



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: MWILU, J. MOHAMMED & ODEK, JJ.A.**

**CIVIL APPEAL (APPLICATION) NO. 98 OF 2013**

**BETWEEN**

**EDWARD NJUGUNA KANGETHE..... RESPONDENT/APPLICANT**

**AND**

**JOEL KIEMA MUTINDA .....1<sup>ST</sup> APPELLANT/RESPONDENT**

**VIOLET NDANU MUTINDA .....2<sup>ND</sup> APPELLANT/RESPONDENT**

**(An application to strike out the decision of the High Court of Kenya at Nairobi (Mutava, J) delivered on the 18<sup>th</sup> October, 2012**

**in**

**HCCC NO. 911 OF 2009)**

**\*\*\*\*\***

**RULING OF THE COURT**

**Background**

1. Before us is a Notice of Motion dated 27<sup>th</sup> June, 2013 and filed on 28<sup>th</sup> June, 2013 brought pursuant to **Rules 42, 75, 77, 84, 87 & 90 of the Court of Appeal Rules** (the Rules). The applicant seeks the following orders:

- i. This Appeal No 98 of 2013 be struck out.*
- ii. The costs of this application and of the appeal itself be awarded to the applicant.*
- iii. Such other and/or further relief be granted as this honourable court might deem fit and just to grant in the unique circumstances of this matter.*

2. The grounds upon which the applicant relies in support of his application are outlined in the notice of motion and are that the notice of appeal is incurably defective and hence invalid and incompetent and the same does not lie; the appellants/respondents are attempting to defraud this Court by filing two different notices of appeal and using them to hoodwink this Court; one Notice of Appeal dated 18<sup>th</sup> October, 2013 was served on the respondent/applicant out of time, whereas the other Notice of Appeal dated 18<sup>th</sup> October, 2012 is still on record but has not been served on the respondents; leave to appeal as required under the provisions of the law, was not sought; the record of appeal was served on the respondent/applicant out of time and lastly that on those premises the appeal is incompetent and incurably defective and does not lie.

3. The genesis of this application is that on 25<sup>th</sup> September, 2009, the applicant entered into a sale agreement with the respondents for the sale of **L.R NO. 12948/266** [the suit property] which comprises of house No. 81 situated at Mountain View Estate, Nairobi. The respondents agreed to sell to the applicant the said premises at a price of KShs.16,000,000/=. The applicant avers that he had paid a total KShs.9,910,516/= when the respondents instructed the Board of Trustees, National Social Security Fund (which was the 3<sup>rd</sup> defendant in the original suit) to cancel the sale, prompting the applicant to file a suit against the respondents for specific performance.

4. The applicant filed a notice of motion dated 18<sup>th</sup> June, 2012 seeking to have the respondents ordered to deposit KShs.80,000/= in court or in a joint account, being monthly rent for the suit property. The applicant contended that he had paid the full purchase price of the suit property amounting to 16,000,000/= as per the sale agreement. The applicant further contended that having paid the full purchase price for the suit property he stood to lose a lot in terms of rent before the completion and determination of the appeal. Further, that the respondents benefitted from holding the deposit of the purchase price paid to them and at the same time continued to occupy the suit property, rent free to the applicant's detriment.

5. The respondents filed a replying affidavit sworn by the 2<sup>nd</sup> respondent on 3<sup>rd</sup> July, 2012, opposing the said application. They averred that the entire sum of 16,000,000/= had not been paid on their account. It was their case that the applicant had come to court with unclean hands as he had breached the orders of the court, in particular the ruling dated 25<sup>th</sup> January, 2012 which ordered him to deposit the balance of the purchase price within ten days; that the ten days expired on 3<sup>rd</sup> February, 2012 while the money was deposited in the joint account on 7<sup>th</sup> February, 2012. The respondents argued that the sale was not complete hence title had not passed to the applicant, therefore, they could not be required to pay rent for their own house.

6. The High Court, (Mutava, J), vide a ruling dated 18<sup>th</sup> October, 2012 allowed the applicant's application dated 18<sup>th</sup> June, 2012 with costs. The court observed that the applicant had indeed paid the entire purchase price of the suit premises as per the sale agreement and that it was only fair and just for the respondents to pay the requisite rent to ensure that both the applicant and the respondents were on equal footing pending the full hearing and determination of the matter. Consequently, the High Court ordered the respondents to deposit KShs.80,000/= in a joint interest earning bank account in the names of the advocates for both the applicant and respondents as monthly rent effective from 31<sup>st</sup> October, 2012.

7. Aggrieved by that decision, the respondents filed a notice of appeal dated 18<sup>th</sup> October, 2012 on 22<sup>nd</sup> October, 2012, which notice was not served on the applicant. The record also indicates that another notice of appeal dated 18<sup>th</sup> October, 2013 filed on 22<sup>nd</sup> October, 2012 but lodged in the High Court on 8<sup>th</sup> May, 2013 which notice was served on the then advocate for the applicant on 10<sup>th</sup> May, 2013. This notice has the stamp of the Registrar of the High Court but not his signature. Further, there is a further notice of appeal dated 8<sup>th</sup> May, 2013 filed on 22<sup>nd</sup> October, 2012 and served on the then advocates for the applicant on 10<sup>th</sup> May, 2013, which notice of appeal has the registrar's stamp and signature. The record of appeal was filed on 17<sup>th</sup> May, 2013 and served upon the applicant on 17<sup>th</sup> May, 2013.

### Submissions by counsel

8. At the hearing before us, learned counsel Mr Gachie S. Mwanza, appeared for the applicant while Miss J.W. Kiniti held brief for learned counsel B.M Musyoki for the respondents. Mr Mwanza reiterated the grounds in support of the application to strike out the appeal. He submitted that the application seeks to strike out **Civil Appeal No. 98 of 2013**. He further submitted that the decision sought to be appealed against is dated 18<sup>th</sup> October, 2012. Counsel submitted that there are three (3) notices of appeal in respect of this appeal which were:

*i. notice of appeal dated 18<sup>th</sup> October, 2012 allegedly filed on 22<sup>nd</sup> October, 2012. The applicant contends that this notice of appeal was not served on him;*

*ii. notice of appeal dated 18<sup>th</sup> October, 2013 allegedly filed a year before on 22<sup>nd</sup> October, 2012, that was served on the applicant's lawyers on record on 10<sup>th</sup> May, 2013; (the said notice of appeal has the stamp of the Deputy Registrar but was not stamped); and*

*iii. notice of appeal dated 18<sup>th</sup> October, 2013, allegedly filed on 22<sup>nd</sup> October, 2012 and served on the applicant on 10<sup>th</sup> May, 2013 which bears the stamp and signature of the Deputy Registrar.*

9. Counsel argued that the three notices of appeal are a clear indication that there was an intention on the part of the respondents to mislead this Court; that the respondents did not comply with the orders of the High Court, since in 2012 the respondents were ordered to deposit KShs.80,000/= monthly; that a joint account was opened but the respondents failed to deposit the said amount and the result of their actions was to delay the cause of justice. Counsel urged us to strike out the notice of appeal with a view to fulfilling the overriding objectives of the court.

10. In opposing the application, Miss Kimiti maintained that the applicant has not complied with the proviso to **Rule 84 of the Rules**. That the present application was filed on 28<sup>th</sup> June, 2013 yet the respondents were served with the notice of appeal on 10<sup>th</sup> May, 2013. In response to the issue of the date of the notice of appeal, counsel submitted that as stated in the respondents' replying affidavit under paragraph 6, it was served on the applicant on 10<sup>th</sup> May, 2013. Counsel argued that the respondents in the said replying affidavit have indicated that there was only one notice of appeal filed and that there was a typographical error therein as it should have been dated 18<sup>th</sup> October, 2012 and **not** 18<sup>th</sup> October, 2013. On the issue of delay, counsel argued that the instant application by the applicant has been filed out of time.

11. In response, Mr Mwanza submitted that the Record of Appeal was filed on 14<sup>th</sup> May, 2013 and served on them on 27<sup>th</sup> May, 2013. That the instant application was filed on 28<sup>th</sup> June, 2013. Counsel contended that the court should take into consideration the confusion brought about by the various notices of appeal and urged us to allow the application.

## Determination

12. We have considered the application, the grounds in support of the application, the replying affidavit, the authorities, the submissions by learned counsel and the law.

*Rule 84 of the Rules* provides as follows:

***“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.*”**

***Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.*** [Emphasis added]

13. Based on the foregoing provision, an applicant can seek an order striking out an appeal on the ground that firstly, either no appeal lies or secondly that an essential step in the proceedings has not been taken or thirdly that the essential step has not been taken within the prescribed time. See ***LITHER***

***PETER MUJA & ANOTHER V ZUENA NGANDO KABABU, (2015) eKLR.***

14. In the instant application, the applicant is seeking to strike out the notice of appeal on the ground that the notice of appeal is incurably defective, invalid and incompetent before the court. In urging us to strike out the notice of appeal the applicant argued that the respondents have violated the rules of the Court by failing to file and serve the notice of appeal and the record of appeal within time or with leave of the court. The respondents on the other hand have urged us to strike out the present application for being incompetent as it was filed out of time as stipulated under ***Rule 84 of the Rules***.

15. The record indicates that the notice of appeal was served on the applicant on **10<sup>th</sup> May, 2013**. The applicant filed the instant application on 28<sup>th</sup> June, 2013. Pursuant to the proviso to rule 84, the application to strike out should have been filed within 30 days from the date of service of the notice of appeal. The instant application was, therefore, brought outside the prescribed time.

16. The respondents herein under ***Rule 75 of the Rules*** were required to lodge the Notice of Appeal within fourteen (14) days of the date of the ruling delivered on 18<sup>th</sup> October, 2012. There are several notices of appeal on record filed by the respondents but learned counsel for the respondents submitted that there was a typographical error and the proper notice of appeal is the one that was served on the applicant on 10<sup>th</sup> May, 2012.

17. Regarding the respondents' contention that the application before us was filed out of time and it is therefore incompetent, this court in the recent case of ***GICHUKI KING'ARA & COMPANY ADVOCATES V AL JALAL ENTERPRISES LIMITED & 2 OTHERS, CIVIL APPLICATION NO. NAI 211 OF 2012 (UR 156/2012)*** (Unreported) stated in reference to Rule 84:

***“The applicant did not file its application within the stipulated period of thirty days. It did so on 9<sup>th</sup> August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”***

18. We find that the filing of a **Rule 84** application outside the stipulated thirty [30] days renders the application incompetent. The rules of the court serve the role of ensuring the just expeditious and efficient dispensation of justice and should be complied with.

19. In the circumstances of this application, we find that the motion before us that seeks to strike out the notice of appeal on account of default is itself incompetent because it does not comply with the proviso to rule 84. The respondent's objection is, therefore, upheld with the result that the notice of motion dated 27<sup>th</sup> June, 2013, is hereby dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of October, 2015.**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**J. OTIENO ODEK**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**



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