



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

Civil Appeal (Appli) 254 of 2007

BEVERLY WAMBURI KINGORI APPLICANT

AND

KIPROTICH ARAP TOO RESPONDENT

(Application seeking orders that the Notice of Appeal, the Record of Appeal from the Ruling of the High Court of Kenya at Kakamega (Kariuki, J.) dated 7th June, 2007

in

H. C. Misc. Appl. No. 88 of 1988)

RULING OF THE COURT

By its notice of motion dated 12th November, 2007, the applicant herein, *BEVERLY WAMBURI KINGORI*, seeks an order under *Rules 42 and 80* of the Court of Appeal Rules that the Notice of Appeal and *Civil Appeal No. Kisumu 22 of 2007* between the respondent and the applicant be struck out on the following grounds:-

- “(i) That the record of appeal does not contain all primary documents.***
- (ii) The Notice of Appeal, the appeal and record of appeal were lodged out of time.***
- (iii) That the certificate of delay is irregular and invalid.***
- (iv) That the notice of appeal and record of appeal have not been served upon all the parties affected by the appeal.***
- (v) That the record of appeal does not comply with the provisions of Rule 85 of the Court of Appeal Rules and the Provisions.***
- (vi) That the Notice of Appeal is invalid as it was filed by the appellant in person when he was represented by an advocate and there had not been filed a Notice of Intention to Act in person.”***

The application was supported by the affidavit of the applicant in which he averred to the following facts:-

“1. THAT I am the applicant herein and hence competent to swear this affidavit.

2. THAT the respondent commenced proceedings at Lukuyani Land Disputes Tribunal which led to an award that was finally adopted by the Court at Kakamega on 28th April, 2006. Annexed are copies of the Tribunal proceedings and award marked “BWK -1”.

3. THAT I moved the High Court vide Kakamega High Court Miscellaneous Civil Application No. 88 of 2006 to quash the award and the adoption. Annexed hereto are:-

(i) Copies of the Chambers Summons dated 10th August, 2006 for leave to file the proceedings, marked “BWK-2”.

(ii) The notice of motion dated 21st August, 2006 marked “BWK-3”.

(iii) The replying affidavit sworn by the Respondent, marked “BWK-4.”

4. THAT on 7th June, 2007 the High Court quashed the Tribunal award. Attached is a copy of the ruling marked “BWK-5”.

5. THAT I am informed by Mr. I.S. Kuloba Advocates, which information I verily believe to be true,

(i) that the Respondent served my advocates with two different Notices of appeals (sic), one served upon them on 15th June, 2007 and the other on 3rd July, 2007. Annexed are the two Notices of Appeal, marked “BWK-6” and “BWK-7” respectively.

(ii) that whereas the Notice of Appeal that was filed in time was not signed by the Deputy Registrar, the notice of appeal which was lodged on 29th June, 2007 out of time was signed by the Deputy Registrar. The affidavit of service of notice of appeal by one JULIAS CHUMBA sworn on 6th July, 2007 shows indeed that the notice of appeal was served out of time.

(iii) that the respondent is relying on a defective notice of appeal in his record of appeal lodged.

(iv) that the record was lodged on 16th October, 2007 out of time since the alleged certificate of delay shows that the proceedings were ready for collection on 9th August, 2007 and the record ought to have been lodged within 60 days, that is, by 9th October, 2007, in any event.

(v) that the respondent never applied for proceedings in writing and did not send a copy of the letter for proceedings to my advocates, and hence he is not entitled to rely on the proviso to rule 81 of the Court of Appeal Rules and hence the certificate of delay is not valid and should be disregarded.

(vi) that the respondent has not numbered the 10th line of each of the leaves in the record of appeal, contrary to Rule 13(5) of the Court of Appeal Rules.

(vii) that the respondent has omitted to include in the record of appeal the Chamber Summons application dated 10th August, 2006, which is an application that was read within the meaning of Rule 85 of the Court of Appeal Rules. Annexed is a copy of the application, marked “BWK-8”. The application and the affidavit thereof are primary documents.

(viii) that there is no evidence to suggest that the Lukuyani Land Disputes Tribunal was served with the notice of appeal and the record of appeal, and yet it is a party affected by the appeal.

(ix) *that the memorandum of appeal does not substantially take the form prescribed under the Court of Appeal Rules.*

6. THAT I swear his (sic) affidavit in support of the application before this court.

7. THAT what is deponed herein is true to the best of my knowledge, information and belief.”

That is the application that came up for hearing before us on 19th June, 2009 when Miss. L.C. Kosgei, appeared for the applicant, and Miss Grace Kamau, for the 1st respondent. The 2nd respondent was represented by Mr. Korir who was holding brief for Mr. Nyekwei. In her submission, Miss Kosgei relied on the grounds upon which this application was brought and went on to emphasize that several essential steps had not been taken in pursuing the appeal. She pointed out that there were two notices of appeal and that when the appeal was finally filed, it was actually out of time.

In reply to the foregoing, Miss Kamau conceded that they had not filed any replying affidavit but she went on to state that she would associate herself with the submissions of Mr. Korir – which submissions were yet to be made!

On his part, Mr. Korir conceded a number of issues raised in this application. He admitted that there were two notices of appeal but, in his view, the notice of appeal in the record of appeal should be accepted while the other notice should be deemed as having been withdrawn. Mr. Korir further conceded that the notice of appeal he wished to rely on had not been endorsed. As regards the record of appeal having been lodged out of time, Mr. Korir conceded that the record of appeal was, indeed, filed out of time. However, it was his view that the fact that the appeal was lodged out of time did not prejudice the applicant!

Mr. Korir finally submitted that despite all the errors and defects as conceded already, he still urged us to consider the circumstances under which the notice of appeal and the record of appeal were filed and that it has to be appreciated that the appellant/respondent was acting in person.

In this application, it has been conceded that the record of appeal did not contain all primary documents; that the notice of appeal and the record of appeal were lodged out of time; that the certificate of delay was invalid; that the notice of appeal and record of appeal were not served upon all the affected parties; that the record of appeal does not comply with provisions of **Rule 85** of this Court's Rules, and that the notice of appeal was filed by the appellant in person who had been represented by an advocate in the superior court, but did not file a notice of intention to act in person.

The foregoing is a litany of defects in the notice of appeal and record of appeal. Clearly, there was non-compliance on the part of the appellant/respondent. But to counter all these defects, Mr. Korir took refuge in the fact that the respondent was acting in person. That line of thinking cannot be accepted by this Court. The rules of the Court apply to all parties coming before it; whether represented or not. We must emphasize that the rules of the court must be obeyed. In **RATMAN V. CUMARASAMY [1964] 3 ALL E.R. 933** Lord Guest delivering the opinion of the *Privy Council* at p. 935 said:-

“The rules of the Court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

In view of the foregoing, we are of the opinion that the application before us could not be resisted despite the feeble, nay lamentable, submissions by Mr. Korir. Indeed, it is our view that this application should have been conceded right from the day it was set down for hearing.

We think we have said enough to indicate the destination of this application. It is for allowing. Accordingly, the application dated 12th November, 2007 seeking the striking out of the notice of appeal

and record of appeal is granted with costs of the application and costs of the struck out appeal.

Dated and delivered at Kisumu this 17th day of July, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR