



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, SICHALE & OTIENO-ODEK, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 22 OF 2014

BETWEEN

HON. ATTORNEY GENERAL..... APPELLANT / RESPONDENT

AND

JAMES HOSEA GITAU MWARA RESPONDENT/APPLICANT

(An application to strike out an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Hon. Justice H.P.G. Waweru) delivered on 7th December 2012

in

H.C.C.C No. 2892 of 1993)

RULING OF THE COURT

1. Before us is an application brought by **James Hosea Gitau Mwaru** pursuant to **Rule 84** of the **Court of Appeal Rules** (the Rules) seeking *inter alia* an order to strike out the appellant's appeal dated 14th February 2014 on the ground that it is incompetent and fatally defective; that the appellant be condemned to pay the costs of appeal.
2. The grounds in support of the application are that the Memorandum of Appeal as filed does not contain any Order(s) which the appellant proposes to ask this Court to make contrary to **Rule 86 (1)** of the Rules of this Court; that a mandatory certified copy of the Order appealed against has not been included in the Record of Appeal contrary to **Rule 87 (i) (h)** of the Rules of this Court; that the Record of Appeal was filed out of time beyond the mandatory sixty days provided for under **Rules 82** and **83** of the Rules of this Court; that the Original Notice of Appeal was filed out of time; that no letter requesting for proceedings was served on the applicant within the mandatory seven (7) days as provided under the Rules of this Court; that the appeal itself has no merit, is incompetent and fatally defective for non-compliance with the mandatory provisions of the Rules of this Court.
3. The Respondent, the Hon Attorney General, did not file any affidavit in reply to the instant application. At the hearing of the application, learned counsel **Mrs. Gichuhi Ngari** appeared for the applicant while Chief State Counsel **Ms. Stella Munyi** appeared for the Attorney

General.

4. Counsel for the applicant reiterated the grounds in support of the application urging this Court to find that the appeal is incompetent and aims at clogging the wheels of justice and to deny the respondent the fruits of his judgment. It was emphasized that the respondent had violated mandatory provisions of **Rules 82 and 83** of this Court; that the Notice of Appeal and Record of Appeal were filed out of time and no leave to extend time was sought or obtained from this Court; that the Record of Appeal does not contain the Order which is being appealed against and the relief sought from this Court is not stated. Counsel submitted that since the filed Notice and Record of Appeal violate the mandatory rules of this Court, the appeal is incompetent, defective and should be struck out. Counsel cited the cases of **Floris Pierro -v- Giancarlo Falasconi - Mombasa Court of Appeal Civil Appeal No. 145 of 2012** and **Ramji Devji Vekaria -v- Joseph Oyula - Eldoret Court of Appeal Civil Appeal No. 154 of 2010** in support of the submissions.

5. The Chief State Counsel in opposing the application submitted that both the Notice and Record of Appeal were filed within time. It was submitted that the Ruling appealed against was delivered on 7th December 2012 and the Notice of Appeal was filed on 9th January 2013; that under **Rule 3 (e)** of the Rules of this Court, the period during Christmas vacation should not be reckoned in the computation of time; that in the present case, the Ruling having been delivered on 7th December 2012, the Christmas vacation period should be excluded from computation and it was not necessary to seek the leave of court to extend time for filing the Notice of Appeal. In response to this submission, counsel for the applicant stated that the respondent had 14 days from the date of the Ruling within which to file the Notice of Appeal; that the Ruling having been delivered on 7th December 2012, the 14 days lapsed on 21st December 2012 before the Christmas vacation started.

6. Counsel for the respondent further submitted that if the Record of Appeal as filed is incomplete, the applicant has a shared responsibility to ensure that the record is complete by filing a Supplementary Record of Appeal; that the applicant was and is at liberty apply to file a Supplementary Record of Appeal; it was further submitted that **Article 159 (2) (d)** of the Constitution enjoins this Court to ensure that justice is administered without undue regard to technicalities.

7. We have considered the application and submissions by parties. The instant application has been brought pursuant to **Rule 84** which provides:-

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not be taken within the prescribed time.

Provided that an application to strike out a Notice of Appeal or an 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.”

(Emphasis ours).

8. In this case, the applicant contends that the Notice of Appeal filed on 9th January 2013 was filed out of time. The applicant further contends that the Record of Appeal was filed out of time. Based on the proviso to **Rule 84** of the Rules, the application to strike out the Notice and Record of Appeal can only be entertained if such an application is lodged within 30 days of service of the Notice or Record of Appeal as the case may be. The affidavit in support of the instant application does not expressly state when the Notice of Appeal was served upon the applicant. However, annexure JHG3 to the Supporting Affidavit has a stamp showing that the Notice was duly received at the applicant’s counsel’s chambers on 11th January 2013. Under the proviso in **Rule 84**, the applicant could only bring the present application within 30 days from 11th January 2013.

The present application to strike out the appeal was filed on 20th March 2014 which is more than one year since service of the Notice of Appeal.

9. The applicant has further urged that the Record of Appeal herein was filed out of time. The Record of Appeal was filed on 20th February 2014. We are cognizant and minded of the proviso in **Rule 84** which states *that an application to strike out a Notice of Appeal or an 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.*

10. As already stated, the present application was filed on 20th March 2014. The affidavit in support of the instant application is silent as to when the Record of Appeal was served on the applicant. Being satisfied that this application has been brought more that 30 days from the date of service of the Notice of Appeal and with no indication as to when the Record of Appeal was served, we are of the considered view that the instant application offends the proviso to **Rule 84**. We take note of **Rule 104 (b)** which stipulates that a respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under **Rule 84**. The upshot of the foregoing is that applicant's Notice of Motion dated 18th March 2014 offends the proviso to **Rule 84** and is hereby dismissed. There is no order as to costs.

Dated and delivered at Nairobi this 19th day of June, 2015

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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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