



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 166 OF 2012

FEISAL YASSIN HUSSEIN.....APPLICANT

VERSUS

1. NARESH RATHOD

2. FASTTRACK LOGISTICS LIMITED.....RESPONDENTS

R U L I N G

1. Before the court for determination is the Notice of Motion dated 6/2/2019 by which the Appellant prays in the main that:-

1. THAT this Honourable Court be pleased to extend time (grant leave to the Applicant) to compile the Record of Appeal out of time at the High Court an Court of Appeal respectively and be deemed as duly filed within time upon payment of the requisite fees.

2. THAT this Honourable Court be pleased to make such orders as may appear to be fit and convenient to meet the ends of justice”

2. My reading of the record reveals that application was provoked by the consequences of the Order made by the court on 21/2/2017 when the court said:-

“For the last time, the appellant shall file and serve the Record of Appeal within 30 days from today and in default the Appeal shall stand dismissed. Costs in the course”.

3. That order followed previous orders by the court by which the court had set timelines for the Appellant to compile and file a Record of Appeal to no avail. On the day the order was made the address by the counsel for the appellant was as follows:-

“Mrs. Momanyi:-

I have not had the proceedings available and I have not therefore filed a Record of Appeal. I need one month”.

4. It is apparent that there was a default to file the Record as directed and by operation of the default clause in the file the appeal thus stood dismissed on the 23/3/2017, or thereabouts, however it was not until the 8/2/2018 when the Appellant thought of bringing the current application which was done without seeking to reinstate the appeal. The application merely seeks that time be extended to file the Record of Appeal here, **and very strangely to have a record of Appeal filed in the Court of Appeal.**

5. I deem prayer 2 of the motion to be strange in that I am not aware that there was any appeal preferred to the Court of Appeal. There was later filed a supplementary Affidavit sworn by the Appellant by which it turns out that an Order of 29/1/2018 was made in the miscellaneous file with the grave allegations that counsel holding brief did not have authority to record what he did and that to the 2nd respondent has no standing to seek the dismissal of the appeal or swear the affidavit to oppose extension of time.

6. That notwithstanding, the Respondent when served filed not only grounds of objection, affidavit in Reply but also a SECOND affidavit in Reply sworn by one JEFFERY WALTER PERIRA which must be seen to have been aimed at refuting the allegation that the 1st respondent had ceased to be an employee of the 2nd defendant and further assert that the 2nd defendant continued to be in operation and dutifully filed annual Returns.

7. The grounds of opposition faulted the Application for being incompetent, bad in law misconceived, frivolous, and vexatious and an abuse of the court process thus a candidate for dismissal and for not disclosing a lawful ground to merit being granted the orders sought. In the Replying Affidavit it was contended that the Appellant had established a modus of filling and withdrawing application solely to delay the just finalisation of the matter and that the appeal was dismissed by the court on 29/01/2018 (my reading of the file however does not reveal such an order and even the exhibit marked "NR1" is not an order for dismissal as much as it is not the alleged handwritten order). The most relevant assertion by the Respondent in the entire affidavit is however to be found at paragraph 5 where it is asserted that the Appellant having failed to file the record within the time stipulated by the court, the appeal stood dismissed and none is pending for the court to order an extension of time with a rider that there is no jurisdiction on the court to grant the order sought and on the basis of the Court of Appeal Rules cited on 6/3/2018.

7. On the directions of the court, parties filed written submissions. The submissions by Appellant/Applicant are dated 9th July 2018 and filed on 24/7/2018 while these by the Respondent were dated 16/7/2018 and filed the next day.

8. Having considered all the materials availed to court the determination of the application must as of necessity revolve around the question whether or not there is a pending appeal upon which the court can extend time to enable a record of appeal be filed. Put the other way, the issue is whether or not there would be a purpose served to order that time be extended to file a Record of Appel when there is no pending appeal on record.

9. I am in no doubt that in the absence of an appeal it would be a pretense at justice to purport to extend time to lodge a record of appeal. In coming to this conclusion, I have also formed the opinion that the counsel should have done something extra to assist the court progress this matter towards a more deserving way forward. I do not doubt that counsel have instead opted to proceed as if there is an appeal pending and could not even heed the written intimation by the respondent.

10. This court is bound to afford parties a fair opportunity to be heard and that necessitate that it limits itself to the dispute presented by parties in their pleadings. Here the prayer for extension of time is outrightly and wholly misconceived and unmerited having been made without a preceding prayer for the appeal to be reinstated.

11. I am in no doubt that a proper prayer would have gathered some weight towards attracting the court's order in favour of the applicant. The application as presented cannot succeed but must fail.

12. It fails and I order it dismissed with costs.

Dated and delivered at Mombasa this 5th day of April 2019.

P.J.O. OTIENO

JUDGE