



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)**  
**CIVIL APPEAL NO. 284 OF 2011**

**BETWEEN**

**FREDRICK JUMA OSURU .....APPELLANT**

**AND**

**ESTHER ATIENO OSURU .....1<sup>ST</sup> RESPONDENT**

**MARTIN MBOYA OSURU ..... 2<sup>nd</sup> RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at*

*Kisumu (Lady Justice Ali-Aroni, J) dated 18<sup>th</sup> February, 2011*

**in**

**HCCA No. 5 OF 2008**

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**JUDGEMENT OF THE COURT**

This is an appeal from the Judgment of Ali-Aroni, J, delivered on 18<sup>th</sup> February, 2011 in Kisumu High Court Civil Appeal No. 5 of 2008 which was itself an appeal from the decision of the Provincial Land Dispute Appeals Committee in Provincial Land Disputes Tribunal Case No. 23 of 2003.

The brief history of the matter is that the respondents, Esther Atieno Osuru and her son Martin Mboya Osuru lodged a land dispute against the appellant, Fredrick Juma Osuru, in Kisumu District Land Dispute Tribunal Case No. 2 of 2001. That dispute was decided by the Tribunal in favour of the respondents and an appeal to the Provincial Committee failed meaning that the award of the Tribunal stood. That award was adopted as a judgement of the Court in Kisumu Chief Magistrate Civil Case No. 23 of 2003. The matter reached the High Court as an appeal and as we have stated the learned judge dismissed the appeal holding it incompetent for being statutorily time barred. That decision led to this appeal.

In view of the position we have taken in this appeal we shall not go into the merits of the appeal

notwithstanding that the same was fully argued before us.

As stated, the judgement appealed from was delivered on 18<sup>th</sup> February, 2011. A Notice of Appeal was lodged at the High Court of Kenya, Kisumu, on 1<sup>st</sup> March, 2011. That Notice complied with the Rules. Thereafter a Record of Appeal was filed in this Court on 21<sup>st</sup> December, 2011, over nine months after the Notice of Appeal was lodged. One of the documents in the Record is a “**Certificate of Delay**” issued by the High Court. It is in the following terms:-

**“REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**KISUMU HCCA 05 OF 2008**

FREDRICK JUMA OSURU .....APPELLANT

-vs-

ESTHER ATIENO OSURU.....

MARTIN MBOYA OSURU ..... RESPONDENTS

**CERTIFICATE OF DELAY**

I THOMAS OBUTU Deputy Registrar of the High Court of Kenya at Kisumu hereby certify that the delay in typing of the proceedings was caused by this court and any inconvenience caused is regretted.

**Deputy Registrar**

**KISUMU”**

No leave was sought to lodge the Record of Appeal out of time. The said document called “**Certificate of Delay**” which is ordinarily drawn by advocates for certification by the court is not dated and does not contain any information to certify what time the High Court required to prepare and avail the proceedings to the appellant.

Rule 82 of this Court's Rules requires a party who is appealing to lodge the appeal within sixty days of the date when the Notice of Appeal was lodged but there is a proviso excluding the time certified by the Registrar of the High Court as having been required for the preparation and delivery to the appellant of the proceedings for purposes of appeal. The appellant is only entitled to rely on that proviso if the letter bespeaking proceedings was copied and served upon the respondent. If there was such letter bespeaking proceedings it has not been availed to us through the Record.

Mr. P. D. Onyango, learned counsel for the appellant, even in the face of the challenge taken by the respondents in a letter dated 3<sup>rd</sup> June, 2014 where the competence of the appeal was raised did not take any step to make good the Record satisfying himself with a position that the respondents had not formally applied to strike out the appeal for incompetence.

The Record of Appeal was filed out of the stipulated period for instituting an appeal and no leave was sought or obtained to lodge the appeal out of time. The Certificate of Delay in the Record is of absolutely no assistance to the appellant as it does not contain the necessary information on the time that was necessary, if an application for proceedings had been made, to prepare the same. It is indeed surprising that the Deputy Registrar of the High Court certified that document which was probably drawn by the counsel for the appellant in the form that we have set out.

For these reasons, we find that this appeal is incompetent and it is hereby struck out with costs to the respondents.

*Dated and Delivered at Kisumu this 14<sup>TH</sup> day of NOVEMBER, 2014*

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**