



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWERA & SICHALE, J.J.A)

CIVIL APPLICATION NO. NAI. 5 OF 2015 (UR. 5/2015)

BETWEEN

FRANCIS MWANGI NJUGUNA 1ST APPLICANT

MARGARET WANGECHI NJUGUNA 2ND APPLICANT

AND

ZACHARIA SOMI NGANGA RESPONDENT

(An application to strike out the notice of appeal dated 29th October, 2009 in an intended appeal against the decision of the High Court of Kenya at Nairobi (Joyce Khaminwa, J) dated 19th October, 2009

in

H. C. C. C. No. 82 of 2009)

RULING OF THE COURT

1. Before us is an application brought pursuant to **Rules 83** and **84** of the Court of Appeal Rules (the Rules) and **sections 3A** and **3B** of the Appellate Jurisdiction Act. The applicants seek the following orders:-

- a. *That the notice of appeal filed 29th October, 2009 be struck out.*
- b. *That the respondents be deemed to have withdrawn their notice of appeal dated 29th October, 2009.*

The ground in support of the application is that the respondent has taken no steps to file the record of appeal since 29th October, 2009 when the notice of appeal was filed.

2. The genesis of this application is the suit filed by the applicants against the respondents in the High Court, being HCCC No. 82 of 2009, to obtain possession of the suit property being

Nairobi/Block/72/1026 which the applicants had purchased in a public auction, and which was subsequently registered in their names. The respondent, who was the previous owner of the suit property, had filed a suit (No. 62 of 2004) in an attempt to stop the transfer of the suit property to the applicants, but had lost the same. Accordingly, the learned High Court Judge (Khaminwa, J) allowed the applicant's application to evict the respondent from the suit property. The respondent has filed a notice of appeal against that decision.

3. It is that notice of appeal that the applicants want struck out on the ground that the respondent has failed to take any further steps to file the record of appeal, even though the proceedings have been ready since 21st January, 2014.
4. At the hearing of this application, Mr. Njenga appeared for the applicants, while Mr. Adida appeared for the respondent. Mr. Njenga reiterated the grounds of the application and urged us to strike out the notice of appeal.
5. We have anxiously considered the application, submissions by counsel and the law. **Rule 82 (1)** of the Rules provides in part:-

“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-

- 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 such copy.”

6. The respondent herein under **Rule 82** of the Rules, was required to lodge the appeal within 60 days of filing the notice of appeal, or within 60 days from the date the proceedings were ready, namely 21st January, 2014. The respondent has not done so, and in a replying affidavit sworn on 3rd July, 2015 the respondent explains that his advocate never in fact received the letter from the Deputy Registrar informing them that the proceedings were ready for collection. Mr. Njenga, learned counsel for the applicants, also admits that he received the Deputy Registrar's letter dated 21st January, 2014 after five months. This is clearly unusual and we are minded to accept the respondent's explanation that his advocate may never have received the aforesaid letter from the Deputy Registrar.
7. This Court has power under both **Article 159** of the Constitution and **sections 3A** and **3B** of the Appellate Jurisdiction Act to bear in mind the overriding objective of civil litigation, namely to facilitate the just, expeditious, proportionate and affordable resolution of disputes and to obviate over reliance of technicalities of procedures. Given the explanation provided by the respondent for his failure to file the record of appeal, we are of the view that it would be too drastic a step to strike out his intended appeal at this time.
8. Accordingly, we disallow the application to strike out the notice of appeal, but we order that the respondent take steps, within the next **14 days**, to file and serve the record of appeal. We award the

costs of this application to the applicants.

Dated and delivered at Nairobi this 31st day of July, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. W. MWERA

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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