



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 108 of 2012

ELISHA OKEA OGOLA.....APPLICANT

AND

JOB OGINGA OGOLA.....RESPONDENT

(Application to strike out the notice and record of appeal against the ruling and order of the High Court of Kenya at Kisii (Muchelule, J.) dated 23rd March, 2010

in

H.C.MISC. APPL. NO. 173 OF 2005)

RULING OF THE COURT

This is an application by way of notice of motion brought under **Rules 42, 43, 82(2) and 84** of the **Court of Appeal Rules** (the Rules) in which the applicant (respondent in the appeal) seeks an order that the notice of appeal dated 23rd April 2010, and the record of appeal dated 28th March, 2012 be struck out on the following grounds:-

- “(a) The respondent herein was aggrieved and/or dissatisfied with the ruling and order of the Superior Court dated and delivered on 23rd day of March 2010.*
- (b) Consequently, the respondent lodged a notice of appeal on the 23rd April 2010.*
- (c) Upon lodging the notice of appeal, the respondent requested for proceedings and ruling vide letter dated 8th April 2010.*
- (d) However, the letter bespeaking proceedings was neither copied nor served upon the applicants’ (sic) counsel.*
- (e) Consequently, the respondent herein, was/is not covered by the provisions of Rule 81(1) of the Court of Appeal Rules, now Rule 82(1) & (2) of the Court of Appeal Rules, 2010.*
- (f) In the premises, the respondent cannot invoke and/or benefit from a Certificate of Delay, whatsoever.*
- (g) Nevertheless, the Certificate of Delay on record, is slanted and defective.*

- (h) *On the other hand, the notice of appeal herein was lodged outside the statutory period.*
- (i) *Besides, the notice of appeal was neither served within the statutory seven days of lodgment or at all.*
- (j) *At any rate, the respondent herein was obliged to file and/or mount the appeal within 60 days of receipt of the proceedings and ruling.*
- (k) *Nevertheless, the respondent herein, mounted the appeal outside the statutory period, albeit without leave.*
- (l) *In view of the foregoing, the record of appeal herein has been filed and/or lodged out of time, without leave of the Court.*
- (m) *On the other hand, no appeal lies as of right against the orders sought to be impugned.*
- (n) *Consequently, the appeal filed is defective, misconceived and otherwise bad in law.*
- (o) *In the premises, the instant appeal is irredeemably and/or hopelessly bad in law.*
- (p) *No amount of amendments would save and/or salvage the instant record of appeal.*
- (q) *That is in the interest of justice that the instant application be granted.*
- (r) *This is a fit and proper application to be granted Ex-Debito justitiae.”*

The appeal herein relates to succession, distribution and management of the estate. The appellant had challenged the manner in which the estate was managed by the respondent, but according to the High Court, had invoked the wrong procedure in doing so. However, as that dispute may still come before our court, we say no more at this time.

With regard to the application before us, the facts are not in dispute. The judgment, the subject of the appeal herein, was delivered on 23rd March, 2010. The notice of appeal was lodged in the High Court at Kisii on 23rd April, 2010 clearly out of time, and without leave of the court. The letter to the Registrar dated 8th April, 2010 bespeaking the proceedings was neither copied, nor served, upon the applicant as was required by the second *proviso* to the then **Rule 81** now **Rule 82** of this **Court’s Rules**. The respondent nonetheless, proceeded and filed the record of appeal on 11th May 2012, well out of the sixty days stipulated in the Rules of this Court. Finally, the most significant ground of this application is that the appeal was filed without leave of the High Court which is mandatory in respect of all matters falling under **Section 40** of the **Succession Act**.

Based on the above facts, none of which are in dispute, *Mr. J. M. Oguttu*, learned counsel for the applicant, submitted that the Notice of Appeal and the Record of Appeal should be struck out as being incompetently before the Court.

Mr. S. M. Sagwe, learned counsel for the respondent, while not disputing the facts, simply relied on **Section 159** of the **Constitution**, and **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, arguing essentially that the Court should not rely on mere technicality to defeat the respondent’s claim. With respect, this is not a matter in which those provisions can be invoked. This is an omission that goes to the root of the Rules i.e. whether or not a party can file an appeal out of time and without leave of the court. To invoke the provisions of **Section 3A** and **3B** would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. **Sections 3A** and **3B** were not meant for that. In the case of *Hunter Trading Company Ltd Vs. Elf Oil Kenya Limited*, **Civil Application No. Nai. 6 of 2010**, this Court considered the applicability of those sections in detail and stated *inter alia* as

follows:-

“It seems to us that in the exercise of our powers under the ‘02 principle’ what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “02”compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “02 principle” could easily become an unruly horse.”

This Court also stated in **City Chemist (Nrb) & Another Vs. Oriental Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (UR. 199/2008)** as follows:-

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

We respectfully agree with those sound legal sentiments. We may cite one more case of **Mradura Suresh Kantaria Vs. Suresh Nanalal Kantaria Civil Appeal No. 277 of 205** (unreported) where this Court stated as follows:-

“The overriding principles will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”

The above are the answers to *Mr. Sagwe’s* submissions. We think we have said enough to indicate that the notice of motion is based on sound grounds and must succeed. In the event, the Notice of Appeal dated 23rd April, 2010 and the Record of Appeal lodged in respect of Civil Appeal No. 16 of 2012 are struck out. Costs shall be to the applicant in this notice of motion who is the respondent in the appeal. Orders accordingly.

Dated and delivered at Kisumu this 28th day of November, 2012.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

R. N. NAMBUYE

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR