



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 28 OF 2013

BETWEEN

DEVELOPMENT BANK KENYA LIMITED (formerly known as) DEVELOPMENT FINANCE LTD.....1ST APPLICANT/1ST RESPONDENT

**SMALL ENTERPRISES FINANCE LIMITED.....
..... 2ND APPLICANT/ 3RD RESPONDENT**

AND

**FRANCIS NDEGWA alias FRANCIS ISHMAEL NDEGWA t/aCENTRAL KENYA PRESS
.....1ST RESPONDENT/APPELLANT**

**MURUGURU HOLDINGS LTD.
..... 2ND
RESPONDENT**

(Being an application to strike out the appeal from the ruling of the High Court of

Kenya at Nyeri (Sergon, J.) dated 12th February, 2011

in

H. C. C. NO. 215 OF 2011)

RULING OF THE COURT

1. Before us is a Notice of Motion application brought pursuant to **Rule 84** of the **Court of Appeal Rules** (the Rules) wherein the 1st and 3rd respondents seek, *inter alia*, that the appeal herein be struck out. The grounds upon which the respondents rely on in support of their application are that firstly, the Memorandum of Appeal and Record of Appeal were filed out of time without leave of the court; secondly, the Record of Appeal does not include all the requisite documents under **Rule**

87(b) & (h) of the Rules and thirdly, that the Record of Appeal was served out of time without leave of the court.

2. The genesis of this application is that the 1st respondent offered the appellant loan facilities between the year 1980 and 1982 and in return the appellant offered land parcel No. Aguthi/Gatitu/667/154 as security. Subsequently, the appellant defaulted in the loan repayment and in the year 1989, the 1st respondent sold the said parcel in realization of the security. The appellant filed suit in the High Court on 23rd November, 2001 against the respondents seeking the following orders:-

- ***Declaration that the sale of the plaintiff's (appellant's) land parcel No. Aguthi/Gatitu/667/154 by the 1st and 3rd defendants (1st and 3rd respondents) or either of them was null and void.***
- ***An order that the register of land parcel No, Aguthi/Gatitu/667/154 be rectified, the names of the 2nd defendant be canceled and the names of the plaintiff and Benjamin Githinji Ndegwa be registered as the registered proprietor of the land.***
- ***In the alternative to the above prayers, the 1st and 3rd defendants be ordered to pay adequate general damages to the plaintiff for loss of land and machineries and the same to be quantified by the court.***
- ***Costs of the suit.***

The respondents filed their respective defences denying the appellant's allegations. When the matter came up for hearing before the High Court, the 1st and 3rd respondents advocate raised a preliminary objection that the appellant's suit as against the respondents was time barred. According to the counsel, the appellant averred in his Plaint that the cause of action arose in the year 1989 when the suit property was sold; he pointed out that the suit property was sold on 26th August, 1989. Therefore, by virtue of **Section 7** of the **Limitation of Actions Act** the appellant's right to recover the suit property lapsed on 26th August, 2001. The 1st and 2nd respondents counsel argued that the suit was filed on 23rd November, 2001 and the 3rd respondent was joined as a party on 29th October, 2008 after the appellant's cause of action had already become statute barred. He urged the High Court to strike out the appellant's suit. The High Court (Sergon, J.) in a ruling dated 11th February, 2011 upheld the preliminary objection and dismissed the appellant's suit with costs to the respondents. It is that decision that is the subject of this appeal. However, since the appeal is not before us that is all we shall state about the same.

3. Mr. Peter Mwaniki Kiura, learned counsel for the appellant, deposed in his affidavit in support of the application that, the ruling subject of the appeal was delivered on 11th February, 2011; the Notice of Appeal was filed on 25th February, 2011 and served upon the 1st and 3rd respondents on 1st March, 2011; the respondents were never served with a copy of the letter requesting for certified proceedings contrary to **Rule 82** of the Rules. He contended that from the Certificate of Delay on record, the appellant requested for certified proceedings on 13th May, 2011, more than 90 days after delivery of the ruling; the appellant filed this appeal on 12th September, 2013 about 142 days after being supplied with the certified proceedings on 23rd April, 2013. He also deposed that contrary to **Rule 90(1)** of the Rules, the appellant served the appeal upon the respondents on 26th September, 2013 despite the same being filed on 12th September, 2013. Mr. Kiura further contended that the appellant did not include a certified copy of the decree and order appealed against in the Record of Appeal contrary to **Rule 87(h)** of the Rules. The appellant did not file a replying affidavit.
4. During the hearing of the application Mr. Ombongi appeared for the appellant, Miss Lucy Mwai appeared for the 2nd respondent while Mr. Kiura appeared for the 1st and 3rd respondents. Mr. Kiura reiterated the averments in his affidavit in support of the application. He submitted that the appellant did not obtain leave to file the appeal out of time and failed to offer an explanation for

the delay in filing and serving the appeal. He urged us to allow the application. Miss Mwai associated herself with the submissions of Mr. Kiura and urged us to strike out the appeal. Mr. Ombongi admitted that the appellant did not seek leave of this Court to file the appeal out of time. While admitting that the certified copy of the order was not included in the Record of Appeal he maintained that it was not a serious defect and the same could be cured. According to Mr. Ombongi, the 1st and 3rd respondents' application was based on technicalities and the respondents failed to demonstrate any prejudice they would suffer if the appeal was determined on merits. He urged us to dismiss the application.

5. We have considered the grounds in support of the application, submissions by counsel and the law. **Rule 82** of the Rules, provides that an appeal should be instituted within 60 days of the date of filing the Notice of Appeal. This rule further provides that an appellant should apply for certified proceedings within 30 days of the date of the decision being appealed against and that in computing time within which to file an appeal any period certified by the registrar as having been required to prepare the proceedings should be excluded. In this case the 1st and 3rd respondents contend that the appellant never served them with a copy of the letter requesting for certified proceedings and that as per the Certificate of Delay the appellant requested for the proceedings on 13th May, 2011, 90 days after delivery of the ruling. **Rule 82(2)** provides:-

“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.”

We cannot help but note that from the record there is no evidence that the appellant served the respondents with the letter requesting for certified proceedings. Further, the appellant's counsel did not address us on this issue. We find that the appellant applied for the certified copies of proceedings out of the stipulated time and did not serve the letter requesting proceedings upon the respondents. Consequently, time within which the appellant was required to file the appeal begun to run on 25th February, 2011 when the Notice of Appeal was filed and lapsed on or about 27th April, 2011. In ***Ramji Devji Vekaria –vs- Joseph Oyula- Civil Appeal (Application) No. 154 of 2010***, this Court held:

“We hold therefore that no letter bespeaking the copies of proceedings was sent to the applicant/respondent or his advocates as is required vide proviso to rule 81 or now 82 of the Court's Rules. That in effect means that the respondent/appellant cannot benefit under the provisions of that rule and thus the record of appeal was clearly filed out of time and without leave of the Court.”

6. Mr. Ombongi contended that the foregoing was a technicality which did not occasion any prejudice to the respondents. With respect, we are of the view that this is not a matter of technicality in which we can invoke the oxygen principles to sustain the appeal. This is an omission that goes to the root of the Rules i.e. whether or not a party can file an appeal out of time and without leave of the court. To invoke the provisions of **section 3A** and **3B** would result in a serious precedent being set which would cause utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. In the case of ***Hunter Trading Company Ltd –vs- Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010***, this Court considered the applicability of those sections in detail and stated *inter alia* as follows:-

“It seems to us that in the exercise of our powers under the “0₂ principle” what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “0₂” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “0₂ principle” could easily become an unruly horse.”

This Court also stated in City Chemist (Nbi) & Another –vs- Oriental Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (Ur.199/2008) as follows:-

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

We respectfully agree with those sound legal sentiments. We cite one more case of Mradura Suresh Kantaria –vs- Suresh Nanal Kantaria Civil Appeal No. 277 of 2005 (unreported) where this Court stated as follows:-

“The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”

Consequently, we find that the appellant filed the appeal herein out of time without leave of the Court.

7. The upshot of the foregoing is that we find that the application has merit and is allowed with costs to the 1st and 3rd respondents. Accordingly, the appeal is struck out with costs to the respondents.

Dated and delivered at Nyeri this 26th day of February, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR