



IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appli. Nai 202 of 2006

JOHN NGINYI MUCHIRI APPLICANT

AND

SAUL KORIR KIPTALAM 1ST RESPONDENT

JOHN KAMUNYA 2ND RESPONDENT

ALEX KIBORE 3RD RESPONDENT

JOB GICHURU NJOROGE 4TH RESPONDENT

ESTHER NJOKI KAMUNYA 5TH RESPONDENT

STEPHEN NGUGI KARIUKI 6TH RESPONDENT

LYDIA JOB WAIRIMU 7TH RESPONDENT

(Application to strike out a Notice of Appeal from the judgment of the High Court of Kenya at Nakuru (Musinga, J.) dated 28th day of April, 2005 and 12th May, 2005

in

H.C.C.C. NO. 583 OF 1996)

RULING OF THE COURT

This is an application by way of notice of motion expressed to be brought “*Under Rules 42, 43, 74, 80 and 81* of the Court of Appeal Rules in which the applicant herein, *John Nginyi Muchiri* seeks the following orders:-

“1. THAT the Notices of Appeal filed herein on 28th April, 2005 and 12th May, 2005 by the 2nd, 4th 5th and 7th respondents be struck out.

2. THAT the costs of the application be borne by the said respondents in any event.”

The application is made on the following grounds:-

“(a) THAT the respondents herein have failed to take essential steps to institute the Appeals.

(b) THAT the time permitted by the rules for lodging the appeal has since expired.

(c) THAT the notice of appeal filed by the 4th and 7th defendants is incurably defective both in form and substance.”

When the matter came up for hearing before us on *1st March, 2007* Mr. Ikua, the learned counsel for the applicant, narrated the history of the matter by informing us that the notice of appeal was filed way back in **2005** and that up to now steps have not been taken to file the intended appeal. It was Mr. Ikua’s contention that the purpose of filing the notice of appeal was merely to allow the respondents remain on the suit land and keep the applicant away from the fruits of his judgment in the superior court.

To counter the foregoing submissions, Mr. Mbugua, the learned counsel for the 2nd and 5th respondents, stated that proceedings of the superior court are not ready and that as at *1st March, 2007* the proceedings were not ready. He pointed out that the file kept on moving from one office to another and hence the respondents are not at fault. Mr. Mbugua asked us to dismiss this application.

Mr. Kahiga, the learned counsel for the 4th and the 7th respondents, similarly urged us to dismiss this application.

Our perusal of the material placed before us reveals that the notice of appeal was dated *12th May, 2005*. It is not very clear as to when it was filed as the rubber stamp on the copy in the file is not clear. It is also not clear as to when the said notice of appeal was lodged in the High Court of Kenya at Nakuru. We would say no more on these apparent difficulties since this application was brought on the ground that the respondents have failed to take essential steps to institute the appeal. From the replying affidavit of ***Esther Njoki Kamunya***, it would appear that the judgment of the superior court was delivered on *28th April, 2005* and that on the following day (*29th April, 2005*) the advocates for the 2nd and 5th respondents applied for copies of the typed proceedings and judgment to enable them prepare the record of appeal. We reproduce the contents of that letter which were as follows:-

“THE DEPUTY REGISTRAR,

NAKURU HIGH COURT,

P.O. BOX 61,

NAKURU.

Dear Sir,

RE: NAKURU H.C.C.C. NO. 583 OF 1996

JOHN NGINYI MUCHIRI VS. SAUL KORIR KIPTALAM & 3 OTHERS

Following the judgment delivered in this case on *28th April, 2005*, please supply us with certified copies of the typed proceedings and the said judgment to enable us to prepare the record of appeal. We shall deposit with the Court the required payment for purposes of availing these proceedings and the judgment.

Yours faithfully

KARANJA-MBUGUA & CO. ADVOCATES

CC.

N. IKUA & COMPANY,

ADVOCATES,

P.O. BOX 300,

NAKURU.

It is to be noted that the letter was copied to the advocates for the applicant herein. The letter was dated 29th April, 2005. A similar letter to the Deputy Registrar was written on 31st January, 2007. We have not come across any letter from the Deputy Registrar stating that certified copies of proceedings and judgment were ready for collection.

The main complaint by the applicant herein would appear to be that the respondents having filed a notice of appeal chose to go to sleep rather than follow up the matter. But is that the position in this matter? We do not think so, especially in view of the *proviso* to **rule 81(1)** of this *Court's Rules* which provides:-

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

In view of the foregoing, we are satisfied that this application to strike out the notice of appeal is filed without any merit. We accordingly order that the notice of motion dated 29th June, 2006 be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nakuru this 30th day of March, 2007.

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR