Ndung'u v Rubis Energy Kenya PLC (formerly known as Kenol Kobil Ltd) (Civil Appeal (Application) E161 of 2021) [2024] KECA 180 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 180 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E161 OF 2021

DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA

FEBRUARY 23, 2024

BETWEEN

EPHANTUS GITHUKU NDUNG'U ..... APPLICANT

AND

RUBIS ENERGY KENYA PLC (FORMERLY KNOWN AS KENOL KOBIL LTD) ..... RESPONDENT

(An application to strike out the appeal in Civil Appeal No. E161 of 2021 arising from the judgment and decree of the Employment and Labour Relations Court in Nairobi (Wasilwa, J.) dated 31st May 2017 in ELRC No. 534 of 2014)

RULING

1. In the application dated July 4, 2023, the applicant, Ephantus Githuku Ndung'u, asks this Court to strike out the respondent's Civil Appeal No. E161 of 2021 with costs for want of compliance with mandatory hearing directions issued on January 17, 2022. In the alternative, he prays that this Court strikes out the notice of appeal dated June 2, 2017. He further prays that the monies held in the joint Account No. 03XXXX006 in the names of the parties' advocates, Kithu Mbuthia Advocates and Muriu Mungai & Co. Advocates respectively at Bank of Africa Limited, Westlands Branch, together with all accrued interest, be forthwith released to his advocates.

2. The application is supported by an affidavit sworn by the applicant on June 29, 2023 and a further affidavit sworn by his advocate, Linus G. Thuranira, on July 13, 2023. The applicant avers that in the judgment delivered on 31st May 2017, the ELRC found that the respondent had unlawfully terminated the appellant's employment solely on account of his disability. It awarded him damages being 12 months' gross pay totaling KShs.780,000.00; damages for discrimination in the sum of Kshs. 5 million; and the costs of the suit.

3. Aggrieved by the judgment and decree, the respondent filed a notice of appeal dated 2nd June 2017, as well as a letter dated June 2, 2017 bespeaking the proceedings before the trial court. That when the applicant moved to tax his party and party bill of costs, the respondent sought an order of stay of execution of the judgment and decree. The application was allowed on condition that the respondent paid half of the decretal sum to the applicant and, to deposit the other half into a joint interest-earning account pending the hearing and determination of the intended appeal.

4. The appellant avers that the respondent lodged a record of appeal dated March 24, 2021, and served it upon the applicant. On January 17, 2022, directions were issued by this Court for the respondent to file submissions within 30 days of that date, with corresponding leave for the applicant to file submissions in response upon service. The applicant states that the respondent has not complied with the directions, and at the time of preparing the present application, one year and five months had elapsed from the time the above directions were given. It is his contention that the delay on the part of the respondent in complying with the directions was inordinate and inexcusable.

5. In submissions dated July 18, 2023, the applicant, while abandoning its alternative ground seeking striking out of the notice of appeal, reiterates the grounds set out in his application. He refers to the case of *Hunker Trading Co. Ltd v Elf Oil Kenya Ltd* [2010] eKLR and *Ramji Damji Vekaria v Joseph Oyula* [2011] eKLR to submit that in the said decisions, the court cautioned litigants against the invocation of the substantive justice principles (referred to as the oxygen principles) as a panacea to all their procedural inadequacies.

6. The respondent opposes the application and has filed a replying affidavit sworn by its advocate, Kenneth Wilson, on July 11, 2023. Mr. Wilson deposes that the notice of appeal was filed on June 8, 2021 and served on June 9, 2021. The record of appeal dated 24th March 2021 was filed on March 31, 2021. The respondent states further that as the record of appeal has been filed, rule 83 of the *Court of Appeal Rules 2010* (now rule 85 of the *Court of Appeal Rules 2022*) cited by the applicant, is not applicable. Further, that under rule the proviso to rule 84 of the *Court of Appeal Rules, 2022* (rule 85 of the 2022 Rules), an application seeking to challenge the Notice of Appeal should have been filed within 30 days of service upon the respondent. The present application is therefore incompetent and should be struck out in limine.

7. With respect to the contention that the respondent has failed to comply with the directions of the Court, the respondent contends that it inadvertently missed out on the directions. It had, however, prepared draft submissions which had been attached to the replying affidavit, and was awaiting the directions of the Court. That its appeal had, however, not been allocated a hearing date, and prayed for the dismissal of the application with costs.

8. The respondent has also filed submissions dated July 21, 2023, in which it argues that it is a settled principle that striking out pleadings is a draconian act, to be resorted to in plain and obvious cases. That this was not one of those cases.

9. We have considered the application, the response thereto, and the respective submissions of the parties. The applicant asks this Court to strike out the respondent's record of appeal on the basis that it had failed to comply with directions issued by this Court for the filing of submissions on the substantive appeal. His application is premised on rule 83 of this *Court's Rules 2010* (rule 85 of the 2022 rules) which provides that:

> "If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be

liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."

10. The proviso to rule 84 relied on by the respondent states:

> "...provided that an application to strike out notice of appeal or an appeal shall not be brought after expiry of 30 days from the date of service of the notice or record of appeal."

11. While the applicant has premised his application on rule 83 of the 2010 rules, and the respondent in opposing the application, has invoked the proviso to rule 84 of the 2010 rules, we observe that these provisions are not applicable to the circumstances of this case. The present application is not premised on a failure to take the steps contemplated under rule 83 or 85 of this Court's rules with respect to late filing of the notice or record of appeal.

12. The respondent has not failed to file the notice of appeal or record of appeal on time. The applicant seeks to strike out the record of appeal on the grounds that the respondent had not complied with administrative directions issued by the court to file submissions on the substantive appeal, an appeal which is, indisputably, properly before the Court. The applicant argues that directions for the hearing of the appeal, including the filing of submissions, were issued on January 17, 2022, but the respondent is yet to comply, one year and five months later, and for this reason, asks us to strike out the record of appeal. In countering this contention, the respondent avers that it has already filed submissions dated July 21, 2023.

13. As submitted by the respondent, it is a settled principle that striking out pleading is a draconian act, to be resorted to only in the clearest of cases and upon considering the peculiar circumstance of each case. It is, however, not the respondent's failure or delay in filing submissions that has caused its appeal not to be listed for hearing. Due to the Court's caseload, 2021 appeals are yet to be set down for hearing. Had the Court's diary reached 2021 appeals, the Court registry would not have failed to list an appeal for hearing at its proper time simply because a party has not filed its submissions.

14. We must observe that the duty of the Court is to do substantive justice to the parties. A delay in filing submissions is not a sufficient reason to drive an appellant who has otherwise complied with all other requirements of the rules of the Court from the seat of justice. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2018] eKLR, stated thus on the issue:

> "We underscore the importance of complying with Court orders and directions given especially with regard to filing and service of documents within the requisite time. That notwithstanding, we take cognizance of Rule 53 of the *Supreme Court Rules, 2012* which gives us power to extend the time limited by the Rules, or by any decision of the Court. To this extent therefore, the late filing of submissions is not patently incurable." (Emphasis added).

15. In the circumstances, we are satisfied that we cannot strike out an appeal that is properly before us on the basis of an infraction of administrative directions when the appeal could still be heard without those submissions.

16. Accordingly, we find the application dated July 4, 2023 to be without merit, and it is hereby dismissed but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR