



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, GATEMBU & MURGOR, JJA)

CIVIL APPEAL (APPLICATION) NO.226 OF 2010

BETWEEN

ALICE WAMBU KARANJA.....2ND APPLICANT/ RESPONDENT

RAHAB MURINGE NDERI.....4TH APPLICANT/ RESPONDENT

VERSUS

(Being an appeal against the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 9th May, 2007

H.C.C.C. NO.1418 OF 2001)

RULING OF THE COURT

This is an application to strike out the record of appeal dated 1st September 2010, against the judgment and decree of the High Court filed by the respondent/appellant, **Jacinta Wairimu Njoroge (Jacinta Njoroge)**. The application is brought by **Rahab Muringe Nderi (Rahab Nderi)** on behalf of **Julia Wanjiru, Alice Wambui Karanja, Agatha Wangechi Muiruri, Rahab Muringe Nderi and Jacinta Mumbi Chege, (the respondents)**.

Briefly the facts are that, judgment was entered against the Jacinta Njoroge on 9th May, 2009 wherein Ang'awa J dismissed Jacinta Njoroge's suit and gave judgment in favour the applicants/respondents. The learned judge found that Jacinta Njoroge did not hold the land on account of valuable consideration, and therefore cancelled the title and ordered that the title be issued in the names of the respondents.

Being dissatisfied with the decision of the High Court, Jacinta Njoroge filed a notice of appeal on 10th May, 2007. Thereafter, through the law firm of P. N. Mugo Advocates, she requested for certified copies of the typed proceedings on 11th May, 2007. On 7th June, 2010 the law firm of Rakoro & Company Advocates came on record and again made a request for the record of proceedings on 2nd July, 2007. A third firm of advocates, Sichangi and Company Advocates again requested for the proceedings, and eventually lodged the record of appeal on 1st September, 2010 and served the respondents on 20th

September, 2010.

This application is brought under **Rule 80, 81, 82 and 87** of the old **Court of Appeal Rules**. The following orders were sought:

1. *That the record of appeal herein be struck out for having been filed and served out of time, and without leave of this honourable court.*
2. *That such other and/or further orders be made as this honourable court may deem fit and just.*

The application is premised on five grounds on its face and on a fifteen-paragraph supporting affidavit sworn by Rahab Nderi. In brief, she deponed that the decree appealed against was delivered on 9th May, 2007 and thereafter the record of appeal was filed on 1st September, 2010, which was more than sixty (60) days after the date of issue of the certificate of delay. That subsequently, the record of appeal was served upon the respondent on 20th September, 2010 more than seven (7) days after the date of filing the record of appeal and further that the certificate of delay was inaccurate and inconsistent with the proceedings. Finally, that the advocate on record for Jacinta Njoroge, was not properly on record. On the part of Jacinta Njoroge, no grounds of opposition were filed.

When the application came up for hearing before us, learned counsel Mr. Muchai appeared for the respondent, whilst there was no appearance for the appellant despite their having been served with a notice of hearing on 21st March, 2013.

According to Mr. Muchai, the application to strike out arose because, the record of appeal had not been filed within the time stipulated by the Rules, and no leave had been sought from this court to file the appeal out of time. The certificate of delay was issued on 30th June, 2010, and thereafter, the record of appeal was filed on 1st September, 2010. This amounted to sixty three (63) intervening days following the date of issuance of the certificate of delay, and not within sixty (60) days stipulated by the Rule 81. In effect, the appeal was filed three (3) days out of time. In addition, in breach of Rule 87, the appeal was not served upon the respondents until the 20th September, 2010, which was nineteen (19) days after the time stipulated for service. A further contention was that, the certificate of delay showed that not less than three sets of proceedings had been issued to the applicant or her advocates.

We have considered the motion, the submissions, the record and the obtaining circumstances. Rule 81 stipulates that, an appeal shall be instituted by lodging in the appropriate registry within 60 days of the date when the notice of appeal is lodged,

“...provided that where an application for a copy of the proceedings in the superior court has been made...in computing the time within which the appeal is to be instituted, be excluded such time as having been required for the preparation and delivery to the appellant of such copy.”

The certificate of delay, indicates that it took 922 days to prepare the proceedings. The proceedings were certified as having been issued on 30th June, 2010. When time is computed from issuance of the proceeding to the date that the record of appeal was filed, it is clear that there was a delay in filing the appeal, and despite this, the record did not show that an application for extension of time had been made or was outstanding.

With regard to service of the memorandum of appeal, it is provided at Rule 87 that before or within seven (7) days after lodging of the memorandum of appeal or record of appeal, each of the respondents shall be served with copies. The record indicates that the respondents were served on 20th September, 2010, some 19 days later.

Having regard to these undisputed or unexplained delays on the part of Jacinta Njoroge in filing of the

appeal, and in serving of the respondents, we find that Jacinta Njoroge did not comply with the requirements as prescribed by the Rules.

As a consequence, we strike out this appeal under Rule 80 of the Court of Appeal Rules with costs to the respondents.

Dated and Delivered at Nairobi this 20th day of September, 2013

J. W. MWERA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR