



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWERA & GATEMBU, JJA.)

CIVIL APPLICATION NO. NAI 323 OF 2013

BETWEEN

FRANCIS WAKAHU THEURI APPLICANT

AND

MONICA NJERI

ESTHER WANGUI

CATHERINE MUTHONI

FRANCIS NJURU NGUGI T/A

WAWAGE INVESTMENT COMPANY 1ST RESPONDENT

JOSEPH GITUMA NDEGWA & 29 OTHERS 2ND RESPONDENT

(Being an application for striking out the Notice of Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Pauline Nyamweya, J) dated and delivered on 25th September, 2013

in

ELC CASE NO. 2484 OF 1994)

RULING OF THE COURT

1. The applicant, Francis Wakahiu Theuri has moved the Court under rule 84 of the rules of this Court to strike out notices of appeal dated 27th September 2013 and 30th September 2013 lodged by the 1st and 2nd respondents respectively. The decision of the High Court to which those notices of appeal relate is a ruling delivered on 25th September 2013 by which the High Court dismissed the respondents' two applications. The first application was for review of the judgment of the High Court delivered on 14th December 2012 in favour of the applicant. The second application was for stay of execution of that judgment.

Background

2. The applicant filed suit in the High Court in which he sought and obtained judgment in his favour against the respondents. That judgment declared that a sale agreement dated 9th February 1991 made between the applicant and the respondents in respect of Title Number Ruiru/Ruiru/Block 1 was legally rescinded; that the respondents are trespassers on that property; and that the respondents should vacate the property. On his part the applicant was ordered to refund the amount of Kshs. 1,560,000.00 to the respondents with interest that he had received towards the purchase price under the rescinded agreement for sale. That judgment was delivered on 14th December 2012. We understand that the respondents were aggrieved by that judgment and lodged a notice of appeal on the 17th December 2012.

3. By an application dated 16th January 2013, the respondents applied to the High Court for review of the judgment and for a declaration that the suit had abated. By an application dated 1st February 2013, the respondents applied for stay of execution of the judgment pending the hearing and determination of the intended appeal from the judgment.

4. The High Court in a ruling delivered on 25th September 2013 dismissed the application for review. In the same ruling, the court allowed the application for stay of execution of the judgment on condition that the respondents furnish security in the amount of Kshs. 80,000,000.00. Dissatisfied with ruling, the 1st respondent lodged a notice of appeal dated 27th September 2013. The 2nd respondent lodged the notice of appeal dated 30th September 2013. It is those two notices that the applicant has asked us to strike out.

Submissions by counsel

5. The grounds on the basis of which the applicant has asked the Court to strike out the notices of appeal are set out on the face of the application and were argued before us by Mr. Kihara Ndiba and Ms. Judy Gichumbi, learned counsel for the applicant.

6. The applicant contends that the notices of appeal should be struck out because the intended appeal is frivolous, vexatious and an attempt to deprive the applicant quiet possession of his land; that the appeal has no chances or probability of success and that the 1st respondent has not complied with orders of the High Court.

7. Mr. Ndiba submitted that after delivery of judgment on 14th December 2012, a notice of appeal was filed by the 1st respondent on 17th December 2012; that that notice lapsed as the respondents abandoned the intended appeal from the judgment and opted to apply for review and stay of the judgment instead; that the High Court granted stay of execution of the judgment pending appeal on condition that security of Kshs. 80,000,000.00 was furnished; that the respondents have not complied with that condition; that the intended appeal from the ruling of the High Court declining to review the judgment and imposing condition for stay of execution is futile when the judgment delivered on 14th December 2012 is itself not being appealed; that in any event the notices of appeal were served outside the time permitted under the rules, without leave of the Court.

8. Opposing the application, learned counsel Mr. D. M. Mwaura and Mr. Gachie Mwanza who appeared for the 1st and 2nd respondents respectively, referred us to the replying affidavits of Joseph Gituma Ndegwa and Francis Njuru Ngugi and submitted that the application has no merit; that the application is not based on any of the grounds permissible under rule 84 of the rules of the Court; that there are only three grounds or instances under rule 84 when the Court may strike out a notice of appeal and none of which apply in this case; that the notices of appeal were filed in time but service was delayed on account of the offices of the applicant's advocates having been closed and subsequently relocated following the death of the proprietor; that the late service of the notice of appeal is excusable under rule 78 of the rules of the Court; and that the application is in any event filed outside the time limit

permitted under rule 84 of the rules of the Court.

Determination

9. We have considered the application, the affidavits and the submissions of learned counsel. Rule 84 of the rules of the Court under which we are asked to strike out the notices of appeal provides:

“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)

10. As submitted by counsel for the respondents, the grounds for striking out a notice of appeal under that provision are limited by the rule. It is not the applicant’s case that the ruling delivered by the High Court on 25th September 2013 is not appealable, or that the respondents have skipped an essential step or that some essential step has not been taken within the prescribed period. The grounds set out on the face of the applicant’s application, which were canvassed before us during the hearing of the application, would in our view be grounds for argument at the hearing of the appeal itself.

11. The closest the applicant got to bringing himself within rule 84 was a contention by his counsel during the hearing that the notices of appeal were served outside the time period stipulated under rule 75 of the rules of the Court. Under rule 75(2) of the rules of the Court “a person who desires to appeal against a decision is required to lodge a notice of appeal within 14 days of the date of the decision desired to be appealed from.”

12. Under rule 77(1) “an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”

13. The two notices of appeal subject of the present application were lodged in the High Court on 1st October 2013. That was clearly within the 14 days period stipulated under rule 75(2) of the rules of the Court.

14. Based on the applicant’s affidavit in support of the application, the 1st respondent’s notice of appeal dated 30th September 2013 was served on the 18th October 2013 while the 2nd respondent’s notice of appeal dated 27th September 2013 was served on the 28th October 2013. In effect the applicant was not served within the 7 day period stipulated under rule 77(1) of the rules of the Court.

15. In their replying affidavits, Joseph Gituma Ndegwa and Francis Njuru Ngugi have deposed that it was not possible to serve the notices on the firm of Njoroge & Musyoka advocates who were on record for the applicant as Mr. Njoroge Musyoka advocate of that firm died days before the impugned ruling was delivered. In his affidavit, Joseph Gituma Ndegwa deposed that the death of Mr. Njoroge “... led to his previous office at Capital Hill Towers Cathedral Road being closed indefinitely and the law firm was only reopened in their new premises at Commodore Office Suites, Ngong Road when they posted a notice of their whereabouts on the door of the previous premises.” To that affidavit is exhibited an extract from the Daily Nation of Friday 13th September 2013 announcing the death of Mr. David Njoroge “of Njoroge & Musyoka Advocates.”

16. We agree with the counsel for the respondents that the circumstances in this case are

covered by Rule 78 that provides:

“A notice of appeal shall not be incompetent by reason only that the person on whom it is required to be served was dead at the time when the notice was lodged but a copy of the notice shall be served as soon as practicable on the legal representative of the deceased.”

17. The notices of appeal were required to be served on the firm of Njoroge & Musyoka Advocates. They could not be served due to the closure of the law firm on account of the death of Mr. Njoroge. The notices were thereafter served upon the reopening of the law firm at a different address. We therefore agree with counsel for the respondents that the late service of the notices is cured by rule 78 of the rules of the Court.

18. There is another problem with the application with respect to the notice of appeal dated 30th September, 2013. Under the proviso to rule 84 of the rules of the Court the present application should be brought before expiry of 30 days from date of service of the notice of appeal. It was not brought until 27th November, 2013. While the application was within 30 days of service of notice of appeal dated 27th September, 2013, it was out of time in relation to notice of appeal dated 30th September, 2013.

19. Accordingly no reasons or sufficient reasons have been advanced for us to strike out the notices of appeal. The application has no merits. It is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 11th day of July, 2014.

M. K. KOOME

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/ewm