



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 311 OF 2014

CORAM: GITHINJI, J. MOHAMMED & KANTAI, JJ.A.

BETWEEN

GEORGE MWAI MBURU .....APPELLANT/RESPONDENT

AND

MARY WAMAITHA KAITANY.....1ST RESPONDENT/1ST APPLICANT

NAIROBI CITY COUNCIL .....2ND RESPONDENT/2ND APPLICANT

(Being an application to strike out the notice & record of appeal from the judgment & decree of the High Court of Kenya at Nairobi (Waweru, J) dated 9th October, 2012

in

HCCS NO. 687 OF 2002)

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RULING OF THE COURT

## Background

1. Before us is a Notice of Motion dated 26<sup>th</sup> November, 2014 brought pursuant to **Rules 82 & 84 of the Court of Appeal Rules (the Rules)**. The

applicants seek the following orders:

- i. *The appeal dated 23<sup>rd</sup> October, 2014 and filed on the 7<sup>th</sup> November, 2014 be struck out;*
- ii. *The appellant be condemned to bear the costs of this application.*

The grounds upon which the applicants rely on in support of their application are that the respondent filed his notice of appeal on 10<sup>th</sup> October, 2012 and later on the same date, through his advocates made a request to the Deputy Registrar to be furnished with copies of the proceedings and a certified copy of the judgment delivered on 9<sup>th</sup> October, 2012; that the Deputy Registrar of the High Court through a letter dated 24<sup>th</sup> July, 2013 informed the respondent's advocates that the copies of the proceedings and the certified copy of the judgment were ready for collection and that the respondent failed to file his intended appeal within the time frame stipulated in law and no application to have the time extended or enlarged has been filed by him to date.

2. The genesis of this application is that the respondent, **GEORGE MWAI MBURU**, vide a re-amended

plaint dated 1<sup>st</sup> March, 2007 and filed on 2<sup>nd</sup> March, 2007 sought a declaration that he was entitled to ownership rights over plots B1 and B2 along Kombo Muniyiri Road, Nairobi (the suit property) by virtue of a letter of allotment issued to him by the 2<sup>nd</sup> applicant herein on 12<sup>th</sup> November, 2002; a declaration that the purported allotment of the suit property to one *Hezron K. Kipkosgei* on 12<sup>th</sup> May 1992 and to the 1<sup>st</sup> applicant on 27<sup>th</sup> October, 1992 were irregular, illegal, null and void; an order that the said allotments and the agreement for lease of 25<sup>th</sup> November, 1997 between the 1<sup>st</sup> and 2<sup>nd</sup> applicants be cancelled; an injunction restraining the demolition of the buildings and improvements on the suit property or interfering with his quiet enjoyment of the suit premises and costs of the suit.

The 1<sup>st</sup> applicant, **MARY WAMAITHA KAITANY**, filed a defence and a counterclaim. She averred that the suit property was not available for allocation to the respondent or any other party after 25<sup>th</sup> November, 1997 when she was formally granted leases over the suit property by the 2<sup>nd</sup> applicant therefore the purported allotment of the suit property to the respondent was null and void and could not invalidate the 1<sup>st</sup> applicant's allocation of the suit property as the same was not acquired fraudulently as alleged by the respondent.

3. The High Court vide a judgment dated 9<sup>th</sup> October 2012 dismissed the respondent's claim with costs to the applicants. The learned Judge found that the respondent had failed to prove his case on a balance of probabilities as he had failed to produce any documents proving the suit property was allocated to him; that the suit property belonged to the 1<sup>st</sup> applicant and that the lease with the applicant expired by effluxion of time and there was no renewal of the lease. The learned Judge allowed the 1<sup>st</sup> applicant's counter-claim for mesne profits and granted the 1<sup>st</sup> applicant vacant possession of the suit property.

4. Dissatisfied with that decision, the respondent lodged a notice of appeal on 10<sup>th</sup> October, 2012. Thereafter, pursuant to an application dated 25<sup>th</sup> October, 2012 the High Court, (Waweru, J) vide a ruling dated 3<sup>rd</sup> May 2013 issued orders of stay of execution of the judgment dated 9<sup>th</sup> October 2012 and decree thereof on condition that the respondent does pay to the 1<sup>st</sup> applicant within sixty (60) days all the mesne profits decreed to her and so far accrued and thereafter to pay such mesne profits by the 10<sup>th</sup> of each succeeding month pending the hearing and determination of the intended appeal in default of which the stay would lapse.

### **Submissions by counsel**

5. At the hearing before us, learned counsel Miss S. I. Okumu appeared for the 1<sup>st</sup> applicant, learned counsel Mr J. Makumi appeared for the respondent while the 2<sup>nd</sup> applicant was represented by learned counsel Miss A.N Maina. Miss Okumu reiterated the grounds in support of the application to strike out the record of appeal. She submitted that the respondent's advocates were informed by a letter dated 24<sup>th</sup> July 2013 that the proceedings were ready; that the 60 days within which the respondents should have lodged the appeal, therefore started running from 24<sup>th</sup> July 2013 and the same expired on 24<sup>th</sup> September 2013; that the appeal was filed on 7<sup>th</sup> November, 2014 which was 405 days outside time; that there has been no application for extension of time to file the record of appeal out of time; **rule 88** of the rules has not been complied with by the respondent. Counsel submitted that the respondent ought to have filed documents in compliance with **rule 87** and taken advantage of **rule 88** to file any omitted documents.

6. Mr Makumi opposed the application. He relied on the replying affidavit sworn by the respondent. He submitted that it was not in issue that the Certificate of Delay was issued on 11<sup>th</sup> September, 2014 and that a certified copy of the decree was issued on the same date; that only the Registrar can issue a certificate of delay; that there is no time line for issuance of certificate of delay; that under the ambit of **rule 85(1)** of the rules, a decree must be certified; that the present application is premised under **rule 84** of the rules therefore the same should have been filed by 24<sup>th</sup> October, 2013; that if the respondent is 405 days late then the applicants are 375 days late in filing the present application; that this is a land matter and courts have ruled that land matters should not be dealt with on technicalities; that the applicants are

enjoying mesne profits pursuant to the court's order; that orders of stay were granted by the High Court; that the issue of prejudice could not be argued as the applicants were being paid mesne profits every month.

7. Miss Maina on the other hand did not oppose the application and associated herself with the submissions of Miss Okumu. She prayed that the application be allowed.

8. Miss Okumu in reply stated that their application was brought within the proviso to **rule 84** as they were served with the record of appeal on 10<sup>th</sup>

November 2014, the application is dated 26<sup>th</sup> November, 2014 and filed on 28<sup>th</sup>

November, 2014.

### **Determination**

9. We have considered the application, the grounds in support of the application, the affidavit, the submissions by learned counsel and the law.

**Rule 84 of the Rules** provides as follows:

***“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 been 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 thirty days from the date of service of the notice of appeal or record of appeal as the case may be.*** [Emphasis added]

10. Based on the foregoing provision, an applicant can seek an order striking out an appeal on the ground that firstly, either no appeal lies or secondly that an essential step in the proceedings has not been taken or thirdly that the essential step has not been taken within the prescribed time. See **LITHER PETER MUIA & ANOTHER V ZUENA NGANDO KABABU, (2015) eKLR.**

11. In this case the applicants are seeking to strike out the appeal on the

ground that the respondent failed to file his intended appeal within the time frame stipulated by law and without leave of the Court. The respondent on the other hand has asked us to strike out the present application for being incompetent as it was filed out of time as provided for under **rule 84 of the Rules**. The question for our determination is firstly, whether the present application is properly before us and secondly whether the appeal ought to be struck out for being incompetent before this Court. From a perusal of the record, it is clear that the record of appeal was filed on 7<sup>th</sup> November, 2014 and served on the applicants on 10<sup>th</sup> November, 2014.

12. **Rule 82** of the Rules provides that an appeal should be instituted within sixty days of the date of filing of the notice of appeal. This rule further provides that in computing the said time any period certified by the registrar as having been required to prepare the proceedings should be excluded. The impugned judgment was delivered on 9<sup>th</sup> October, 2012. The respondent lodged a notice of appeal on 10<sup>th</sup> October, 2012. The respondent obtained the Certificate of Delay and certified decree on 13<sup>th</sup> September, 2014.

13. On 11<sup>th</sup> September, 2014, the Deputy Registrar issued a Certificate of

Delay stating, inter alia:

“2. By a letter dated 24<sup>th</sup> July, 2013 the advocates for the applicant were notified by the Deputy Registrar that the copies were ready for collection upon payment of requisite court fees.

3. The court fees were paid on 24<sup>th</sup> July, 2013 and certified copies of proceedings and judgment were collected the same day.

4. The time taken by the court to prepare and supply certified copies of proceedings and judgment was from 10<sup>th</sup> October, 2012 to 24<sup>th</sup> July, 2013 that being 288 days.

5. This certificate of delay was prepared and ready for collection on 11<sup>th</sup> September, 2014.”

14. We note that on 24<sup>th</sup> July, 2013, counsel for the respondents were informed that certified copies of proceedings and the impugned judgment were ready for collection. Counsel for the respondents collected the same on the same date.

15. Pursuant with proviso to **rule 82** the respondent ought to have filed his appeal within 60 days of the receipt of proceedings. The proceedings were received on 24<sup>th</sup> July, 2013. The record of appeal ought to, therefore, have been filed on or about 25<sup>th</sup> September, 2013. The same was filed on 7<sup>th</sup> November, 2014.

16. Counsel for the respondent submitted that they were awaiting certified copies of the decree and certificate of delay to enable them file the record of appeal.

**Rule 88** provides:

**“Where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the deputy registrar on application.”**

17. In compliance with proviso to **rule 82**, the respondent ought to have filed the record of appeal within 60 days from the date of receipt of a copy of the proceedings. The present appeal was filed on 7<sup>th</sup> November, 2014, over one year after the receipt of the proceedings. Thereafter, pursuant to **rule 88**, the respondent should have filed a certified copy of decree and certificate of delay in a supplementary record of appeal. Time taken to obtain a certificate of delay is not excluded by proviso to **rule 82**.

18. We are satisfied that the record of appeal before us is incompetent as it was filed outside the stipulated 60 days period without leave of the Court.

In the case of **PATRICK KIRUJA KITHINJI V VICTOR MUGIRA MARETE, [2015] eKLR**, this Court stated:

**“In our view whether or not an appeal is filed on time goes to the jurisdiction of this court. It is trite that this court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the court.**

**To hold otherwise would upset the established clear principles of institution of an appeal in this court. Consequently, we find that an appeal filed out of time is not curable under Article 159.”**

19. Regarding the objection that the application to strike out the notice and record of appeal was filed outside the stipulated thirty day period, we find that the record of appeal was served on the applicants on 10<sup>th</sup> November, 2014. This application was filed on 28<sup>th</sup> November, 2014 in compliance with the proviso to **rule 84**. We are, therefore, satisfied that the application is competently before this Court.

20. The upshot of the foregoing is that we allow the application and hereby strike out the respondent’s

appeal – CA No. 311 of 2011 filed on 7<sup>th</sup> November, 2014. The applicants shall have costs of the application.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of October, 2015.**

**E. M. GITHINJI**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**