



IN THE COURT OF APPEAL

AT NAIROBI

Civil Application No. Nai 303 Of 2013

CORAM: OUKO, GATEMBU & J. MOHAMMED, J.J.A

BETWEEN

MUSYOKA MUTIE MAKAU APPLICANT

AND

PETER MUTIE MAKAU 1ST RESPONDENT

MUNYAO MUTIE MAKAU..... 2ND RESPONDENT

(An application for striking out Notice of Appeal filed by the respondent arising from the judgment of the High Court of Kenya at Machakos (Dulu, J) dated 7th November, 2012

in

HCCC NO. 110 OF 2011)

RULING OF THE COURT

Before us is a Notice of Motion application dated 7th November, 2013 brought pursuant to *Rules 83 & 84 of the Court of Appeal Rules* (the Rules) and *Section 3A & 3B of the Appellate Jurisdiction Act, Chapter 9, Laws of Kenya*. The applicant seeks the following orders:

1. *That the Notice of Appeal filed on the 4th June, 2012 in Machakos High Court Case 110 of 2011 be struck out with costs.*

2. *That the costs of this application be awarded to the applicant.*

The grounds upon which the applicant relies on in support of his application are that the Notice of Appeal was filed on 4th June, 2012, against the High Court's ruling dated 29th May, 2012; that the matter proceeded for formal proof hearing on 4th July, 2012, judgment entered on 7th November, 2012 and decree issued on 8th November, 2012; that to date, the respondents have not challenged the decree or the proceedings in the matter neither have they filed a Record of Appeal in respect to their appeal; that the applicant is elderly and his health is failing and therefore, requires expeditious disposal of his application.

The genesis of this application is that the respondents having failed to file a defence, the High Court vide an interlocutory judgment dated 6th July,

2011, issued a mandatory injunction compelling the respondents herein either by themselves or otherwise to vacate or be evicted from *L.R. NO. MACHOKOS/KATHEKA-KAI BLOCK 5/268,275,276 (formerly Katheka-Kai Block 5/70) (subject property herein)*. The court further issued a permanent injunction restraining the respondents herein either by themselves or otherwise from in any manner ingressing, interfering with, trespassing, carrying out any operations and/or any activities on the said land. The subject property was owned by the applicant's mother, now deceased. Consequently, on 8th August, 2011, the respondents filed an application to set aside the interlocutory judgment on the ground that the file could not be traced at the registry to enable them file a defence. The High Court (Dulu, J) dismissed the said application on 29th May, 2012. The matter then proceeded for formal proof and judgment entered on 7th November, 2012.

Aggrieved by the decision of the High Court given on 29th May, 2012, dismissing the application to set aside the interlocutory judgment, the respondents lodged a Notice of Appeal on 4th June, 2012. Thereafter, pursuant to an application by the respondents, the High Court (Mutende, J) vide a ruling dated 14th June, 2013, issued orders of stay of execution of the judgment dated 29th May, 2012, and any subsequent orders pending the hearing and determination of the intended appeal to this Court.

In opposition to the current application, the 2nd respondent swore a replying affidavit. He deposed that he had the 1st respondent's authority to file the replying affidavit; the applicant had not come to court with clean hands; he had been informed by his advocate on record that the application lacked merit and offends the provisions of the proviso to *Rule 84 of the Court of Appeal Rules* as it has been brought after the expiry of 30 days from the date of service of the notice of appeal; he had applied to be supplied with certified copies of proceedings and ruling from the High Court without success; to date no proceedings have been availed to them; he had no notice whatsoever of the formal proof hearing and was not notified of the judgment date in respect of the judgment dated 7th November, 2012, as the same was never served on them. That striking out of the respondents' notice of appeal would highly prejudice them and cause irreparable harm as it will unlawfully deny them justice.

At the hearing before us, there was no attendance by or on behalf of the respondents and the matter proceeded *ex-parte*. Learned counsel, Mr Moses Odawa held brief for Mr Jacob Ngwele, for the applicant, who reiterated the grounds in support of the application to strike out the Notice of Appeal. He argued that the notice of appeal was filed on 4th June, 2012, yet the respondents have not challenged the decree or the proceedings. Further, he stated that the respondents have not filed the Record of Appeal in respect of their appeal. He added that from the background of this case, it is clear that the respondents clearly lack interest to prosecute this matter. Counsel urged us to allow the application as prayed.

We have considered the application, the grounds in support of the application, the affidavits, the submissions by the learned counsel for the applicant and the law.

Counsel for the applicant submitted that it is not in dispute that judgment was delivered on 29th May, 2012, and that the respondents lodged a notice of appeal on 4th June, 2012. Counsel for the respondents requested for proceedings vide a letter dated 4th June, 2012, which letter had no stamp impression to show that the same was received at the High Court registry.

From the record it is evident that the letter bespeaking the proceedings was not copied or served upon the applicant's advocates. Further, it is not clear whether the said letter was received by the court as there is no stamp impression evidencing receipt. This was observed by the learned judge who heard the respondents' application for stay dated 14th November, 2012 vide her ruling dated 14th June, 2013.

Rule 82 of the Rules, provides as follows:

"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-"

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.

From the record, it is clear that the appeal which is yet to be filed will be out of time. That situation

could have been salvaged if there was proof that the respondent had, within thirty [30] days from the date of the delivery of judgment, written to the Deputy Registrar, bespeaking the copies of the proceedings and judgment and if such a copy had been served on the applicant.

In this case, at the end of 30 days from 4th June, 2012, no such letter had been served upon the applicant as required by *Rule 82*. That in effect means that the respondent cannot benefit under the provisions of that rule.

We have considered whether *Sections 3A and 3B of the Appellate Jurisdiction Act* and the provisions of *Article 159 of the Constitution* could breath new life into this matter.

With respect, this is not a matter in which those provisions can be invoked. This is an omission that goes to the root of the Rules, that is, whether or not a party can file an appeal out of time and without leave of the court.

In the case of *HUNTER TRADING COMPANY LTD V 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.”

Further, in the case of *CITY CHEMIST (NBI) & ANOTHER VS. ORIENTAL COMMERCIAL BANK LTD, CIVIL APPLICATION NO. NAI. 302 OF 2008 (UR.199/2008)* this Court stated 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.”

The purpose of *Sections 3A and 3B* and *Article 159* was to avoid delay caused by application of technicalities. We find that in the circumstances of this matter, the omission would result in further delay in concluding this matter and thereby defeat the very principle of expeditious disposal of cases enshrined in *Sections 3A and 3B of the Appellate Jurisdiction Act*.

Accordingly, we find that the notice of motion is based on sound grounds and must succeed. It is allowed with the result that the notice of appeal dated 4th June, 2012 is struck out with costs to the applicant.

Dated and delivered at Nairobi this 25th day of July, 2014.

W. OUKO

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR