



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 13 OF 2020

BETWEEN

NOORLANDS LIMITED.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

(An application to strike out the notice of appeal dated 7th November, 2016 and lodged in court on 8th November, 2016 in an intended appeal against the judgment of the Environment and Land Court at Mombasa (Omollo, J.) delivered on 4th November 2016 in ELC Case No. 287 of 2013)

RULING OF THE COURT

1. In its application dated 3rd February 2020 made under Section 3A and 3B of the Appellate Jurisdiction Act and Rules 82, 83 and 84 of the Court of Appeal Rules, the applicant Noorlands Limited, seeks an order that the notice of appeal lodged by the respondent, Kenya Power & Lighting Company Limited on 8th November 2016 be struck out on the ground that the respondent has not undertaken the essential step of filing a memorandum and record of appeal within the prescribed time.

2. In his affidavit in support of the application, Mohammed Faki Mwinyihaji Khatib a duly appointed attorney for the applicant deposes that the applicant successfully sued the respondent before the Environment and Land Court (ELC) in 2013 for trespass by erecting electricity supply poles on the applicant's property without permission; that in a judgment delivered by that court on 4th November 2016, the applicant was awarded general damages of Kshs.2,500,000.00 against the respondent; that on 8th November 2016, the respondent lodged a notice of appeal but has not filed a memorandum and record of appeal since that time.

3. The applicant's suit before the ELC was founded on a claim that the respondent had placed equipment and erected power supply lines on the applicant's property, plot 121/V/MN, without consent. It sought a mandatory injunction to compel the respondent to remove the power supply lines from the suit property as well as general and punitive damages for trespass. Satisfied that the applicant had not granted the respondent way leaves to the property, the learned Judge found that the claim for trespass was established, and although the court did not order the removal of the supply lines from the property, it did award the applicant damages for trespass as already mentioned.

4. In her replying affidavit in opposition to the application, Emily Kirui, a legal officer of the respondent deposes that in

addition to filing the notice of appeal, the respondent did apply, through its advocates, for the typed proceedings and judgment by a letter dated 7th November 2016; that the typed proceedings were certified by the lower court on 5th October 2018 and a certificate of delay dated 11th October 2018 issued; that the advocates for the respondent then prepared the memorandum of appeal and compiled the record of appeal and forwarded the same to their representative in Malindi on 3rd December 2018 for filing in the registry of the Court but the said advocates failed “*to follow up the matter with their representative in Malindi*”. Ms. Kirui deposed further that the respondent remains keen to pursue the appeal and that the mistake of the respondent’s advocates should not be visited on the respondent and that an application has since been filed for extension of time.

5. We have considered the application, the affidavits and the submissions. There is no dispute, as submitted by Jengo Associates advocates for the applicant, that it is over four years since the judgment of the ELC was delivered on 4th November 2016. It is also not in contest that the notice of appeal was filed and served within time. The explanation given by the respondent for the omission over the years to file the memorandum and record of appeal is that their advocates, Kiarie Kariuki & Company advocate, prepared the record of appeal and forwarded it to their representative in Malindi in October 2018 for purposes of filing but omitted to follow up to ensure that was in fact done.

6. It is urged for the respondent that mistake of counsel should not be visited on the client. In that regard, we recall the words of *Madan, JA* in the case of *Belinda Murai & Others vs. Amos Wainaina, [1979] eKLR*, that:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate....”

7. In the present case, however, quite apart from the fact that the advocates for the respondent, Kiarie Kariuki & Company advocate, have not themselves explained what transpired, the respondent itself appears to have made absolutely no effort to follow up with its advocates to establish the status of the matter for an inordinately long time. As stated in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR*:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.

8. Similarly, in *Bi-Mach Engineers Limited vs. James Kahoro Mwangi [2011] eKLR* the Court expressed that:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate...”

9. Consequently, there being no good reason given why we should not strike out the notice of appeal, we allow the applicant’s application dated 3rd February 2020 with the result that the respondent’s notice of appeal dated 8th November 2016 is hereby struck out. The applicant will have the costs of the application.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of July, 2021.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

SANKALE ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR



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