



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CIVIL APPEAL NO. 33 OF 2014**

**(CORAM: MARAGA, MUSINGA & GATEMBU, J.J.A)**

**BETWEEN**

**GRACE JELEI BOIT ..... APPELLANT**

**AND**

**SAMMY SOME KOSGEI..... RESPONDENT**

*(An application to strike out the appeal lodged in the sub-registry at Eldoret on the 28<sup>th</sup> day of February, 2014 and served upon the respondent on the 10<sup>th</sup> day of March, 2014 from the judgment and decree of the environment and land court of Kenya at Eldoret (Hon. S. Munyao, J.) dated and delivered on 6<sup>th</sup> day of February, 2013*

**AND**

*(An application for leave to file and serve Record of appeal out of time from the Judgment and decree of the Environment and Land Court of Kenya at Eldoret (Hon. S. Munyao, J) dated and delivered on 6<sup>th</sup> day of February, 2013*

**in**

**E & L Case No. 411 'B' of 2012**

**Formerly HCCC No. 20 of 2008)**

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**RULING OF THE COURT**

1. This ruling relates to two applications. The first application is by the respondent in the appeal, Sammy Some Kosgei. It is dated 28<sup>th</sup> March 2014 and was presented to Court on the same date. It seeks an order, essentially under Rule 82 of the Rules of the Court, to have the appellant’s appeal struck out on the grounds that the appeal was lodged out of time. In response to that application the appellant, Grace Jelel Boit, swore a replying affidavit on 27<sup>th</sup> December 2014.

2. The second application is by the appellant. It is dated 20<sup>th</sup> June 2014 and was presented to Court on 9<sup>th</sup> July 2014. It is made under rule 4 of the Rules of the Court. It is for enlargement of time for the appeal to be admitted out of time. In response to that application the respondent, Sammy Some Kosgei, swore a replying affidavit on 31<sup>st</sup> August 2014.
3. When the second application (a single judge application under rule 53 of the Rules of this Court) was scheduled for hearing before A. Visram JA, both parties agreed that the two applications should be heard together by a bench of three judges. We accordingly heard the two applications together on 26<sup>th</sup> May 2015.

### **Background**

4. On 14<sup>th</sup> March 2008, the respondent commenced a suit in the High Court at Eldoret against the appellant, the administrator of the estate of Abraham Kimiti Boit, deceased. The respondent sought a declaration that he is the owner of two portions of land measuring 0.0632 and 0.0460 hectares of Title Number Eldoret Municipality Block 4/97 designated as Title Numbers Eldoret Municipality Block 4/342 and 343 respectively. He also sought an order for specific performance to compel the appellant to execute all necessary documents in order to vest the two portions of land on him. The basis of that suit was that he purchased the two portions of land from the deceased during his lifetime and that the appellant had, as administrator of the estate of the deceased, declined to recognize the respondent's interest in those portions.
5. In her statement of defence filed on 31<sup>st</sup> March 2008, the appellant denied that the deceased had sold the two portions of land to the respondent; that the two portions of land did not in fact exist as subdivision of Title Number Eldoret Municipality Block 4/97 was never completed; that the respondent forged the deceased's signature on the alleged agreement for sale and misrepresented to the deceased that he was capable of carrying out the subdivision of Title Number Eldoret Municipality Block 4/97.
6. After hearing the parties, the High Court (Munyao Sila, J) in a judgment delivered on 6<sup>th</sup> February 2013 decreed that the respondent is the owner of the two portions of land designated as Title Numbers Eldoret Municipality Block 4/342 and 343 respectively and directed the appellant to execute all necessary documents to vest the ownership of the same to the respondent.
7. Aggrieved by that decision, the appellant filed and served a notice of appeal on 13<sup>th</sup> February 2013. On the same date the appellant applied to the Deputy Registrar of the Environment and Land Court to be supplied with typed copies of the proceedings. That letter was copied to the advocates for the respondent. Subsequently, the appellant filed the record of appeal in this Court on 28<sup>th</sup> February 2014.
8. The respondent contends that the record of appeal was filed out of time without leave and should be struck out. The appellant on the other hand seeks enlargement of time for the appeal to be regarded as having been duly filed.

### **Submissions by counsel**

9. At the hearing of the appeal learned counsel for the respondent Mr. I. J. Onyinkwa referred us to the application dated 28<sup>th</sup> March 2014 and to the affidavits relating to the same and submitted that the appeal is out of time by over eleven months since the notice of appeal was filed; that the delay is inordinate; that the appellant has admitted that the record of appeal was filed out of time without leave; that there is therefore no competent appeal before the Court and the same should be struck out. With that Mr. Onyinkwa urged us to allow the application dated 28<sup>th</sup> March 2014.
10. Adverting to the appellant's application for extension of time, Mr. Onyinkwa submitted that there

is in fact no prayer for extension of time; that the appellant's application was a reaction to the respondent's application to strike out the appeal and the same was presented three months after the respondent's application to strike out the appeal and the aim is to circumvent the striking out application and to validate the appeal; that the appellant is also guilty of inordinate delay in making the application for enlargement of time; that the appeal cannot be saved by invoking the overriding objectives of the court or by flashing a claim to substantive justice as the competence or otherwise of the appeal is not a technical matter but a fundamental issue of jurisdiction.

11. Learned counsel for the appellant, Mr. P. Murgor, opened his address by stating that the substantive dispute between the parties involves land; that the appellant who is a widow of advanced years produced evidence before the trial court demonstrating that the alleged transaction between the respondent and her late husband was tainted by fraud and there are therefore serious questions for consideration in the appeal; that Article 159 of the Constitution bars technical justice and parties should be afforded an opportunity to be heard on merits; that the reasons for the delay in lodging the record of appeal are well explained in the affidavits of the appellant; that critical is the failure on part of court registry of the High Court to notify the appellant's advocates that the typed proceedings were ready for collection and that as soon as the appellant was notified, the record of appeal was filed without delay. Counsel concluded his address by submitting that any mistakes on the part of counsel should not be visited upon the parties. With that Mr. Murgor urged us to dismiss the respondent's application and instead allow the appellant's application.

12. In his brief reply, Mr. Onyinkwa contested the assertion that the court registry is to blame for failing to notify the appellant that the typed proceedings were ready for collection. He drew our attention to the paragraph 9 of the respondent's affidavit sworn 28<sup>th</sup> March, 2014 where the respondent deposes that he witnessed the appellant collecting the proceedings from the registry on 8<sup>th</sup> March 2013 and the delay in instituting the appeal thereafter cannot be blamed on the court. Indeed, counsel argued, there is evidence that the appellant attempted to manipulate the certificate of delay but the registrar of the High Court maintained that the proceedings were ready by March, 2013.

### **Disposition**

13. We have considered applications, the affidavits and the submissions by learned counsel for the parties. The only question that we have to consider is whether the appellant's appeal is competent or whether it is out of time. As already noted, the judgment of the High Court that is the subject of this appeal was delivered on 6<sup>th</sup> February 2013. The appellant filed and served a notice of appeal on 13<sup>th</sup> February 2013. That was undoubtedly within the time provided for filing and serving a notice of appeal under rule 75(1) and (2) of the Court of Appeal Rules.

14. Under rule 82(1) of the Rules of the Court, the appellant was required to institute the appeal by lodging the documents therein spelt out (the record of appeal) "within sixty days of the date when the notice of appeal was lodged."

The proviso to rule 82(1) of the Rules provides that:

***"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."***  
[emphasis added]

Rule 82(2) of the Rules of the Court provide that:

***"(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 served upon the respondent.”***

15. It is common ground that by a letter dated 13<sup>th</sup> February, 2013 addressed to the Deputy Registrar of the High Court and copied to the advocates for the respondent, the appellant applied to be supplied with typed copies of the proceedings for purposes of an appeal. Consequently, by reason of rule 82(1) of the Rules, the sixty-day time limit for instituting the appeal was suspended until such time as a copy of the proceedings would have been ‘prepared and delivered’ to the appellant. [See for instance the decision of this Court in **Felister Wakonyo Wamahiu vs. Joseph Wachira Mwangi [2014] eKLR.**]
16. The question therefore becomes: when was the typed copy of the proceedings delivered to the appellant? According to the respondent the typed copy of proceedings was ready and was collected by the appellant on 30<sup>th</sup> March 2013. Even after that date, the respondent deposes that the applicant had the opportunity on the numerous occasions when the matter came up before the High Court, to collect the proceedings and lodge the appeal if she was minded to do so. Her failure to do so, he says, is evidence of her indolence.
17. The appellant on the other hand says in her affidavit sworn on 20/6/2014, that having applied for the typed proceedings in a timely fashion, she awaited “*a notification from the deputy registrar that the proceedings were ready*” and that she became “*aware that the typed proceedings were ready for collection on 27<sup>th</sup> January 2014 when she received a letter from the Deputy Registrar addressed to Onyinkwa and Company Advocates and copied to her stating that the proceedings are yet to be supplied to her as she had not paid the typing charges.*”
18. There is a certificate of delay issued by the Deputy Registrar of the High Court on 19<sup>th</sup> February 2014 certifying that the period taken to prepare the typed proceedings was from 13<sup>th</sup> February 2013 to 8<sup>th</sup> March 2013 and that the appellant’s advocates were notified that the typed proceedings were ready by a letter dated 27<sup>th</sup> January 2014. There is also evidence consisting of a court receipt showing that the appellant’s advocates paid and collected the typed proceedings on 30<sup>th</sup> January 2014. Against the respondent’s sworn statement that he was present and witnessed the appellant collect the typed proceedings from the court registry on 8<sup>th</sup> March 2013 is the certificate of delay and the Deputy Registrar’s letter dated 27<sup>th</sup> January 2014 stating that “*the proceedings are yet to be supplied to Kalya & Co Advocates who are yet to pay outstanding typing charges...*” that give credence to the claim by the appellant that the court did not notify the appellant that the proceedings were ready for collection until January 2014.
19. Based on the certificate of delay therefore and having regard to rule 82(1) of the Rules of the Court, the sixty days period did not run between 13<sup>th</sup> February 2013 (when notice of appeal was filed and served and when a request for typed copies of the proceedings was made) and 27<sup>th</sup> January 2014 when the appellant was notified that the typed proceedings were ready for collection. The record of appeal having been filed on 28<sup>th</sup> February 2014 was therefore filed within sixty days from 27<sup>th</sup> January 2014 and is accordingly competently and properly before the Court.
20. In view of that conclusion that we have reached, we need not consider the other grounds canvassed before us, neither do we need to review the authorities cited before us regarding the principles governing the exercise of discretion to either extend time or strike out an appeal.
21. The result is that the application by the respondent dated 28<sup>th</sup> March 2014 fails and is dismissed. The appellant’s application dated 20<sup>th</sup> June 2014 was unnecessary and is equally dismissed. Each party shall bear its own costs with respect to each application.

**Dated at Eldoret this 24<sup>th</sup> day of June, 2015**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

I certify that this is a true

Copy of the original.

**DEPUTY REGISTRAR**