



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A.)

CIVIL APPEAL(APPLICATION) NO. 26 OF 2013

BETWEEN

ONCHWARI MOGAKA..... APPLICANT/1ST RESPONDENT

AND

NYACHIRO SIRIBA 1ST RESPONDENT/APPELLANT

GORI KIBINDORI 2ND RESPONDENT

ABANCHANI FARMERS CO. LTD 3RD RESPONDENT

(An Application to strike out the Record of Appeal from the Judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 9th May, 2013

in

H.C.C.C. NO. 119 OF 1994)

RULING OF THE COURT

The respondent in this Notice of Motion dated 19th September, 2013 and filed on the same date, *Nyachiro Siriba* was the plaintiff in the H.C.C.C. No. 119 of 1994 at Kisii. The applicants in the Notice of Motion *Ochwari Mogaka, Gori Kibindori* and *Abanchani Farmers Co. Ltd*, were the defendants in that case.

Vide a judgment dated and delivered on 9th May, 2013, the High Court

(Sitati, J.) dismissed the case with costs to the first and second respondents. The respondent felt aggrieved. He moved to this Court vide Notice of Appeal filed on 16th May 2013, through his firm of Advocates Migiro & Co. on 28th May, 2013. That firm of Advocates wrote a letter to the Deputy Registrar bespeaking certified copies of proceedings and judgment for purposes of appeal. That letter was copied to the advocates for the applicants. On 8th August 2013, the respondent lodged record of appeal and served the advocates for the applicants with that record on 21st August, 2013.

On being served with the Record of Appeal, the applicants' advocate on perusing the record, realised that the record was filed 23 days out of time specified under Rule 82 (1) of this Court's Rules.

Through their advocates, M/S Soire & Co., the applicants filed this Notice of Motion seeking an order that the appeal be struck out. The grounds advanced in support of the application are:

- “1. *The appeal was lodged out of time without leave of the court.*
2. *That the appeal having been lodged out of time and without leave of court is fatally defective and irregular.*
3. *That this application has been brought timeously and within the time parameters set out by law.*
4. *That considering that the litigation in this suit has been on going since 1994 or thereabouts it is in the interest of justice to grant the reliefs sort (sic) in this application.*
5. *And an order that the costs of and incidental to this application be borne by the appellant/respondent.”*

The application is supported by a short supporting affidavit sworn by the first applicant and merely sets out the grounds above, except it adds that the last date for filing the appeal was to be 15th July, 2013, being the sixtieth day after the date the Notice of Appeal was filed which was 16th May, 2013.

The respondent in the Notice of Motion opposed the application contending that vide his letter of 28th May, 2013, he applied for copies of proceedings and that letter was served upon the applicants' counsel on 5th June, 2013; that he got those proceedings on 12th July 2013, and that in the circumstances time for filing the appeal started running from 12th July 2013 and therefore the filing of the record on 8th August 2013 was not out of time. Thus he maintained in that affidavit that the appeal was not filed out of time and without the leave of the court.

Before us, Mr. Soire relied on his clients' Affidavit and submitted that the record of appeal was filed after 60 days within which it should have been filed and therefore was filed out of time. He submitted further that there was no evidence to demonstrate that the respondent had received proceedings on 12th July, 2013 as he contended as there was no Certificate of Delay annexed to the record before the court.

In response, Mr. Migiro, the learned counsel for the respondent in the Notice of Motion referred us to paragraphs 3, 5 and 6 of the Replying affidavit and contended that as the copies of proceedings were applied for in time but received on 12th July, 2013, the time began to run from the date the proceedings were received and so he was in time. Asked to show certificate of delay, Mr. Migiro referred us to a court stamp at page 4 of respondent's replying affidavit which stamp was merely certifying the proceedings as true copy and had no legible date appended to it. He also referred us to the decision of this Court in the case of **Nicholas Kiptoo Arap Korir Solet vs Independent Electoral and Boundaries Commission and some others** – *Civil Appeal No. 228 of 2013* and urged us to ignore technicalities and allow the appeal already filed to proceed to hearing.

We have anxiously considered the application, the affidavit in support of it and the Replying affidavit together with the submissions and the law. We have also considered the case of Solet (*supra*). We agree that striking out an appeal is draconian and the courts should strive to avoid it. However, in clear cases where the law has been flagrantly ignored, the court cannot look another way for to do so is also unjust and a court of law is always there to do justice to all parties before it without fear or favour. It has always been said by this Court that neither Article 159 of the Constitution of Kenya 2010 nor **Sections 3A** and **3B** of the Appellate jurisdiction Act are panacea to parties to ignore the legal provisions.

In this matter the proviso to Rule 82 (1) of the Court of Appeal Rules is clear. It states:

“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.”

This rule is well known along the court corridors. The document required to be issued by the Registrar as stated above in the proviso is commonly known as Certificate of Delay. That is the document that the Court will recognise as evidence that the delay to file record within the sixty days provided under Rule 82 (1) was caused by delay in supplying copies of proceedings and judgment sought by a party. That document is certainly not a court stamp that certifies that the proceedings are properly prepared as the one Mr. Migiro showed us.

In any event, Mr. Migiro was served with this application way back and certainly before 26th November, 2013. He had enough time to note that something was amiss and that he needed to obtain certificate of delay from the Registrar of the High Court stating the period of delay for purposes of ensuring that the appeal was, subject to such period of delay, filed in time. He did not do so nor did he consider it necessary to do so. In such scenario, the party cannot be heard to seek that technicalities be ignored. In any case it is not a matter of mere technicality where an appeal is filed out of time and without leave. It is a breach of fundamental rule of the court. It is even made worse where a party who has done so gets a word that something is wrong with his appeal but ignores it for a period close to one year. We think it is abuse of the court process to invoke the provisions of Article 159 of the Constitution of Kenya 2010 or **Sections 3A** and **3B** aforesaid to aid such a party.

This application succeeds. It is granted with the result that *Civil Appeal No. 26 of 2013* is hereby struck out with costs to the applicant in the Notice of Motion who are the respondents in the appeal. Orders accordingly.

Dated and Delivered at Kisumu this 1st day of August, 2014.

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR