REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 156 OF 2017

WAMBUA KATITI...APPELLANT/RESPONDENT

VERSUS

OBED MOSE NYAGAKA..RESPONDENT/APPLICANT

RULING

1. The applicant has filed a not...ice of motion dated 23rd May, 2018 seeking that the notice of appeal dated 30th November, 2017 be struck out.

2. The application is based on grounds on the body of the motion and the supporting affidavit of the applicant sworn on 23rd May, 2018. He stated that the appellant filed a notice of appeal on 30th November, 2017 having been dissatisfied with the judgement of the trial court. That the appellant had sixty (60) days within which to institute the appeal by filing a record of appeal. That to date the appellant has failed to institute the appeal. That his advocates applied for proceedings in the case and was supplied with certified copies of the same on 18th May, 2018. That the appellant filed an application for stay of execution and which was allowed.

3. In rebuttal, the appellant filed a replying affidavit sworn on 22nd October, 2018. He contended that it is true that the proceedings in the lower court file were delayed but were later presented to the parties on 7th June, 2018. That by the time the proceedings were ready, the sixty days period had already lapsed. That the delay in providing the typed proceedings was occasioned by the Civil Registry and not by the actions or omissions of any party. That the record of appeal has already been prepared and was filed on 5th October, 2018. That consequently, this court should not waste its precious time on trivial matters of procedure but should now proceed to hear the appeal on merit. That there has been no delay whatsoever in preparing the record of appeal on the part of the appellant. It was contended that the application is a waste of court's time and as demonstrated above, made to frustrate the appellant and deny him his rights and should consequently be dismissed with costs.

4. It is the applicant's submission that under rule 4, a court may exercise its discretion to extend time on such terms as it deems just. That decisions consistently show that the court will not merely extend time on the asking. That the party seeking extension of time has to establish the basis upon which the court should exercise its discretion in his favour. That some of the consideration to be borne in mind while considering extension of time include the length of delay, the reasons for the delay, the possible prejudice that each party stand to suffer depending on how the court exercises its discretion, the conduct of the parties, the need to balance those interests among others. It was submitted that appellant's counsel explained that the delay in filing the record of appeal was occasioned by the civil registry and not by the actions or omission on their part. That the proceedings were collected on 7th June, 2018, and that they were obligated to file the record of appeal within 60 days from 7th June, 2018 and having failed to do so, their notice of appeal was deemed to have been withdrawn pursuant to rule 83 of the rules of this court. The applicant cited **Bivoc International v. Chieni Enterprises Limited & another (2015) eKLR** and **Charles Wanjohi Wathuku v. Githinji Ngure & Another (2016) eKLR**. It was submitted that in view of the fact that the delay in filing the appeal was not explained and a certificate of delay attached, there was adequate time to prepare and photocopy the record of appeal. That the appeal does not have any chances of success and is only calculated to delay the resolution of the dispute in the High Court. That in the circumstances, extending time would be very prejudicial to the applicant and in violation of his constitutional right to expeditious determination of the dispute. That the appeal was out of time by 5 months which showed that the respondent was indolent. It was submitted that the court in **Patrick Kiruja Kithinji v. Victor Mugira Murete (2015) eKLR** held that failure to file the appeal on time went to jurisdiction.

5. In conclusion, the applicant submitted that the appellant has not provided any plausible reasons as to why the court should exercise its discretion to extend time in this case. That the court should strike out the notice of appeal for reasons that the appellant has not demonstrated what loss its stands to suffer if the appeal is struck out, that the appellant has not demonstrated that he would suffer any prejudice if extension of time is not granted, that no sufficient reasons have been given by the appellant for the delay in filing the record of appeal or certificate of delay issued by the Deputy Registrar explaining the reasons for delay and that if the court is inclined to grant extension of time then without prejudice, the same be on condition that a sum of KShs. 460,000/- be paid to the applicant.

6. It was submitted for the appellant that what is before this court for determination is whether or not to deny the appellant substantive justice

on the basis of a technicality when there is nothing at this point barring the court from determining the appeal on merits. That the record of appeal is already filed in court and has been served upon the respondent. That Article 159 of the Constitution has been cited severally to cure injustices that can be occasioned by technicalities and that substantive justice should prevail. It was contended that the amount the applicant urges this court to be paid to him is the decretal sum which forms the substance of the appeal and releasing it to the applicant will amount to pre-empting the appeal.

7. I have given due consideration to the motion. Striking out of pleadings has over the years been held to be a draconian measure that is to be employed only in the clearest of cases. Justice Musinga J (as he then was) put it as follows in **Geminia Insurance Co. Limited v. Kennedy Otieno Onyango (2005) e KLR**:

> ***"It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption."***

8. The Court of Appeal in **Kivanga Estates Limited v. National Bank of Kenya Limited (2017) eKLR** stated as follows on the same:

> ***"At the beginning of this judgment we have set out what guides courts in an application for striking out pleadings. We rehearse them here one more time. Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious."***

9. This court therefore has to determine whether or not the notice of appeal is an abuse of court process, scandalous frivolous and vexatious. The appellant alleged that he was supplied with proceedings on 7th June, 2018. Working with the said date and the record of appeal having been filed on 5th October, 2018, it is clear that the filing of the record of appeal was late by 5 months. An explanation for the 5 months delay has not been given by the appellant. The only explanation given is for not getting the proceedings in good time. However a certificate of delay has not been filed for the court to establish that indeed the delay was occasioned by the court and not the appellant's indolence. The appellant instead of giving an explanation for the delay of 5 months, stated that the court should focus on substantive justice considering that the record of appeal has been filed and served upon the respondent. It is clear to me from the foregoing that the delay is unexplained and inordinate.

10. The next question that follows is whether or not even with such delay justice could still be done. In this regard I adopt the reasoning of justice Kiage JA in **Nicholas Kiptoo Arap Korir Slat v. Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR** where he stated:

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."***

11. Being guided by the above authority, I would however go ahead to weigh the parties' interests. The appellant has filed the record of appeal which has also been served upon the applicant. The applicant has not established that he stands to suffer any prejudice that cannot be compensated in costs in the event the appellant is allowed to proceed with the appeal. In the circumstances, it would be just to allow the appellant to proceed with the appeal. It is noted that the parties herein had entered into a consent before the trial court to have the decretal sums deposited in a joint account pending the determination of the appeal. Again the appellant has already served the record of appeal on the respondent and that what is remaining is the setting down of the appeal for hearing after the requisite directions have been taken. That being the position it is appropriate to allow the appellant's notice of appeal to be admitted so that the appeal could be determined on the merits. See **Nairobi Civil Application No. 173 of 2010., Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others where** the Court of Appeal had this to say where a notice of appeal was served on the respondent out of time and without leave of the court:

> ***"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."***

Again in **Civil Appeal (Application) No. 130/2008., Joseph Kiangoi v. Waruru Wachira & 2 others,** the court held as follows:

> ***"The cure would come about because in the circumstances justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should, in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair…the substantive aspect of sustain the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record…"***

12. In the result, I find the Respondent's application dated 23/05/2018 lacks merit and is dismissed with no order as to costs. The Appellant's Memorandum of Appeal and the Record of Appeal are deemed as properly filed. Parties herein are directed to set down the appeal for hearing on priority basis.

Orders accordingly.

Dated and delivered at **Machakos** this **16th** day of **July, 2019.**

D. K. KEMEI

JUDGE