



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 350 OF 2017**

**STANDARD GROUP LIMITED.....APPLICANT**

**VERSUS**

**AMOS NYARIBO..... RESPONDENT**

**RULING**

1. In the Notice of Motion dated 9<sup>th</sup> November 2017, *Standard Group Limited*, the applicant herein sought six substantive orders against the respondent, *Mr. Amos Nyaribo* which are reproduced verbatim hereunder:

- i. *That this court be pleased to grant leave to the applicant to file a memorandum of appeal against the judgment and decree of the Nairobi Chief Magistrate Court Civil Case No. 7224 of 2014, Amos Nyaribo V Standard Group Limited delivered on 8<sup>th</sup> June 2017 out of time;*
- ii. *The memorandum of appeal dated 13<sup>th</sup> November 2017 be deemed as properly filed subject to payment of court filing fees;*
- iii. *The warrants of attachment and warrant of sale of property issued to Tigwoods Auctioneers on 8<sup>th</sup> November 2017 be recalled, cancelled and declared void;*
- iv. *The honourable court be pleased to order the release of all the movable assets proclaimed vide proclamation notice dated 8<sup>th</sup> November 2017 and subsequently attached by Tigwoods Auctioneers;*
- v. *The applicant be at liberty to apply for further orders and/or directions as the honourable court may deem fit and just to grant; and*
- vi. *The costs of this application be provided for.*

2. The application is anchored on the grounds stated on its face and the depositions made in the supporting affidavit sworn on 13<sup>th</sup> November 2017 by *Millicent Ngetich*, Head of the Legal Department in the applicant's company.

3. The application is opposed through grounds of opposition dated 27<sup>th</sup> November 2017. In the main, the points taken in opposition to the motion are that the application is defective and amounts to an abuse of the court process; that the applicant has not advanced any reason to explain why the appeal was not filed within the legally stipulated time and that no mistake has been demonstrated on the part of the applicant's advocate which can form the basis of the court's exercise of discretion in enlarging time as sought by the applicant.

4. The application was argued *inter partes* before me on 25<sup>th</sup> September 2018. Learned counsel *Mr. Limo* prosecuted the application on behalf of the applicant while learned counsel *Mr. Mogeni* represented the respondent.

5. In his submissions, *Mr. Limo* informed the court that the applicant was abandoning all prayers in the application apart from the prayer seeking extension of time within which to file an appeal against the decision of the lower court and the prayer seeking that the memorandum of appeal dated 12<sup>th</sup> November 2017 be deemed as properly filed subject to payment of court filing fees.

Counsel urged the court to find that the prayers were merited as the memorandum of appeal was filed four days out of time; that the delay was therefore not inordinate or unreasonable; that the delay was caused by miscalculation of dates by counsel who was then seized of the matter and was excusable. He contended that if the application was allowed, the respondent will not suffer any prejudice since he has already been paid the full decretal amount.

6. In his riposte, *Mr. Mogeni* invited the court to find that the application was frivolous and amounted to an abuse of the court process. In his

view, the application was asking the court to sit on appeal over the decision of *Hon. Mwongo J* made on 18<sup>th</sup> October 2017 in which he struck out the memorandum of appeal the applicant seeks to have regularized; that the appeal having been struck out cannot be re-litigated and that in any case, there is no appeal on which the instant application can be anchored.

7. Counsel further submitted that the applicant has not shown sufficient cause why it should be given leave to file an appeal out of time; that if the application was allowed, a lot of prejudice will be suffered by the respondent since he has already been paid the full decretal sum and he is entitled to enjoy the fruits of his judgment; and, litigation of whatever nature must come to an end.

8. I have carefully considered the application, the supporting affidavit and grounds of opposition as well as the parties' rival submissions. I have also perused the court record.

Having done so, I find that the applicants intended appeal is encapsulated in the memorandum of appeal filed on 12<sup>th</sup> July 2017 which the court is being requested to admit on record and deem it as having been properly filed subject to payment of filing fees. The court record however shows that this is the same memorandum of appeal which was struck out by Hon. Mwongo J on 18<sup>th</sup> October 2017 following *inter partes* hearing of an application filed by the respondent on 27<sup>th</sup> July 2017.

9. The first prayer in the above application was in the following terms:

***“That the memorandum of appeal filed herein be struck out and/or the appeal be dismissed.”***

In the concluding paragraph of his ruling, the learned judge held as follows:

***“The application succeeds with costs and unless stayed those shall be orders of the court.”***

10. From the prayer reproduced above and the ruling of the court, it is not clear whether the appeal was struck out or dismissed but whatever the case, the court made a determination that the memorandum of appeal sought to be regularized in the instant application was incompetent for having been filed out of time. The applicant has not furnished this court with any evidence to show that the learned judge's decision has been stayed or overturned on appeal.

I therefore agree with learned counsel *Mr. Mogeni* that the current application amounts to an abuse of the court process as it seeks to have this court sit on appeal on a decision made by another judge of concurrent jurisdiction which is not legally permissible.

11. If the applicant was aggrieved by the learned judge's ruling, it ought to have applied for a review of the decision or appeal against the decision to the Court of Appeal. The record shows that the applicant actually applied for a review of the learned judge's decision in the Notice of Motion dated 11<sup>th</sup> December 2017 but the application was on 21<sup>st</sup> June 2018 withdrawn with costs to the respondent upon application by the applicant.

12. As there is no evidence to show that the orders of 18<sup>th</sup> October 2017 have been stayed by any court or overturned on appeal, it is my finding that the memorandum of appeal filed on 12<sup>th</sup> July 2017 stands struck out and/or dismissed and cannot be the subject of any further litigation.

13. In view of the foregoing, I am satisfied that the Notice of Motion dated 9<sup>th</sup> November 2017 is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI** this 18<sup>th</sup> day of October, 2018.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Limo for the applicant

Mr. Chacha holding brief for Mr. Mogeni for the respondent

Mr. Fidel: Court Assistant