



REPUBLIC OF KENYA



KENYA LAW

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Isaac Onyango & Company Advocates v Hakika Transport Services Limited (Civil Application E016 of 2023) [2024] KECA 33 (KLR) (26 January 2024) (Ruling)

Neutral citation: [2024] KECA 33 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E016 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JANUARY 26, 2024**

BETWEEN

ISAAC ONYANGO & COMPANY ADVOCATES APPLICANT

AND

HAKIKA TRANSPORT SERVICES LIMITED RESPONDENT

(Being an application to mark as withdrawn the Notice of Appeal lodged on 7th October 2021 against the Ruling and Orders of the Employment & Labour Relations Court of Kenya at Mombasa (L. Ndolo, J.) dated 23rd September 2021 in Misc. Application No. E019 of 2021)

RULING

1. Before us is a Notice of Motion dated 8th March 2023 filed pursuant to rules 83 and 84 of the Court of Appeal Rules, 2010 by which the applicants, Isaac Onyango & Company Advocates, seek orders that the respondent's Notice of Appeal dated 5th October 2021 and lodged on 7th October 2021 be marked as withdrawn pursuant to rule 85(1) of this Court's Rules; that, in the alternative, the said notice be struck out with costs; and that the costs of the application be borne by the respondent, Hakika Transport Services Limited.
2. The applicant's Motion is supported by the annexed affidavit of Isaac Onyango sworn on 8th March 2023, and is anchored on the grounds that, after lodging the notice of appeal, the respondent failed to request for typed and certified copies of the proceedings; that more than one-and-a-half years since it lodged its notice of appeal, the respondent was yet to lodge its appeal; that the respondent blatantly disregarded the timelines set for lodging appeals; that the notice of appeal was a delaying tactic, and ought to be marked as withdrawn or struck out with costs; and that it was in the interest of justice that the Court do grant the orders sought.
3. The respondent opposed the applicant's Motion vide the replying affidavit of Abdulhakim Abeid, the respondent's Director, sworn on 7th June 2023. According to Mr. Abeid, the respondent duly



filed and served the notice of appeal on the applicant; that, by a letter dated 19th October 2021, their advocates then on record applied for typed and certified copies of the proceedings; that his advocates overlooked the important procedural steps for filing the memorandum and record of appeal; that the respondent instructed new advocates, who applied for extension of time to do so, and that the ruling on its application was scheduled for delivery on 23rd June 2023; that the delay was inadvertent; that their intended appeal had a high chance of success; and that the applicant stood to suffer no prejudice if the orders sought were granted.

4. In their written submissions dated 9th June 2023, a list of authorities and case digest dated 29th September 2023, the applicants cited 5 judicial decisions, including: Mae Properties Limited vs. Joseph Kibe & Another [2017] eKLR highlighting the mandatory provisions of rule 83 of the 2010 Rules (rule 85(1) of the 2022 Rules), which stipulates the consequences of failure to institute an appeal within the prescribed period; Habo Agencies Limited vs. Wilfred Odhiambo Musingo [2016] eKLR and Rajesh Rughani vs. Fifty Investments Limited & Another [2016] eKLR for the proposition that the effect of a plea of mistake of counsel depends on the circumstances of each case; and Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2013] eKLR, submitting that courts must never provide succor and cover to parties who exhibit scanty respect for rules and timelines.
5. In addition to the foregoing, the applicants drew the Court's attention to the ruling of Lesiit, JA. in Hakika Transport Services Limited vs. Isaac Onyango & Company, Advocates [2023] KECA 777 (KLR) by which the learned Judge dismissed the respondent's motion for extension of time to file and serve its memorandum and record of appeal. Counsel urged us to allow the applicants' Motion with costs.
6. On their part, learned counsel for the respondent, M/s. Wachenje & Mariga LLP, filed their written submissions dated 7th June 2023 and a case digest dated 29th September 2023 citing the case of Patriotic Guards Limited vs. Safaricom Limited [2016] eKLR, submitting that the provisions of rule 84 (rule 86 of the 2022 Rules) (which required an application for orders to strike out a notice of appeal to be filed within 30 days of service of such notice) were to be strictly adhered to.
7. When the applicants' Motion came for hearing before us on the GoTo Meeting virtual platform, learned counsel Mr. Onyango appeared for the applicants while learned counsel Mr. Wachenje was present for the respondent. Counsel made oral highlights of their respective written submissions. In the opening words of his oral submissions, Mr. Onyango withdrew prayer No. 2 by which the applicant sought to have the respondent's notice of appeal struck out, presumably for non-compliance with the proviso to rule 86 of the 2022 Rules. Counsel for the respondent conceded the withdrawal of the prayer to strike out the notice, leaving the applicants' Motion for determination of the application for orders that the notice be deemed as having been withdrawn pursuant to rule 85 of the 2022 Rules of this Court.
8. On his part, Mr. Wachenje confirmed that the respondent's application for extension of time was dismissed on 23rd June 2023 and also conceded that, consequent upon dismissal of the respondent's application, its notice of appeal, which the applicant urges us to deem as withdrawn or, in the alternative, strike it out, was superfluous.
9. We take to mind the provisions of rule 85 of the Court of Appeal Rules, 2022 which reads:

85.

- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and



the Court may, on its own motion or on application by any other party, make such order.

(2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

10. We agree with learned counsel. The respondent's application for extension of time to file and serve its memorandum and record of appeal having been dismissed, its notice of appeal falls flat on its face. In effect, it was bereft of procedural value to the respondent's intended appeal and consequently, was liable to be deemed as having been withdrawn pursuant to rule 85.

11. In conclusion, the respondent's notice of appeal dated 5th October 2021 and lodged on 7th October 2021 be and is hereby deemed as withdrawn pursuant to rule 85(1) of the Court of Appeal Rules, 2022 with costs to the applicant. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

