985 filed a suit HCCC No.2091 of 1998 (O.S.) against the respondent claiming the land by adverse possession. The respondent also filed a counter suit - HCCC No.2146 of 1998 against the applicant for vacant possession. The two suits were consolidated. On 29th March, 2009 the High Court after full hearing of the dispute found in favour of the applicant and made a declaration that the applicant was entitled to either reinstatement into

the suit premises (from which he had been evicted) or to damages. The High Court further stipulated the nature of damages that the applicant should be entitled to in case he elected to take damages in lieu of reinstatement.

The respondent being aggrieved by the judgment and decree lodged a notice of appeal on 30th March, 2009. He subsequently filed Civil Application No. Nai 167 of 2010 in this Court apparently seeking stay of execution of the judgment and decree pending appeal which application was granted on 23rd October, 2010.

The applicant now seeks orders that the notice of appeal be struck out and that the stay of execution be vacated on the ground that the respondent has failed to expeditiously file a record of appeal.

The respondent explains in the replying affidavit that the delay in filing the appeal is due to delay by the High Court to supply typed proceedings to the respondent's advocates. He deposes that the application should not be allowed in the interest of justice.

Mr. Njiru learned counsel for the applicant submitted that the delay of seven years is either due to incompetence or is intended to delay the matter and that there is no evidence that the respondent's advocates have taken concrete steps to obtain the proceedings.

We have considered the application. By Rule 82(1) an appeal to this Court should be instituted within 60 days of the date when the notice of appeal was lodged provided that time certified by the Registrar as required for preparation and delivery of a copy of proceedings is excluded from computation of time if the conditions specified in the rule are satisfied. Further by Rule 83, a party who files notice of appeal but fails to institute the appeal within the stipulated time is deemed to have withdrawn the notice of appeal.

It is true that the respondent's advocates have written six letters to the Deputy Registrar of the High Court requesting for uncertified copies of proceedings and judgment. Two letters were written in the year 2009. Two other letters were written in 2010 and two letters in the year 2011. The last letter is dated 30th August, 2011. It is also true as the authority of ***Shah v Patel & Others – Civil Application No.139 of 2011*** cited by respondent, shows that a party should not be ordinarily punished for proven administrative delays in courts. The delay in this case is however unusual. The respondent's advocates have not sworn an affidavit indicating the concrete steps they have taken to obtain the proceedings such as, visits to the Registry, paying requisite deposits for typing charges, complaints to Judiciary Ombudsman. The last letter was written one year before the present application was filed and even after the filing of the application the respondent's advocates have not shown that they have taken any further step. We are satisfied that the respondent has not demonstrated that he and his advocates have exercised due diligence or that they have been vigilant to have the proceedings supplied.

However, having regard to the nature of the intended appeal, it is in the interest of justice that we give the respondent a chance to lodge the appeal on terms that we consider just.

Accordingly,

- 1. The application is dismissed with costs to the applicant which shall be taxed and paid forthwith.***
- 2. The respondent shall file and serve the record of appeal within sixty (60) days.***
- 3. In default of either filing the record of appeal or serving the record of appeal within the stipulated 60 days, the application shall stand allowed with costs and,***
 - i. The notice of appeal dated 30th and lodged on the same day shall stand struck out without any further orders of the court and***

ii. The order of stay of execution granted on 23rd October, 2010 in Civil Application No. Nai 167 of 2010 shall stand vacated without any further order of the Court.

Dated and delivered at Nairobi this 25th day of March, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR