



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 48 OF 2014

BETWEEN

PATRICK KIRUJA KITHINJI APPLICANT

AND

VICTOR MUGIRA MARETE RESPONDENT

(An application to strike out an appeal from the ruling of the High Court of Kenya

at Meru (Makau, J.) dated 18th March, 2014

in

H.C Succession Cause No. 96 of 2008)

RULING OF THE COURT

1. The application before us has been brought pursuant to **Rules 42(1) & 43(1), 82(1) & (2) & 84** of the **Court of Appeal Rules** (the Rules). The applicant herein seeks an order striking out the appeal herein. The appeal is against the High Court (Makau, J.) ruling dated 18th March, 2014 wherein the Estate of Marete Ingetu (deceased) was distributed. The parties herein are administrators of the deceased's Estate. The ground in support of the application is that the appeal had been filed out of time without leave of the Court.

2. The applicant deposed that the impugned ruling was delivered on 18th March, 2014; the respondent lodged a Notice of Appeal against the said decision on 27th March, 2014. The respondent ought to have filed the appeal within 60 days of lodging the appeal, that is, on or before 27th May, 2014. The appeal herein was filed on 7th October, 2014, 130 days after lapse of the requisite time frame. The applicant also faulted the Certificate of Delay that was issued by the Deputy Registrar of the High Court. He deposed that the Certificate was defective because it did not state when the proceedings were requested and contained extraneous matters. The applicant further deposed that even if the Court were to find that the Certificate was valid, the respondent could not rely on the same because he had failed to comply with **Rule 82** of the Rules.

3. In response the respondent deposed that the delay in filing the appeal was due to several attempts which were made to settle the dispute out of court. According to him, the applicant's application was based on procedural technicalities and this Court ought to invoke **Article 159** of the **Constitution** and determine the appeal on merit.

4. Miss Thibaru, learned counsel for the applicant, argued that since the respondent's request for proceedings was never served upon the applicant the applicant could not rely on **Rule 82** of the Rules. In the alternative she submitted that as per the Certificate of Delay the proceedings were ready on 21st July, 2014 yet the appeal was filed on 7th October, 2014, 17 days late. She submitted that the respondent had not given any explanation for the delay. Miss Thibaru urged us to allow the application.

5. Mr. Kimaita, learned counsel for the respondent, in opposing the application urged us to invoke our inherent powers to ensure the ends of justice are met. He submitted that **Article 159** of the **Constitution** provides for administration of justice without undue regard to technicalities. He argued that **Rule 41** of the Rules empowers this Court to extend time on its own motion.

6. In reply to the submissions made by Mr. Kimaita, Miss Thibaru submitted that if the Court were to disregard its own rules the same would cause confusion. She argued that **Rule 41** of the Rules was not applicable in this case.

7. We have considered the application before us, the grounds in support of the application, submissions by learned counsel and the law. The application was brought pursuant to **Rule 84** of the Rules which provides:-

“A person affected by an appeal may at any time either before or after institution of the appeal apply to the Court to strike out the Notice of Appeal or the appeal, as the case may be on the ground that no appeal lies or that some essential step in 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 appeal shall not be brought after the expiry of 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be.”

8. The applicant contends that the Record of Appeal herein was filed out of time without leave of this Court. **Rule 82** of the Rules provides in part 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-

.....

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 such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the application for such copy was in writing and a copy was served upon the respondent. “Emphasis added.

9. The applicant deposed that he was never served with any letter requesting for proceedings. We note that the respondent never denied the same. By dint of **Rule 82(2)** the respondent cannot rely on the proviso of the said rule in the computation of time for filing the appeal. Consequently, time within which the respondent was required to file the appeal begun running on 27th March, 2014 and lapsed on 26th May, 2014. Therefore, the appeal was filed out of time without leave of this Court.

10. The respondent argued that by virtue of **Article 159** of the **Constitution** we ought to disregard procedural technicalities and sustain the appeal. The Supreme Court in **Hon. Lemanken Aramat –vs- Harun Meitambei Lempaka & 2 others – Petition No. 5 of 2014** observed:

“A Court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court’s jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character.”

11. Can the delay in filing the appeal be considered as procedural technicality capable of being cured under **Article 159 of the Constitution**? In **Hon. Lemanken Aramat –vs- Harun Meitambei Lempaka & 2 others (supra)** the Supreme Court 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.”

.....

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.”

12. 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**.

13. The upshot of the foregoing is that we allow the application and hereby strike out the respondent’s appeal filed on 17th October, 2014. We bring to the attention of the parties this Court’s decision in **Jedida Alumasa & 3 Others –vs- SS Kesitany – Civil Application No. Nai. 337 of 1996** 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.”

See also **George Wachira Kirira –vs- Joe Maina Ruthuthi – Civil Application No .Nyr. 11 of 2013**. The applicant shall have costs of this application.

Dated and delivered at Meru this 12th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J.OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR