



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A.)

CIVIL APPLICATION NO.49 OF 2014

BETWEEN

FIDELITY COMMERCIAL BANK LTD INTERESTED PARTY

AND

SAMUEL KAMAU MACHARIA 1ST RESPONDENT

ALI KHAN MUSES 2ND RESPONDENT

ESTATE OF SONRISA LTD 3RD RESPONDENT

LAND REGISTRAR KWALE

(SUED THROUGH THE HON ATTORNEY GENERAL 4TH RESPONDENT

(Being an application to strike out Notice of appeal out of the judgment of the High Court at Mombasa (Mukunya, J.) dated 13th October, 2014

in Mombasa H.C.C.S. No.30 of 2014)

JUDGMENT OF THE COURT

The applicant **Samuel Kamau Macharia** filed a Notice of Motion application under **Rules 75(2) and 84** of this Court's Rules against the three respondents namely, **Ali Khan Muses, Estate of Sonrisa Ltd and Land Registrar Kwale (sued through the Hon Attorney General)** and the interested party, **Fidelity Commercial bank Limited**. It sought an order that the Notices of Appeal by the interested/affected party dated 27th October 2014 be struck out. The application was premised on the reasonin that the Notice of Appeal lodged in Court on 30th October, 2014 and served on 31st October, 2014 was lodged outside the 14 days period. The application was supported by the affidavit of Julius Orange sworn on 26th November, 2014. He deponed that his firm was served with two Notices of Appeal, the first one was served on 28th October, 2014 and was not signed by the Deputy Registrar whilst the second was served on 31st October, 2014 having been lodged in Court on 30th October, 2014; that the Notice of Appeal ought to have been lodged by 27th October, 2014 and finally that no extension of time was sought to file the Notice out of time.

The application was opposed by Fidelity Commercial Bank Ltd who had been enjoined in the suit in the lower court as an interested party. In an affidavit dated 30th January 2015 sworn by **F. Kinyua Kamundi**, the interested party's advocate deponed that the Notice of Appeal was filed on 27th October, 2014 and he duly paid for it vide receipt **No.3008935** of the same date; that the applicant's counsel was served with a copy of the Notice of Appeal on 28th October, 2014; that the Deputy Registrar signed and sealed the Notice of Appeal on 30th October 2014.

When counsel appeared before us on 9th February 2015, each one of them reiterated the averments in their respective affidavits.

On our part, we have considered the Notice of Motion application, the affidavits of the respective parties, the submissions before us and the law.

It is true as submitted by **Mr. Orange** that under **Rule 75(2)** of this Court's Rules, a Notice of Appeal has to be lodged by a party within 14 days of the decision against which it is desired to appeal. The decision against which the interested party desired to appeal against was delivered on 13th October, 2014. It is common ground that the 14 days elapsed on 27th October, 2014. Mr. Kinyua for the interested appellant delivered Notices of Appeal on 27th October, 2014. These were duly received by the registry and stamped. Thereafter the firm of Mr. Kinyua served upon the applicant a Notice, albeit the same having not been signed and sealed by the Deputy Registrar. The said Notice was paid for and a receipt issued. The date of the receipt was given as 27th October, 2014.

It was Mr. Orange's contention that the Notice served upon his firm on 28th October, 2014 was not valid for lack of signing and sealing by the Deputy Registrar.

We are at loss to understand the argument by the applicant that the Notice subsequently served upon them on 31st October, 2014 was out of time. As submitted by Mr. Kinyua, the purport of service of a Notice of Appeal is to inform your adversary of your intention and they did by serving the Notice on 28th October, 2014. This Notice had been filed on 27th October, 2014, received and stamped by the Court and it is this Notice that was served upon Mr. Orange's firm on 28th October, 2014. This Notice had been paid for and the receipt No. No.3008935 dated 27th October, 2014 was exhibited as proof of payment. The fact that the Deputy registrar did not sign and seal the Notice filed on 27th October, 2014 cannot be the interested party's fault. As pointed out by Mr. Kinyua this is an administrative procedure and litigants cannot be held responsible for acts of omission or commission (if any) on the part of the Court. In any event a document required to be filed in court is deemed as validly filed on the day the requisite fees is paid on the same in court and not when the necessary administrative functions are undertaken.

We have no hesitation whatsoever in finding therefore that this application has no merit. It is dismissed with costs to the interested party.

Made and dated at Mombasa this 12th day of March, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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