



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: G.B.M. KARIUKI, OUKO & MURGOR, J.J.A)**  
**CIVIL APPEAL NO.200 OF 2008**

**ELIUD NGUGU EVANS.....APPLICANT/RESPONDENT**

**VERSUS**

**CHRISTOPHER MURIITHI NGUGU.....RESPONDENT/APPELLANT**

*(Application to strike out a record of appeal from the ruling and order of the High Court of Kenya*

*at Nairobi (B. P. Kubo) made on the 17<sup>th</sup> July 2006*

**in**

**H.C. Misc. Application No.80 of 2004)**

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**RULING OF THE COURT**

1. On 10.11.2008, the respondent in the appeal herein namely **Eliud Ngugu Evans** made an application dated 28.10.2008 seeking orders that;

1. *The appeal herein be struck out and*
2. *That costs of the application and of the appeal be awarded to him.*

The application was based on the ground that the appeal was filed out of time without leave and further that the memorandum of appeal and the record of appeal were not in compliance with the rules of this court particularly rules 84 and 85. The application was supported by an affidavit sworn on 28.10.2008 by the respondent who averred that the proceedings were ready on 7<sup>th</sup> August 2008 and the record of appeal was lodged on 19.9.2008, after the expiry of the period of 60 days. In the applicant's submission, leave ought to have been obtained. Moreover, contended the respondent, the record of appeal was deficient as it did not contain the proceedings and judgment of the subordinate court which led to the issuance on 17.7.2006 of the impugned orders by B. P. Kubo J.

2. The appellant, **Christopher Muriithi Ngugu**, filed in answer to the application a replying affidavit on 7.12.2009 in which he averred that the appeal was competent and that the record of appeal filed on

25.9.2008 was in compliance with the Rules of this court. He conceded that the record of appeal did not contain the proceedings in the subordinate court but contended that such proceedings were unnecessary as they did not constitute the dispute before the High Court and never formed part of the record and that in any case if the respondent deemed such proceedings necessary, the respondent should have filed supplementary record of appeal. Besides, the respondent's application was incompetent, contended the appellant.

3. The background to the application is that on 22.09.2003 the Principal magistrate's court at Kerugoya had in Succession Cause No.278 of 1994 determined a dispute between Eliud Ngugu Evan and Christopher Muriithi Ngugu relating to land parcel No.Baragwe/Thumaita/1207 which was on 11.9.1991 registered under the provisions of the Registered Land Act, Cap 300 (now repealed) in the names of James Muriuki Muriithi and Christopher Muriithi Ngugu "as the absolute proprietors." When James Muriuki Muriithi died Succession Cause No.278 of 1994 at Kerugoya Principal Magistrate's Court to determine his heirs ensued. The Principal Magistrate court slapped an injunction against Eliud Ngugu Evans restraining him from interfering with the possession and quiet enjoyment of the land by Christopher Muriithi Ngugu and proceeded to order on 22.9.2003 that the land No.Baragwe/Thumaita/1207 would be inherited by Christopher Muriithi Ngugu who would get 0.304 of a hectare and the balance of 0.40 would be shared equally between Eliud Ngugu Evan and his brother John Muchina (each getting 0.20 of a hectare). Aggrieved by the decision, Christopher Muriithi Ngugu decided to prefer an appeal to the High Court but because he was out of time for lodging appeal, he applied on 22.12.2004 for leave to lodge appeal out of time. On 17.7.2006, the High Court (Kubo J) rejected the application and dismissed it with an order for each party to bear its own costs. On 11.9.2008 the appellant, Christopher Muriithi Ngugu, lodged Notice of appeal against Kubo J's decision of 17<sup>th</sup> July 2006. On 19.9.2008, the appellant, lodged record of appeal. As stated above, the application (by notice of Motion) dated 28.10.2008 by the respondent, Eliud Ngugu Evans, seeks to strike out the appeal.

4. When the application came up for hearing before us Mr. Macharia Muraguri, learned counsel for the respondent, urged us to strike out the appeal as it had been filed out of time without leave of court and in disregard of the Court of Appeal Rules. On his part, Mr. Mwangi Kigotho, the learned counsel for the appellant contended that the appeal was filed in compliance with the rules of this court. He drew the attention of the court to the certificate of delay issued on 4.9.2008 which shows that (1) proceedings were applied for on 28.07.2006 and

(2) the appellant was on 7.7.2008 notified by the court registry in the High Court that the proceedings were ready for collection on payment of requisite fees and (3) that the payment for the certified proceedings (although there was no need for certification) was made on 23.7.2008 and (4) certification was effected 23.7.2008 and (5) collection was on 19.8.2008.

5. The Deputy Registrar certified that the time required for preparation and delivery of certified copies of the proceedings and ruling was from 28.7.2006 to 19.8.2008, a total of 754 days. On 19.09.2008, the appellant lodged the record of appeal. The respondent concedes in paragraph 2 of his affidavit in support of the application to strike out the appeal that the record of appeal was served on him on 25.10.2008 and that the application to strike out the record was brought on 10.11.2008.

6. Rules 82(1) of the Rules of this Court requires that an appeal be instituted by lodging record of appeal within 60 days of the date of lodgment of the notice of appeal subject to the proviso that;

***"where an application for a copy of the proceedings in the High court has been made in accordance with sub-rule (2) within 30 days of the date of the impugned decision, the time required for obtaining the proceedings shall be excluded in the computation of the 60 days for lodging appeal."***

7. In this case, the appellant applied for the proceedings on 17.7.2006 and in compliance with sub-rule 2 of rule 81 of the rules of this Court copied his letter to Messrs Macharia Muraguri & co. advocates who were on record for the respondents. Rule 82(2) states:

***“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 copy of it was served upon the respondent”***

8. After being notified on 7<sup>th</sup> July 2008 that the proceedings were ready, the appellant took 16 days to pay for the same on 23.7.2008. It was not until 19.8.2008 when certification was endorsed that he collected the same. It is not clear why, if payment was made on 23.7.2008, the certification would not be immediate. It took the court registry almost a whole month to certify the proceedings. The Deputy Registrar certified that the period from 28.7.2006 to 19.8.2008 was necessary for the preparation of the proceedings. It is not clear why that period would start to run on 28.7.2006 instead of 17.7.2006 when the proceedings were applied for, a fact that is not denied.

9. Having collected the proceedings on 19.8.2008, the appellant lodged the record of appeal within 30 days on 19.9.2008. He was entitled to lodge the appeal within 60 days from the date of the lodgment of the Notice of Appeal after discounting the period necessary for preparation of the proceedings which is stated by the Deputy Registrar to be 754 days from 28.7.2006 to 19.8.2008. In effect he had up to October 8<sup>th</sup> 2008 to lodge the appeal. But he lodged the record on 19.9.2008. He was within time. And even if one were to take the 17.7.2006 as the date on which the application for proceedings was made instead of 28.7.2006, the additional 11 days would still bring the period within which the record was lodged to 41 days which was still within time.

10. By virtue of the proviso to rule 84 of the Rules of this court, an application to strike out the appeal ought to be brought within 30 days from the date of service of the record of appeal (or notice of appeal as the case may be). The respondent concedes in paragraph 2 of his affidavit in support of the application to strike out the record of appeal that he was served with the record of appeal on 25.10.2008. He brought the application to strike out (on 10.11.2008) within the prescribed time. But does it have merit? In paragraph 5 of his affidavit, the respondent avers that the appellant was notified on 7.8.2008 that the proceedings were ready but the certificate of delay which has not been faulted shows the date of notification to be 7.7.2008. Clearly, there was no need for the appellant to seek leave as he was not out of time.

11. The application has no merit and it seems to have been motivated by miscalculation of time. We have no alternative but to dismiss it with costs to the appellant.

12. This appeal shall be set down for hearing as soon as it is convenient.

**Dated and delivered at Nairobi this 7th day of November 2014.**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**