REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 20 OF 2020

(CORAM: F.M. GIKONYO J.)

(An application to strike out the Record of Appeal in Civil Appeal No. 20 of 2020)

COUNTY GOVERNMENT OF NAROK.....APPELLANT

VERSUS

BRITISH PHARMACEUTIOCALS LIMITED.....RESPONDENT

RULING

Striking out Record of Appeal

[1]. In a ruling delivered on 25th January 2021, the court granted a conditional stay of execution in the following terms;

i. The appellant shall pay the sum of Kshs. 1,000,000/= to the respondent within 90 days of today.

ii. The appellant shall file and serve record of appeal within 21 days.

iii. This appeal shall be listed before the court on a date to be appointed by court for direction on hearing of the appeal.

iv. Cost of the application shall be in cause.

[2]. This matter was set down for mention on 15th march 2021 to confirm whether the appellant had filed its record of appeal and take further directions. Counsel for the appellant. Mr. Kere informed the court that he had prepared the record but had been unable to file the same owing to the fact that the court had been closed between 11th March 2021 and 14th March 2021. In the circumstances he requested for more time to file the same. This court granted the appellant 14 days leave to file and serve the said record of appeal. The appellant subsequently filed the record of appeal on 15th March 2021.

[3]. The matter came up on 24th April 2021 whereby the counsel for the appellant indicated to this court that he had served the respondent with the record of appeal.

[4]. On 25th May 2021, the firm of Oyatta & associates filed a notice of motion pursuant to Article 159 of the constitution 2010, order 42 (6), and 51 of the civil procedure rules 2010 seeking three main orders that; the record of appeal be determined incompetent and incapable of sustaining the conditional orders of stay issued on 25th January 2021; the record of appeal , if at all filed should be struck out for having not been served upon the respondent and / or served out of time without leave of court; the conditional orders of stay issued on 25th January 2021 be vacated and / or set aside; and that costs of the application be borne by the appellant.

[5]. The main grounds argued by Mr. Oluoch Advocate in support of his application are: -

i) That the stay issued on 25th January 2021 was not absolute in nature but was conditional to the appellant satisfying all the orders of the honourable court;

ii) That, on 24th may 2021 the counsel for the appellant misled court that he had served the respondent with the record of appeal.

[6]. In response to the application Mr. Kere filed a replying affidavit sworn on 21st July 2021. Whilst conceding that the Record of appeal was served out of time, the appellant contended that it was as a result of an inadvertent error on the part of its advocate who was under the impression that service thereof had been effected by his clerk. Counsel stated that on or about 20th March 2021 up to around the beginning of June 2021, all his staff were working remotely from home owing to the fact that one of his staff member had been in contact with someone who had tested positive for COVID-19 virus. Further on 24th may 2021 he had four matters before this court but at the time the matter was called out counsel for the respondent had not logged in to the virtual platform. This court confirmed that record of appeal had been filed but would not give directions on the appeal as it was yet to receive the lower court file. The court then rescheduled the matter to 22 nd July 2021 for directions.

[7]. On 3rd June 2021, Mr. Kere made arrangements for the said record of appeal to be served on counsel for the respondent electronically via email. He urged this court not to strike out the appeal based on his inadvertence to serve. In a bid to convince the Court to overlook the delay, he referred this court to the sentiments in ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR*** and Article 159 of the Constitution.

[8]. Mr. Kere urged the court to give directions for the disposal of the appeal.

[9]. The respondent filed a supplementary affidavit sworn by **Dayanand K. Poojari** on 2nd August 2021. The respondent contended that they were served with the record of appeal on 3rd June 2021 by the appellant without leave of this court. Further that the said record of appeal is defective and incomplete as it does not contain the memorandum of appeal dated 9th March 2021.That this court issued ex parte orders directing the appellant to file their reply within 14 days from the date of service with the instant application but the same once again was not complied with. Therefore, the appellants conduct is wanting and not in good faith. They prayed that the conditional orders of stay of execution granted be vacated.

[10]. The respondent submitted that the disobedience of orders of this court by the appellant was intentional, a ploy to derail the matter and frustrate the respondent's right to immediate realization of the fruits of the judgment. They cited the cases of ***Milton Munene & Another V Vicbran Consultants Limited & Another [2017] eKLR, Mike Maina Kamau V Hon. Franklin Bett And 6 Others [2012] eKLR, And Hadkinson V Hadkinson 2 ALL ER 1952 P. 569***

[11]. The respondent submitted that the conditional orders of stay of execution ceases to exist and cannot be enforced once there is a default in compliance. Unless this honourable court is moved by way of an application to have the same extended which application has not been made in this matter not even this court can proceed to enforce such orders. They cited the case of ***Kamau & another V Ngera [2004] eKLR.***

[12]. The respondent submitted that there was irregular and improper service of the record of appeal upon the respondent. The law and rules of procedure was not followed. As such there is no competent appeal for consideration. That the record served is defective and incomplete contrary to Order 42 Rule 13(4) of the Civil Procedure Rules as it does not contain the memorandum of appeal. They cited the case of ***South Nyanza Sugar Co. Ltd V Simeona A. Opola [2020] eKLR.***

[13]. The respondent submitted that costs follow the event. they cited the cases of ***In Re Estate of Kiptoo Lagat (Deceased) [2021] eKLR*** and Judicial Hints On Civil Procedure Vol 1, by Kuloba J.(Retired)

[14]. The respondent urged this court to allow the prayers sought in the application as it is merited. They cited the case of ***Meis Industries Limited V Mohamed Enterprises (T) Limited and Others (2012) EALR 217.***

[15]. The appellant submitted that the appellant has not willfully disobeyed the order and directions of this court. The order to file and serve the record of appeal within 21 days was varied and the appellant was granted a further 14 days from 15th March 2021 to comply. The appellant complied by filing the record of appeal but inadvertently failed to serve the same within the stipulated timelines. Therefore, the issue of non-service should not be a basis for striking out the record of appeal. They cited the cases of ***Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR***

[16]. The appellant submitted that the record of appeal as filed is complete and does not lack any of the requisite documents as prescribed under Order 42 Rule 13 (4). That there is a typographical error appearing in the index dated 9th March 2021 for it indicates erroneously that the memorandum of appeal in the record is dated the same day as the index. The actual memorandum of appeal that was duly filed and served when this appeal was commenced is what is included as part of the record of appeal. That at pages VI-VIII of Volume 1 of the record of appeal. The memorandum of appeal dated 7th October 2020 is attached having been duly filed on 8th October 2020. The exact memorandum that was served on the respondent on 9th October 2020. No new memorandum of appeal has been filed by the appellant, either dated 9th March 2021 or 9th June 2021.

[17]. The appellant urged this court to dismiss the instant application, maintain the stay orders and issue directions for the disposal of this appeal. That there has not been a willful disobedience of the court order of 25th January 2021. The appellant has duly complied with that order save that the record of appeal was inadvertently not served on the respondent until 3rd June 2021.

[18]. The appellant submitted that costs should follow the event.

ANALYSIS AND DETERMINATION

[19]. The issues arising from pleadings, the submissions made on behalf of the respective parties and the law which this court should determine are: -

i. Whether the record of appeal should be struck out for being served out of time and or for being incomplete.

ii. Whether the stay orders issued on 26th January should be vacated; and

iii. What orders should be made on costs.

Striking down appeal

[20]. In ***Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others [2011] eKLR,*** in which a notice of appeal was served on the respondent out of time and without leave of the court, and upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A) observed that:-

> **"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice…**
>
> **In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." (emphasis added).**

[21]. Scarcely was such substantive justice served before the enactment of the Constitution of Kenya, 2010 in cases with procedural shortcomings and want of form. This must be the work of the Constitution; the new yardstick: serving substantive justice. And, when posterity will be pronouncing its calm and impartial decision; it will be a decision which, I firmly believe, will place in the same rank with Galileo, and with Locke, those who found jurisprudence a gibberish and left it a science with complete practical benefits to the people of Kenya. The raw material and tools provided in the Constitution, *inter alia* article 159(2)(d), is most precious in resolution of disputes and administration of justice between the parties; may it not be injured by a vicious arrangement and approach that leans back to the old habits where courts were eager and readily provoked to strike down a party's action on technicalities.

[22]. Although the case by the Court of Appeal dealt with the striking out of the notice of appeal on the basis that it was served on the respondent out of time and without leave of the court, the jurisprudence coming through is that, in exercise of discretion to strike out a pleading or document, in this case, record of appeal, the court has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if his pleading or document is struck down. A perfect exposition of the core of the overriding objective of the court in section 1A and 1B of the Civil Procedure Rules as well as the principle of justice in article 159(2)(d) of the Constitution towards serving substantive justice.

[23]. It is about 8 months since the appeal was filed. The appellant has defaulted on several occasions to comply with court orders. Mr. Kere, the appellant's counsel had misrepresented at one point that the record of appeal had been served upon the respondent. He however, explained himself and the explanation was accepted. The appellant has also admitted the typographical error on the index to, but the record of appeal is complete and the memorandum of appeal therein is dated 6th October, 2020 and lodged in the Registry on 7th October 2020. I also do note that the record of appeal was served out of time. But, despite these transgressions, is it still possible to do justice between the parties by hearing the merit of the appeal?

[24]. The test is to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if his pleading or document is struck down. The striking out the appeal means striking down the case for the appellant in a summary manner. I have said time without number that striking down a party's suit is only comparable to proverbial drawing of the sword of the Damocles, in effect, driving such party away from the seat of judgment unheard. Such is a cruel way of resolution of disputes, a return to the bill of attainder; an assuredly, arbitrary taking away of the right to be heard. This does not mean, however, that a record of appeal cannot be struck down for good reason. Except, in the circumstances of this case, the kind of prejudice that the appellant/respondent is likely to suffer if this appeal is struck out is graver than the prejudice that the respondent/ applicant will suffer if the appeal is heard on merit. I am answering to a higher calling of the Constitution, and in the interest of justice, the court will give an opportunity to the appellant/respondent to take directions on and set the appeal down for hearing.

[25]. However, the appellant's offensive conduct will not go unpunished. The appellant shall bear the cost of the application to be taxed or agreed upon between the parties, and his appeal will be deemed to be dismissed if it is not set down for directions and a hearing in 21 days of today.

[26]. In light thereof, the prayer to vacate the conditional stay orders is deemed to have been declined. It is so ordered.

Dated, signed and delivered at Narok through Teams Application, this 17th day of November, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Kere for Appellants

2. Ochieng for Oyatta for Respondents

3. Mr. Kasaso - CA