



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & KANTAI, JJ.A)

CIVIL APPLICATION NO. 324 OF 2014

BETWEEN

JULIE MUKAMI KANYOKO.....1ST APPLICANT

SIMON NGETA KANYOKO.....2ND APPLICANT

PERPETUA WANJIRU KANYOKO....3RD APPLICANT

AND

SAMUEL MUKUA KAMERE.....1ST RESPONDENT

ANNE WAMBUI KAMERE.....2ND RESPONDENT

(Application to strike out a Notice of Appeal dated 26th November 2014 issued pursuant to leave of this court granted on 25th November 2014 by the Honourable M. Warsame Judge of Appeal arising from the Respondents' intention to file an appeal from the ruling of the High Court of Kenya at Nairobi (Honourable Justice J. M. Mutungi) dated 29th November 2010)

in

ELC Civil Suit NO. 229 OF 2011)

RULING OF THE COURT

1. This is an application by **JULIE MUKAMI, SIMON NGETA KANYOKO and PERPETUA WANJIRU**, the applicants, under rules 84, 42(1) and 43(1) of the Rules of this Court for striking out the notice of appeal dated 26th November, 2014. The application is based on the grounds on the face of it and supported by the affidavit of **Julie Mukami Kanyoko**, on her own behalf and with authority from the other applicants.

2. The facts as they relate to this application are that a ruling was delivered by the Honourable Justice Mutungi on 14th July, 2014 in which the trial judge denied the respondents' application to review the trial judge's earlier ruling denying the respondents leave to defend the suit. An interlocutory judgment had been entered against the respondents mainly on account of the respondents' failure to adhere to laid down

procedures and timelines and the dilatory conduct of the respondent at the trial. The matter was thus expected to proceed for formal proof hearing before the trial court. The respondents, having exceeded the time to appeal to this court filed an application on 23rd October, 2014 to enlarge time within which to file a notice of appeal. The application was allowed by Warsame, J on 25th November 2014 granting the respondents leave to file and serve a notice of appeal within seven days from the date of the learned judge's order. The respondents filed and served the notice of appeal on 5th December 2014, about five days out of the time prescribed justice Warsame's order of 25th November 2014.

3. The applicants now seek to strike out the said notice of appeal. It is the applicants' contention that the orders by this Court made Warsame, J were made without the benefit of considering the merits of the respondents' application and should be struck out as offending the provisions of **rule 75** of this Court's rules. In addition, the applicants contend that the respondents have neither applied for copies of proceedings in order to prepare a record of appeal nor sought orders of this Court to enlarge time within which to make the said application in terms of **rule 82** of this Court's rules. The applicants through the supporting affidavit by **Julie Mukami Kanyoko** have sought to bring to our attention the fact that the respondents have not followed the requisite steps within the prescribed timelines and that the respondents' conduct has always been dilatory and characterized by delay. Furthermore, the applicants argue that the respondents do not have an arguable appeal and they have an opportunity to ventilate their defence through cross-examination at the formal proof hearing at the trial court.

4. At the hearing before us, **Mr. A.G.N. Kamau** learned counsel appearing for the applicants reiterated the applicants' case on the failure by the respondents to adhere to the procedural steps and timelines and informed us that he was never served by the respondents with the application for leave to extend time for the filing of an appeal. Counsel submitted that he was only served with the hearing notice by the Court and that the learned judge was therefore not properly apprised of the situation in granting his orders, the applicants not having had an opportunity to articulate their position in opposing the respondents' application on leave to extend time within which to file and serve a notice of appeal. Learned counsel indicated that even if we were inclined to allow the notice of appeal to remain in place, the record of appeal is yet to be filed and it is hopelessly out of time. Finally, learned counsel added that the subject matter of the suit is land and the applicants have continued to suffer prejudice by the pendency of this appeal, they having substantially paid the purchase price. The applicants are willing to pay the balance as soon as the respondents are ready to accept the payment. We were referred to the authority of **Council, Jomo Kenyatta University of Agriculture and Technology v Joseph Mutuura Mbeera & 3 others [2015]eKLR** in which an application for extension of time to file a Notice of Appeal was rejected on account of mistake by counsel to adhere to this Court's rules. Counsel also relies on **Samuel Njirani Ngabia v Michael Thungu Wanyoike & 2 others [2009] eKLR** where this Court refused to exercise its jurisdiction to grant leave for an applicant to file Notice of Appeal and Record of Appeal out of time. The applicant herein had failed to adduce grounds for failing to annex the ruling in addition to the delay not being explained. We were also referred to **Stanley Maina Mwangi v Sabina Wanjiru Mwangi [2009] eKLR** where the court explained the principles of exercise of judicial discretion whilst appreciating the effort taken by the applicant in allowing the application for extension of time to file an appeal. The applicants also rely on **Kenya Tea Development Authority v Roy Transmotors Limited [2009] eKLR** where the learned judge refused to exercise discretion in favour of the applicant who had sought leave to extend time for filing of appeal. Learned counsel also pointed out that the application was unopposed as no replying affidavit had been filed. He urged us to allow this application.

5. **Mr. P.M Benchi** holding brief for **Mr. Gachanja**, learned counsel for the respondents conceded that they were served with the current application in December 2014 but were unable to file a reply owing to the misplacement of their office file and counsel had to get their clients' file to know the position. He submitted that the respondent's application for extension of time had been heard and determined by learned Justice Warsame when the applicants' advocates failed to attend Court. Learned counsel further submitted that the notice of appeal was filed within time as ordered but conceded to serving the same upon the applicants four days late.

6. From our perusal of the Notice of Motion and the grounds on the face of the application, affidavit in support thereof and the arguments adduced before us by the respective counsel, the main issue for our

determination is whether or not a case is made out to strike out the notice of appeal. Without overemphasizing, it is well settled that we are being called upon to exercise our unfettered discretionary jurisdiction. Like all such discretion, it must be exercised judiciously, not capriciously. Certain principles have taken root as the guiding principles in our exercise of discretion. These are that, for an applicant to benefit from the rules, he must demonstrate the period of the delay and give explanation and/or reasons for the delay and whether or not the appeal or the intended appeal is arguable but without going into the merits. (**Joseph Weteri Igweta v Mukira M'Ethare & Another CA No. NAI 8 of 2000**). These principles are by no means exhaustive but it is imperative to add that we have to take into consideration all relevant circumstances.

7. The matters raised by the application are largely factual. Leave to file the notice of appeal out of time and serve the same within seven days was granted to the respondents Warsame, J on 26th November, 2014. The applicants did not attend Court on the hearing of the application to extend time. The applicants' advocates concede to having been served with the hearing notice though they insist that they were never served with the application. Despite voicing their concerns vide their letters to the Deputy Registrar of the court and the respondents' advocates expressing their not having been served with the application, there was still no appearance before Warsame, J. The applicants' advocates did not address us on or explain their non attendance when they were aware of the proceedings before Warsame, J. We are convinced that the applicants' advocates still had an avenue to address their concerns before the learned judge had they attended. By failing to attend the hearing of the application before Wasame, J, we are inclined to agree with Wasame, J in the exercise of his discretion in reasonably inferring that there was no objection on the part of the applicants to the application for extension of time within which to file an appeal.

8. Be that as it may, we have also had the benefit of information and representation from the applicants which could have impacted on the exercise of discretion by Wasame, J had that been brought to his attention. Since we are also being called upon to exercise our discretion, we find it prudent and in the interest of justice to consider the overall circumstances and conduct of the parties since the inception of matter before the High Court. We are mindful that we are not considering the appeal on merit and would therefore limit our comments on merits to the extent we consider necessary in so far as there has been compliance with the rules of this court. We note that no replying affidavit was filed by the respondents and only submissions were made from the bar by the respondents' advocates in response to the application.

9. It is evident that there has been no compliance with the rules of this Court on the part of the respondent. Despite indulgence being extended to the respondents to file and serve the notice of appeal, the respondents concede to effecting late service upon the applicants of the notice of appeal. From our perusal of the notice of appeal, we note that the same was filed and served on 25th November, 2014. We find the arguments by counsel for the respondents untenable for him, when on the one hand he admits to filing the notice of appeal within time and on the other hand serving it upon the applicants' advocates four days later whilst the two actions occurred on the same date. From the record before us, it is also apparent that the respondent did not apply for a certified copy of proceedings within the period prescribed under the proviso to **rule 84(1)** or at all. Furthermore, no memorandum of appeal is in place to enable us consider the arguability of the respondents intended appeal. Under **rule 84(2)** an appellant is not entitled to rely on the proviso to sub rule (1) unless his application for such copy was in writing and copy served upon the respondent. In the absence of the record of appeal therefore we agree with the applicants' counsel that the appeal cannot lie especially in the absence of any application or prayer by the respondents requiring us to exercise our discretion and extend time accordingly. The respondents did not address themselves to these omissions or their intention to remedy the situation. It is evident that there has been a persistent failure to comply with court rules by the respondent despite reprieve from the courts.

10. We have expectantly waited to hear the explanation from the respondents on their conduct and failure to observe this court's rules. No explanation was given by the respondents for their failure to effect service on their opponents of their application to extend time within which to file a notice of appeal. We can only hope that the respondents were not trying to pull a rag from under the applicant's carpet. The only explanation given by the respondents in these proceedings is to the effect that the respondents' advocates misplaced their file and would therefore not respond until they obtained their clients' file. We

affirm that the period between service of the current application upon the respondents in December 2014 and July 2015 when the application came up for hearing would be more than sufficient to, not only trace the respective files and information but also file a response. We also bear it in our minds that the advocates on record for the respondents in this Court are the same since inception of the dispute before the High Court. We are not convinced by the explanation as has been proffered on behalf of the respondent and abhor the casual approach with which the respondents' case has been articulated. As the Privy Council stated in **Ratnam v Cunarasamy**[1964] 3 All ER 933: 8 ***“the rules of court must prima facie be obeyed . . .if the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”*** We can do no more than agree and reiterate this position.

11. We take note that the matter is pending at the High Court, this being an interlocutory appeal. The applicants allude to the prejudice they continue suffering as a result of such pendency. We did not hear any representations from the respondents in this respect. We wish to point out that it is in the interests of justice that litigation needs to come to an end and every party afforded their day in court. The respondents are not precluded from ventilating their case before the trial court within the confines of the law. The pendency of this matter in this court is an unnecessary clog to the judicial system and there are no compelling reasons why the matter should not be allowed to proceed before the trial court.

12. We have a duty under **sections 3A and 3B** of the **Appellate Jurisdiction Act** to ensure that the factors considered are in consonant with the overriding objective of civil litigation, that is to say, the just, expeditious and affordable resolution of disputes before the court. Accordingly, we order that the Notice of Motion dated 19th December, 2014 is hereby allowed and the notice of appeal is hereby struck out with costs to the applicants.

Dated and delivered at Nairobi this 25th day of September, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR

