



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.)

CIVIL APPEAL (APPLICATION) NO. 3 OF 2013

BETWEEN

JEMIMAH CALEB OTIENO.....APPELLANT

AND

MARY ANG'AWA.....1ST RESPONDENT

CHARLES ANG'AWA.....2ND RESPONDENT

(Being an Application to strike out the Appeal from the Judgment and Decree of High Court of Kenya at Kisumu (Ali-Aroni, J.) dated 6th November, 2012

in

HCCC NO. 83 OF 2007

(As consolidated with H.C.C.C. No. 124 of 2012)

RULING OF THE COURT

1. The respondents have moved this Court by a Notice of Motion dated 18th June 2014 and filed on 19th June 2014 to strike out the appellant's appeal filed herein on 6th March 2013 as well as the Notice of Appeal lodged in the High Court on 20th November 2012. The application is said to be based on Rules 80 and 85 of the Court of Appeal Rules (the Rules) and is supported by an affidavit sworn by Hillary Mecheo Orina, an advocate, on behalf of the Respondents.
2. In opposition to the application, the appellant swore a replying affidavit on 19th December 2014. There is also a notice of preliminary objection filed by the advocates for the appellant contending that the application should itself be struck out as it was filed outside the time limited under Rule 84 of the Rules.
3. During the hearing of the application, Mr. Hillary Orina, learned counsel for the respondents, referred us to the application, the grounds in support and the supporting affidavit and urged that the appeal was lodged outside the sixty days period permitted under the Rules without leave; that the impugned judgment having been delivered on 6th November 2012, the appeal should have been instituted on or before 5th

January 2013; that the appellant's record of appeal does not contain a letter to the High Court requesting for proceedings of the High Court and neither does it contain a certificate of delay; and that the record of appeal was not served on the respondent until 6th June 2014. Counsel referred us to the decisions of this Court in **Julia Wanjiru 7 4 others vs. Jacinta Wairimu Njoroge [2013] eKLR** and **Kenya Ports Authority vs. Maison 425 [2014] eKLR** where the Court struck out appeals on account of failure to comply with the Rules.

4. Opposing the application, learned counsel for the appellant, Mr. G. O. Yogo, referred us to the replying affidavit. He submitted that the firm of L. G. Menezes Advocates represented the respondents in the High Court; that the appellant's record of appeal was served on that firm which then requested for 'postponement of service' to enable that firm obtain instructions; that the appellant was "*all along represented by one John Ongele Advocate, who has since died*" and that prior to his death he had by a letter dated 9th November 2012 applied for proceedings from the lower court; that by a letter dated 23rd November 2012 the appellant applied, in person, for the proceedings from the lower court and followed up on that; that the omission to include the letters bespeaking the proceedings in the record of appeal was inadvertent and that any missing documents can be brought on board through a supplementary record of appeal; and that as the record of appeal was served on the respondent's advocates in March 2013, the present application is out of time as it violates the proviso to Rule 84 which provides 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.***"

5. We have considered the application and the submissions by counsel. We address first, the question of service of the record of appeal. The respondents complained that the record of appeal was not served on them until 6th June 2014. There is evidence however that the record of appeal was served on her advocates in March 2013 who then requested, by letter dated 12th March 2013 that "*service be postponed*" to enable them seek instructions whilst at the same time asserting that "*we appreciate that our Mr. Menezes (S) is still on record.*" We think, in those circumstances, service of the record of appeal on L. G. Menezes Advocates on 12th March 2013 was within the seven days period provided for service under Rule 90 of the Rules as the record was lodged on 6th March 2013. We reject that complaint.

6. We turn next to the appellant's contention that the present application by the respondents to strike out the appeal was itself outside the prescribed time. This Court has stated before that the proviso to Rule 84 could not have been intended to apply to a situation, such as the present, where the contention is that the record of appeal was served out of time. In **Lither Peter Muia & Another vs. Zuena Ngando Kabibu [2015] eKLR** this Court stated, "***A party cannot be penalized for failing to do something in 30 days when that party has at least 60 days within which to perform such act.***"

7. Adverting now to the substance of the application, the judgment, the subject of the appeal sought to be struck out was delivered by the High Court of Kenya on 6th November 2012. By that judgment, the court restrained the appellant, Jemimah Caleb Otieno, from trespassing on a parcel of land known as title number North Gem/Marenyo/1021. The court also restrained the appellant or her kin et al from burying the remains of Caleb Willis Otieno Oyunga on that parcel of land.

8. Desiring to appeal against that decision to this Court, the appellant lodged a Notice of Appeal with the High Court on 20th November 2012. That was done in accordance with Rule 75(1) of the Rules and within the time period prescribed under Rule 75(2) of the Rules.

9. Under Rule 82 of the Rules, the appellant had sixty days from 20th November 2012 to institute the appeal by lodging the memorandum of appeal and the record of appeal, among other documents, with this Court. In computing the sixty-day period within which to lodge the appeal, the time certified by the Registrar of the High Court as having been required for the preparation and delivery of a copy of the proceedings in the High Court is excluded. The proviso to Rule 82 of the Rules provides:

“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.

(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.”

10. The appellant has demonstrated to us that on 9th November 2012, Ms. Ong’ele & Company Advocates wrote a letter to the Deputy Registrar, Kisumu, applying for the proceedings. We were informed from the bar that Mr. Ongele advocate subsequently passed on. That letter was, however, not copied to the advocates for the respondents. The appellant appears to have realized that there was an omission by her advocate to copy that letter to the respondents because by a letter dated 23rd November 2012, she took matters into her hands and wrote to the Deputy Registrar herself, with a copy to L. G. Menezes & Co Advocates, seeking copies of the proceedings. Although the copy of the letter dated 23rd November 2012 annexed to the appellant’s replying affidavit does not, on the face of it, have the court stamp, we have no reason to doubt her sworn statement that she did apply for the proceedings. The letter dated 9th November 2012, by Ms. Ong’ele & Company Advocates and the letter dated 23rd November 2012 by the applicant herself to the Registrar seeking copies of the proceedings were both within the thirty day window provided in the proviso to Rule 82 of the Rules.

11. As the respondents correctly point out however, the record of appeal does not contain a certificate of delay. Without the benefit of excluding the time that would have been required for preparation and delivery of the proceedings, the appellant had sixty days from the date when the notice of appeal was lodged to institute the appeal. Having regard to Rule 3(a) and 3(e) of the Rules of the Court on computation of time, the 20th November 2012 (the date on which the notice of appeal was lodged) and the period of Christmas vacation (the period between 21st December 2012 and 13th January 2013 both dates inclusive) are excluded when computing the sixty days period. Accordingly, the appeal should have been instituted by 12th February 2013, (and not 5th January, 2013 as Mr. Orina deposed in his affidavit) at the latest. It was not instituted until 6th March 2013. If the period that was required for preparation and delivery of proceedings is not taken into account, there is merit in the respondent’s complaint that the appeal was instituted late.

12. The appellant has however demonstrated to us that the benefit of extension of time by dint of the proviso to Rule 82 of the Rules accrued to her, except that she did not furnish a certificate of delay. In those circumstances, we are reluctant to strike out the appeal and decline to allow the respondents’ Notice of Motion dated 18th June 2014. The order that commends itself to us in those circumstances is to order the appellant to file, within thirty days from the date of delivery of this Ruling, a supplementary record of appeal containing a certificate of delay, failing which the appeal shall stand struck out with costs to the respondents.

13. As this application was precipitated by the appellant’s failure to include a certificate of delay in her record of appeal, the respondents shall in any event have the costs of the application.

Dated and delivered at Kisumu this 20th day of November, 2015

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR