



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 47 OF 2014**

**BETWEEN**

**MWANIKI MUNYI & 55 OTHERS ..... APPLICANTS**

**AND**

**THE HON. ATTORNEY GENERAL & 2 OTHERS ..... 1<sup>ST</sup> RESPONDENT**

**ANDREW IRERI NJERU & 14 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

*(An application to strike out the appeal from the ruling of the High Court of Kenya at Kerugoya (Ola, J.) dated 10<sup>th</sup> July, 2014*

**in**

**H.C.ELC. No. 822 of 2013)**

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**RULING OF THE COURT**

1. The applicants have filed a Notice of Motion pursuant to **Rule 84** of the **Court of Appeal Rules** (the Rules) seeking *inter alia*:
  - **The appeal be struck out in its entirety.**
  - **The 2<sup>nd</sup> respondent be condemned to pay costs of the application.**

The grounds in support of the application are that the 2<sup>nd</sup> respondent filed a Notice of Appeal on 17<sup>th</sup> July, 2014 against the ruling of the High Court dated 10<sup>th</sup> July, 2014. The 2<sup>nd</sup> respondent served the said Notice of Appeal upon the applicants and the 1<sup>st</sup> respondent out of time; the 2<sup>nd</sup> respondent filed the Record of Appeal out of time without leave of this Court. Therefore, the appeal was incompetent and ought to be struck out. The 1<sup>st</sup> respondent supported the said application.

2. The genesis of the said application is that the 2<sup>nd</sup> respondent filed a representative suit on behalf of other plaintiffs against the applicants and the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent sought *inter*

*alia* an order cancelling transactions in respect of land parcels numbers Mbeti/Gachuriri/ 250, 255 & 256; an order rectifying the registers of the said parcels. Subsequently, the 2<sup>nd</sup> respondent filed an application in the said suit seeking interlocutory judgment against the applicants and the 1<sup>st</sup> respondent. When the said application came up for hearing, the applicants and the 1<sup>st</sup> respondent raised a preliminary objection. The preliminary objection was to the effect that though the 1<sup>st</sup> respondent had instituted the suit as a representative suit, the authority of some of the plaintiffs named therein had not been obtained; the applicants were not properly enjoined as interested parties in the said suit and the suit was defective. The High Court (Olaogun, J.) vide a ruling dated 10<sup>th</sup> July, 2014 upheld the preliminary objection and struck out the 2<sup>nd</sup> respondent's suit. Aggrieved with that decision, the 2<sup>nd</sup> respondent lodged a Notice of Appeal on 17 July, 2014.

3. At the hearing of the application there was no appearance for the 2<sup>nd</sup> respondent despite being served with the hearing notice. Mr. Mungai, learned counsel for the applicants, reiterated the grounds in support of the application and urged us to strike out the appeal. Mr. Makori, learned counsel for the 1<sup>st</sup> respondent, while supporting the application submitted that the 2<sup>nd</sup> respondent had not given any explanation for the delay in serving the Notice of Appeal and filing the Record of Appeal.
4. We have considered the application, submission by counsel and the law. The application before us as noted herein above has been brought pursuant to **Rule 84** of the Rules which 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.*”**

In this case, the applicants were served with the Record of Appeal on 11<sup>th</sup> October, 2014 and the current application was filed on 17<sup>th</sup> October, 2014, within the 30 days stipulated by the above rule. Hence the application is properly before this Court.

5. Turning to the merits of the application, **Rule 75** of the Rules provides in part as follows:-

***“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.*”**

***(2) Every such notice shall, subject to rules 84 and 97 be so lodged within 14 days of the date of the decision against which it is desired to appeal.*”**

In this case, the 2<sup>nd</sup> respondent suit was struck out vide a ruling dated 10<sup>th</sup> July, 2014; the 2<sup>nd</sup> respondent lodged a Notice of Appeal against the said ruling on 17<sup>th</sup> July, 2014, seven days after the said ruling. We find that the Notice of appeal was filed within the requisite time frame. **Rule 77(1)** of the Rules provides:-

***“An intended appellant shall, before or within seven days after lodging a Notice of appeal, serve copies thereof on all persons directly affected by the appeal.”***

In this case, the 2<sup>nd</sup> respondent ought to have served the Notice of Appeal upon the applicants and the 1<sup>st</sup> respondent on or before 24<sup>th</sup> July, 2014. It was the applicants' uncontroverted evidence that the Notice of Appeal was served upon them on 31<sup>st</sup> July, 2014, seven days out of time.

6. **Rule 82(1)** of the Rules provides in part:-

**“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-**

- a. **A memorandum of appeal, in quadruplicate;**
- b. **The record of appeal, in quadruplicate;**

**(c)The prescribed fee; and**

**(d)Security for the costs of the appeal.**

**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 such copy.”**

The 2<sup>nd</sup> respondent herein under **Rule 82** of the Rules was required to lodge the appeal within 60 days of filing the Notice of Appeal. It is not in dispute that the 2<sup>nd</sup> respondent herein filed the Notice of Appeal on 17<sup>th</sup> July, 2014. Therefore, when did the time frame within which the 2<sup>nd</sup> respondent could file the appeal lapse? The 2<sup>nd</sup> respondent ought to have filed the Record of Appeal on or before 15<sup>th</sup> September, 2014. The Record of Appeal was filed on 3<sup>rd</sup> October, 2014, 18 days late.

7. We cannot help but note that no explanation has been tendered by the 2<sup>nd</sup> respondent in respect of the delay in serving the Notice of Appeal and filing the Record of Appeal. The 2<sup>nd</sup> respondent neither filed a replying affidavit nor attended the hearing of this application. In **Felister Wakonyo Wamahu –vs- Joseph Wachira Mwangi – Civil Appeal (Application)No. 8 of 2013**, this Court while dealing with a similar application expressed itself as follows:-

**“The appeal was filed out of time on 19<sup>th</sup> April, 2013 and without leave of this Court. No explanation was given by the respondent for the delay in filing the Record of Appeal. Can the overriding objective of this Court be invoked to save the appeal? We are of the view that the competency of the appeal goes to the jurisdiction of this Court and cannot be cured by the overriding objective of this Court. It’s trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. In **City Chemist (NRB) & Others –vs- Oriental Commercial Bank Ltd- Civil Application No. Nai. 302 of 2008** this Court in discussing the overriding objective of the Court stated:-**

**“That however is not to say that the new thinking totally uproots well established principles or precedents in the exercise of 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 ambiguous principles and precedents assists litigants and legal practioners 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.”**

8. In the circumstances, we are of the considered view that the appeal herein is not competently before this Court and is hereby struck out. The applicants and the 1<sup>st</sup> respondent shall have costs of this application

*Dated and delivered at Nyeri this 16<sup>th</sup> day of December, 2014.*

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***