



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 11 OF 2013 (UR 5/13)

BETWEEN

REBECCA MORAA OCHI & OTHERS ..... APPLICANTS

AND

KIONGORO LAND DISPUTES TRIBUNAL &

TEN OTHERS ..... RESPONDENTS

*(Appeal from ruling and order of the High Court of Kenya at Kisii (Sitati, J.) dated 31st January, 2013 in MISC. CIVIL APPL. NO. 81 OF 2011)*

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RULING

From the scanty information provided in the record of the Notice of Motion before me, I gather that the applicants **Rebecca Moraa Ochi and Others** filed a record of Civil Appeal in this Court in respect of this matter on 12th March, 2013. In the application the number of that appeal is not stated, but a look at draft supplementary record the applicants seek to file and which was not annexed to this application but was shown to me during the hearing of this Notice of Motion, it would appear that the appeal already filed is **No. 5 of 2013**. All this is because the Notice of Motion was not filed within the record of appeal but was filed separately and no draft supplementary record or intended supplementary record was annexed to it, and Mr. Sagwe is plainly right on that issue.

Be that as it may, the applicants realised later that certain important documents namely the Magistrate's Court decree, and the parties' written submissions were omitted from the record filed on 12th March, 2013. They filed this application seeking that:-

*“The Honourable Court be pleased to allow the applicants to file a supplementary Record of appeal out of time.”*

The grounds in support of the application were four and the application was supported by an affidavit sworn by their advocate Christopher Orina Kenyariri.

The application was brought pursuant to **Rule 88** of the **Court of Appeal Rules** under **Appellate Jurisdiction Act Chapter 9 Laws of Kenya** and also pursuant to **Article 159 (1)** of the Constitution of

Kenya 2010. **Rule 88** of this Court's Rules states as follows:-

**“Where a document referred to in Rule 87(1) and (2) is omitted from the record of Appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the Deputy Registrar on application.” (underlining supplied)**

In my view, on strict interpretation of this rule, Mr. Sagwe's point that as the applicants did not file the supplementary record within fifteen days of lodging the record, they needed to proceed and obtain leave to do so from the Deputy Registrar by way of an application appears to me to be merited. The rule is to me clear and leaves no room for any doubt as to its meaning. In my understanding the rule, which I think is very generous when one considers the repealed rule on the same issue, gives an appellant who has omitted to file some parts of the record two options. First is to file the same within 15 days of lodging the record and that he may do without any leave from anybody. If he fails to do so within that time stated, then he has to apply to the Deputy Registrar for leave to do so. To do so, no time limit is specified in that Rule, but as is usual in all such cases, the same application must be filed within a reasonable time from the date the omission was discovered. The applicant invokes the provision of **Article 159(1) (d)** of the **Constitution of Kenya 2010**. With respect that provision cannot be invoked in a situation such as the one before me where the rule is so plain. Neither can I rely on that Article to give to myself jurisdiction not conferred on me by the Rules but which is clearly conferred on to the Deputy Registrar. In this case no injustice would ensue if the party is asked to take appropriate action before an appropriate institution.

I must not say more nor deal with the substance of the application for fear of prejudicing either party or embarrassing the Deputy Registrar on account of what I am about to say below, as this application from what I have stated above is not a matter for me. It is a matter for the Deputy Registrar once an appropriate application is made before him. Most likely this application was meant to be placed before him. In that case Mr. Kenyariri should have been the first to say so. He did not but I think in the interest of justice and to avoid time wastage, I will apply the provisions of **Section 3A** and **3B** of the **Appellate Jurisdiction Act** and have this matter referred to the Deputy Registrar. I do so. But the applicant is to meet the cost of the day. Costs to the Respondent.

***Dated and Delivered at Kisumu this 1st day of November, 2013.***

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**