



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appeal (Application) 222 of 2008

BETWEEN

JAMES OBANDE APPELLANT

AND

ISAIAH JUMA 1ST RESPONDENT
PATRICIA OBUYA 2ND RESPONDENT

*(An appeal from the ruling and order of the High Court of Kenya at Kisumu
(Mwera, J) dated 15th June, 2008*

in

H. C. SUCCESSION CAUSE NO. 418 OF 2001)

RULING OF THE COURT

The appellant in Civil Appeal No. 222 of 2008, **James Obande Owuor**, obtained a grant of Letters of Administration in respect of the estate of **Daudi Owuor Awuor** (deceased) who died on 20th December, 1966. **Isaiah Juma** and **Patrick Abuya**, the respondents in this appeal were not amused and they moved to the superior court by way of summons dated 2nd July, 2002 to challenge that issue of grant to the appellant. In a ruling dated and delivered on 15th June, 2008, Mwera J, revoked that grant and also revoked transfer of Land Parcel Numbers **KABONDO/KODUMO EAST/370** and **KABONDO/KODUMO EAST/392** to the appellant and ordered cancellation of the entries made on the registers of the two titles in the Land Registry and awarded the costs of the application to the respondents.

The appellant felt aggrieved by that order and filed notice of appeal on 25th June, 2008. Thereafter, he filed the appeal aforesaid on 13th October, 2008 and served the record of appeal upon the respondents on 27th October, 2008. Upon receipt of the record of appeal, the respondents (now the applicants in this application) filed notice of motion dated 12th November, 2008 on 13th November, 2008 seeking orders:-

- “1. *That this appeal be struck out with costs.*
2. *That costs of and incidental to this application be paid by the Respondent.*”

Five grounds were cited in support of the application. These are that:-

- “(a) *The appeal has been filed out of time without leave of this Court and certificate of delay issued by the superior court is of no assistance to the appellant.*
- (b) *The appellant did not obtain leave of court before instituting this appeal.*
- (c) *The record does not contain a certified copy of the order/decree granting leave to appeal.*
- (d) *The copy of the order appealed from is not certified and does not conform with the ruling of the Court.*
- (e) *The notice of appeal is defective.*”

There is a supporting affidavit sworn by David Otieno, the counsel conducting the application on behalf of the applicants in the notice of motion, who are the respondents in this appeal. The respondent in this notice of motion, who is the appellant in the appeal, though duly served with the notice of motion, has not filed any replying affidavit challenging the facts deponed to in the supporting affidavit.

At the commencement of the hearing of the notice of motion, Mr. Nyanga, counsel holding brief for the respondent, applied for adjournment of the hearing. That application was opposed and in a separate ruling we rejected it and ordered the hearing of the application to proceed. Mr. Otieno, the counsel for the applicant addressed us at length, mainly highlighting the grounds in support of the application and referring us to two authorities on the question of whether or not leave was required before the appeal could be lodged in the matter that was before the superior court. When it came to the respondents' turn to respond to the submissions of Mr. Otieno, Mr. Nyanga left the matter to the court.

The record shows, and it was not disputed, that when the ruling appealed from was delivered on 15th June, 2008 and the respondent/appellant was supplied with the copies of the proceedings on 16th July, 2008, he did not promptly take necessary steps to file his appeal but allegedly waited for certified copies which he received on 20th August, 2008. All this is contained in the Certificate of Delay at paragraphs 2, 3 and 4 which state:-

- “2. On 16th July 2008, uncertified copies thereof were supplied to the said petitioner James Obande Owuor upon payment of Kshs.2,350/=.**
- 3. On the 20th August, 2008, the Deputy Registrar, High Court of Kenya, informed the said petitioner James Obande Owuor that certified copies of proceedings and ruling were ready for collection.**
- 4. The typed and certified copied (sic) thereof were collected by the petitioner James Obande on the 20th August, 2008.”**

Thus it is not in dispute that on 16th July, 2008, the respondent/appellant was supplied with copies of proceedings. That being the case, he had to file the appeal within sixty days from that day. He should have lodged the appeal latest by 16th September, 2008. He did not. He lodged it on 13th October, 2008, without leave, about 27 days late. This Court has said on several occasions that certified copies of proceedings are not necessary for purposes of mounting a competent appeal. The argument that he delayed because he was waiting for certified copies of proceedings is not available to the respondent/appellant. The appeal was filed out of the time allowed by law. That would have, on its own been enough to dispose of this application. However, there is the other point which was raised and which we also consider as being valid. That was that a copy of the order appealed from is not certified. That order appears at page 177 of the record. It is certainly not certified and this is apparent on the face of it. We also note that it was not properly drawn. **Rule 85** of this Court's Rules specifies what is required to be included in the record of appeal. Certified copy of the decree or order appealed from is a requirement. The omission may be fatal, depending on the circumstances in a particular matter.

Lastly, there is the question of whether or not in this appeal, there was need to have leave of the superior court to lodge the appeal. Our view is that in the circumstances of this case, that was not a requirement. The ruling delivered by Mwera, J, was in a summons in a succession matter in which he revoked the grant; revoked the transfer of Land Parcel Numbers **KABONDO/KODUMO EAST/370 and KABONDO/KODUMO EAST/392** and cancelled the title deed issued to the appellant in respect for those land parcels. In short the court therein made orders that finally determined the issues between the parties. The Succession Act does not make any specific provisions as to whether appeals from such orders made by the superior court in its original jurisdiction are to be made with leave of the superior court or leave of this Court. It makes clear provisions as regards appeals from the subordinate courts to the High Court when it states that decisions of the High Court on such appeals would be final but does not state whether or not appeals to this Court from the superior court's decision in its original jurisdiction are appealable as of right or with leave.

Section 75 of the Civil Procedure Act is not relevant in this matter. **Section 66** of the Civil Procedure Act states:-

“Except where otherwise expressly provided in this Act, and subject to such provisions as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decree and from the orders of the High Court to the Court of Appeal.”

In our view, and confining ourselves to this matter before us, we do not think the argument of Mr. Otieno on this point is tenable. However, as we have stated above, on the other grounds raised, we find the application to strike out the appeal valid. We have agonized over whether the latest amendments to the Appellate Jurisdiction Act namely the provisions of **section 3A** and **3B** of the Act which provide for the overriding objective of civil litigation, would be invoked in this matter, but even if we were to do so, the result would still be against the appellant (respondent in this application) for he is the one that has sought on more than one occasion to delay the expeditious process of the court. He would thus not benefit from our application of those provisions.

In short, the notice of motion succeeds. Civil Appeal No. 222 of 2008 is struck out with costs to the respondent (applicant in this application) both of the appeal and the application dated 12th November, 2008.

Dated and delivered at Kisumu this 30th day of April, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR