



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT NO.10 OF 2014**

**BUBBLE ENGINEERING COMPANY LIMITED .....PLAINTIFF/APPLICANT**

**VERSUS**

**MASENO UNIVERSITY .....DEFENDANT/RESPONDENT**

**RULING**

1. By its application dated 20.11.2015 the applicant/plaintiff prays for the following orders:

**a) The court be pleased to declare that the Notice of Appeal filed and lodged by the defendant herein on 4.3.2015 be deemed as withdrawn**

**b) The sum of Kshs.11,643,986 deposited in court on the 28th July 2015 pursuant to the courts ruling dated 2.7.2015 pending the hearing and determination of the hitherto intended appeal be released to the plaintiff/applicant forthwith.**

2. The application is supported by the affidavit of William O. Owuor sworn on 30.11.2015. The said deponent avers that the Notice of Appeal filed on 4.3.2015 was filed way out of time and that the same cannot be considered to be proper notice. He further states that the respondent has not demonstrated any steps taken so far to ensure that the appeal is heard and determined. In short the applicant contents that all that the respondent is doing is to ensure that the applicant does not enjoy the fruits of the judgment.

3. On its was part the respondent through the replying affidavit of David Otieno advocate has averred that on the contrary the respondent has done all that is necessary to ensure that the appeal is heard. He states that the respondent already lodged a valid notice of appeal and has simultaneously applied to the court for typed proceedings. That the respondent has done all that is necessary and all that it awaits is the deputy registrar to notify it to collect the proceedings which it has apparently paid for.

4. Having heard the parties and read their rival affidavits, the substantive issue to determine which was heavily relied on by the applicant is whether there was a valid Notice of Appeal on record. According to the application the same was filed a day out of time and thus it cannot be validly be termed as a Notice of Appeal.

5. The respondent has raised a fundamental issue through which I think will determine the outcome of this application namely whether this court has jurisdiction to determine whether that notice is valid or not.

According to the respondent it is only the Court of Appeal which is left to determine the same. This court in short was functus officio.

6. The recourse is to look at Rule 83 of the Appellate Jurisdiction Act Cap 9 which states as follows:

**“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of if any persons on whom the notice of appeal was served.”**

7. Rule 84 further states:

**“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 records of appeal as the case may be.”**

8. My reading of the above rules clearly shows that the application ought to be made within the confines of the Court of Appeal. Once the notice is lodged its validity or otherwise is determined by that court in which it is lodged. It would therefore in my respectful view be wrong for this court to determined whether it was filed within the stipulated time or otherwise. Rule 84 above clearly opens the door for any affected party to apply in the event of there being no appeal or that an essential step has not been undertaken.

9. Consequently, whether the respondent has not undertaken any steps as claimed by the applicant is not for the court to decide. In any case the respondent did comply with the last order of this court namely depositing the decretal sum as ordered by the court.

10. I think I have stated much to show that the application is not meritorious. The same is dismissed with costs to the respondent.

**Dated, signed and delivered this 23<sup>rd</sup> day of March 2016**

**H. K. CHEMITEI**

**J U D G E**