IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE, M'INOTI & J.MOHAMMED, JJ.A.

CIVIL APPEAL (APPLICATION) NO. 104 OF 2011

BETWEEN

MAUREEN WAITHERA MWENJE…….1ST APPELLANT

ERIC KAMAU MWENJE……..…….…….2ND APPELLANT

AND

DAVID KINYANJUI NJENGA…..…..……...……..…….1ST RESPONDENT

MONICA WANGUI NJENGA…...……...2ND RESPONDENT

GRACE NJERI NJENGA…...…….…….3RD RESPONDENT

(An application to strike out the record of appeal in CA No. 104 of 2011 from the ruling and order of the High Court of Kenya at Nairobi (Muchelule, J.) dated 15th December, 2010

in

H.C.C.C. NO. 243 OF 2009 (OS))

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RULING OF THE COURT

The appellants, ***Maureen Waithera Mwenje*** and ***Eric Kamau Mwenje*** are the children and administrators of the estate of the late ***David Mwenje***. The respondents, ***David Kinyanjui Njenga***, ***Monica Wangui Njenga*** and ***Grace Njeri Njenga*** are respectively the owners of the parcels of land known as ***LR No. 10060/9, LR No. 10060/12*** and ***L.R. No.10060/8*** (the suit properties). On 15th December 2010, the High Court ***(Muchelule, J.)*** struck out with costs the appellants' suit claiming ownership of the suit properties by adverse possession.

Aggrieved by the ruling and order of the High Court, the appellants filed ***Civil Appeal No 104 of 2011***. By a Notice of Motion dated 23rd June 2011, and taken out under ***Rule 84 of the Court of Appeal Rules, 2010***, the respondents applied to strike out the appeal on the grounds that it was filed out of time and the

record of appeal did not contain important documents that formed part of the record in the High Court.

The affidavit in support of the application was sworn by the respondents' advocate, ***Mr. Nelson Kaburu,*** and the grounds upon which the application was based were that the appellants' advocates had not served upon the respondents' advocates the letter dated 15th December 2010 bespeaking copies of the proceedings and the ruling; that the record of appeal had omitted exhibits which formed part of the record; that the original originating summons in the High Court had been omitted from the record of appeal, and for good measure, that even the authorities relied upon in the High Court had been omitted from the record.

It is common ground that pursuant to leave granted by this Court on 8th July 2013, the respondent filed, on 12th July 2013 a Supplementary Record of Appeal by which the omitted documents were introduced. Accordingly, the only live issue in the application before us is whether the appeal was filed out of time and if so, whether it should be struck out.

Before us, Mr. Kaburu contended that the letter dated 15th December 2010 from the appellants' advocates bespeaking copies of the proceedings and ruling was never served upon him. He disputed the averments of ***Francis Mwangi Njoroge***, who in an affidavit sworn on 12th July 2013 had deposed that he was a Court Process Server and that on 15th December 2010 he had personally served a copy of the letter upon Mr. Kaburu's secretary. Learned counsel submitted that there was no evidence presented in support of the alleged service, such as a signed or endorsed copy of the letter or a delivery book acknowledging service. It was argued that the letter was not even copied to the respondents' advocates.

It was also contended that the name of the said Francis Njoroge Mwangi was not in the list of licensed court process servers for the year 2010. Relying on the rulings of this Court in ***BENEDICT MWAZIGHE & ANOTHER V. GASPER WALELE & 2 OTHERS, CA NO. NAI 255 OF 2010*** and ***MISTRY VALJI NARAN MULJI V VANTAGE ROAD TRANSPORTERS & OTHERS, CA NO 230 OF 2009***, learned counsel urged us to find that having failed to serve the letter of 15th December 2010 upon the respondents' advocates, the appellant was obliged to file the appeal within 60 days from the date of the ruling and therefore the appeal, which was filed on 27th May 2011, was filed out of time. We were accordingly urged to strike out the appeal with costs.

Mr. Githinji, learned counsel for the appellants opposed the application contending that the appeal was properly before this Court. Counsel submitted that the applicable rules of this Court were those in force before the ***Court of Appeal Rules, 2010*** and that ***rule 81(2)*** of the former rules merely required the letter bespeaking copies of the proceedings and ruling to be *sent* to the opposite number rather than to be *served*. Counsel invited us to find that the letter in question had been properly sent to the respondents' advocates.

Learned counsel further urged us to dismiss the application on the grounds that it was founded on technicalities; that the objective principle under sections 3A and 3B of the Appellate Jurisdiction Act allowed this Court to overlook such technicalities; that the respondents had not demonstrated any prejudice occasioned to them; and that since the respondents had not been heard on merit before the High Court, they should have the opportunity to agitate their grievances before this Court.

By ***rule 1(1)*** of the Court of Appeal Rules, 2010, those rules came into force 90 days after publication in the Gazette. The relevant Gazette, being Legal Notice No 152 of 2010, was published on 17th September 2010. The 2010 rules therefore came into force on 16th December 2010. The letter bespeaking the ruling and proceedings was written and received at the High Court Registry on 15th December 2010, the last day of the old rules. We accordingly agree with the respondents that as far as the application before us is concerned, the old rules are the applicable rules.

Rule 81 of those rules provided as follows:

*"**81(1) Subject to the provisions of rule 112, 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.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent."

The purport of the rule is simply that an appeal has to be filed within 60 days of the filing of the notice of appeal. However, where the appellant has within 30 days of the decision sought to be appealed against applied in writing for copies of the proceedings and ***sent*** a copy of that application to the opposite number, the sixty days for filing the appeal would exclude the period certified by the registrar as having been necessary for the preparation and delivery to the appellant of the proceedings.

Rule 81 of the old rules became ***rule 82*** of the 2010 rules, the only difference being in ***rule 82(2)*** where, instead of the requirement of ***sending*** the application for proceedings to the opposite number, the rules now require ***service***. This change was apparently informed by the possibility of abuse and disputations like we now have before us, which was noted and articulated by

this Court in ***ALI AHMED NAJI V LUTHERAN WORLD FEDERATION, CA NO 18 OF 2003***. Be that as it may, ***Rule 17 (5)*** of the old rules provided that where the rules required a document to be sent to any person, it could be sent by hand or by registered post. It did not require a court process server to send the letter by hand; it could be done by any person.

In this case, there is disagreement between the appellants and the respondents whether the letter in question was sent to the respondents' advocates. It is literally the word of one party against that of another. As this Court did in ***ALI AHMED NAJI V LUTHERAN WORLD FEDERATION*** (supra), we shall give the respondents the benefit of doubt, not least for the purposes of affording them an opportunity to exercise their right of appeal and to give effect to the overriding objective, which requires this Court to facilitate the just, expeditious, proportionate and affordable resolution of appeals.

In ***E. MURIU KAMAU & ANOTHER V. NATIONAL BANK OF KENYA LTD. (2009) EKLR*** stated as follows on the overriding objective:

"The courts including this Court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principal aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing."

Ultimately we are not persuaded to strike out the appellants' appeal.

Accordingly, the motion dated 6th June 2011 is hereby dismissed. However we direct that costs of the

motion shall abide the outcome of the appeal. It is so ordered.

Dated and delivered at Nairobi this 8th day of May, 2015.

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR