Waruru & another v Abisai t/a Abisai & Company Advocates (Civil Application E116 of 2022) [2023] KECA 882 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 882 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E116 OF 2022

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JULY 7, 2023

BETWEEN

WACHIRA WARURU .... 1ST APPLICANT

THE STANDARD LIMITED .... 2ND APPLICANT

AND

RODGERS ABISAI T/A ABISAI & COMPANY ADVOCATES ...... RESPONDENT

(Application to vary/set aside the ruling and orders of the Court (Kiage, Mumbi Ngugi & Tuiyott, JJ.A) issued at Kakamega on 11th May, 2022 in Civil Application No. E10 of 2022)

RULING

1. The applicants, by the motion dated September 27, 2022, brought under a multiplicity of legal provisions including, sections 3A & 3B of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya, article 159(2) of the *Constitution of Kenya*, and Rules 43, 44 and 58 of the *Court of Appeal Rules, 2022* seek, in the main, orders that;

   " 2. This Honourable Court be pleased to stay further proceedings in Kisii High Court Civil Suit No 52 of 2001 – Rodgers Abisai P/A Abisai & Company Advocates v Wachira Waruru & The Standard Limited pending the hearing and determination of this application.

   3. In the alternative but without prejudice to prayer 2 above, this Honourable Court be pleased to stay the execution of the decree in respect of the judgment and decree issued on May 18, 2007 by the Honourable Mr Justice Kaburu Bauni in Kisii High Court Civil Suit No 52 of 2001 – Rodgers Abisai P/A Abisai & Company Advocates v Wachira Waruru & The Standard Limited pending the hearing and determination of this application.

4. This Honorable Court be pleased to vary and/or set aside the ruling and orders of the Court (Kiage JA, Ngugi JA & Tuiyott JA) issued at Kakamega on May 11, 2022 and do consequently reinstate the Applicant's Notice of Appeal dated May 23, 2007 as well as the orders issued by the consent of the parties and recorded by this Honourable Court (E. M. Githinji, J. W. Onyango-Otieno & Deverell, JJA) on July 3, 2007."

2. The motion is premised on grounds appearing on the face of it and a supporting affidavit sworn on behalf of the applicants on September 27, 2022 by learned counsel Mr John M. Ohaga.

3. The applicants' case is that on May 25, 2007, they lodged a Notice of Appeal against the quantum of general damages in the judgment of K Bauni, J delivered on May 18, 2007. The learned judge had awarded the respondent the sum of Kshs 6,500,000 in general damages as well as costs of the suit.

   The applicants claimed that they thereafter wrote to the Deputy Registrar of the Kisii High Court on May 30, 2007 requesting for typed proceedings to enable them to prepare and file the Record of Appeal. They also applied for stay of execution before this Court of Appeal in Civil Application No 141 "B" of 2007, which application was allowed with the Court ordering them to pay the respondent the sum of Kshs 3,200,000.

4. Subsequently, in the year 2009, the respondent filed Civil Application No 26 of 2009 in which he sought to have the applicants' Notice of Appeal deemed as withdrawn. That application was dismissed with the Court agreeing with the applicants herein that the Deputy Registrar had not supplied them with the typed proceedings to enable them to compile and filed the Record of Appeal. The applicants further deposed that in the year 2014, the respondent filed a second application seeking to have their Notice of Appeal deemed and marked as withdrawn vide Civil Application No 19 of 2014. This second application was similarly dismissed as the Deputy Registrar had still not furnished them with the typed proceedings.

5. The applicants averred that they later made numerous follow ups with the Deputy Registrar for the supply of typed proceedings but those pursuits proved futile. In due course the respondent filed yet another application dated January 20, 2022 seeking to mark the applicants' Notice of Appeal as withdrawn vide Civil Application No E10 of 2022.That application was allowed vide an order made on May 11, 2022 in the absence of the applicants. The applicants now seek to challenge that decision contending that their counsel only became aware of it when the respondent lodged an application at the High Court on September 22, 2022 seeking construction of a skeletal file for purposes of carrying out execution proceedings in respect of the decretal sum awarded to him by K. Bauni, J.

6. The applicants further claim that their counsel inadvertently failed to attend court on May 11, 2022 when the Notice of Appeal was marked as withdrawn, because the invitation and virtual link for the hearing was sent to them under the heading of "Court of Appeal, Court No 3 Kakamega" in which court they did not have an upcoming hearing on the said date. As such, the applicants assert that their counsel did not log in to the virtual court session. It is also deposed that the applicants had made several follow ups with the Deputy Registrar of the High Court to be issued with typed proceedings whereupon it was established that the court file had been disposed of on February 17, 2022 under the provisions of the Records Disposal (Courts) Rules, 1968 as set out in Gazette Notice No 6966, published on July 9, 2021.

7. The applicants complain that they stand to suffer great prejudice and hardship if the respondent proceeds with the execution of the outstanding portion of the judgment and decree of the High Court

as the amounts in question are colossal, considering the element of interest since the year 2007 when judgment was delivered.

8. The respondent countered the applicants' assertions in a rather lenghty affidavit running into 55 paragraphs sworn on March 16, 2023. He swears that the applicants lodged their notice of appeal on May 25, 2007 but failed to file the record of appeal within the stipulated 60 days. This position prompted him on two occasions to tender an application deeming the notice of appeal lodged as withdrawn. On both occasions, however, this Court dismissed the applications for reasons that the Deputy Registrar of the High Court had not responded to the applicants' request for typed proceedings.

9. The respondent laments that despite dismissal of his applications, the applicants reverted back to their slumber and took no steps to ensure that the record of appeal was lodged. For the third time, he submitted another application vide Civil Application No E010 of 2022 inviting this Court to deem the Notice of Appeal as withdrawn. The respondent contends that in spite of serving the applicants with the application, he never received a response from them. Moreover, parties were informed of the date of the hearing of the application being May 11, 2022 and a link was sent inviting them for that hearing but the applicants failed to attend.

10. The respondent maintains that the only evidence on record indicating that the applicants had attempted to follow up on typed proceedings by the court below was two letters dated April 25, 2016 and October 10, 2016 and nothing more. He avers that following the order of May 11, 2022 deeming the Notice of Appeal as withdrawn, he commenced execution of the High Court judgment in Kisii HCC No 52 of 2001 but was informed by the registry that the file had been destroyed. He thus applied for reconstruction of a skeletal file.

11. Next, the instant application is opposed on grounds that although the applicants were seeking a stay of proceedings and execution pending hearing of the intended appeal, the application had not been brought under the prescribed Rule 5(2)(b) of this Court's *Rules*. Moreover, the Notice of Appeal having been deemed as withdrawn, the Court does not have jurisdiction to grant the orders sought. The respondent argues that the application is incompetent because, while the applicants were seeking orders of variation and/or setting aside of the orders of May 11, 2022 and reinstatement of the notice of appeal, they have not sought orders of re-hearing and/or restoration of the application based on which the notice of appeal was deemed as withdrawn.

12. The application is further assailed on the premise that since it is made under Rule 58 of the Court of Appeal Rules, 2022, it ought to have been lodged within 30 days of the decision of the Court, that is by June 16, 2022. The respondent argues that it was necessary for the applicants to seek leave and/or extension of time pursuant to Rule 4 of the Court of Appeal Rules, before lodging the instant application. Since they failed to do so, it is argued that this Court is bereft of jurisdiction to hear and determine the application.

13. The respondent asserts that even though this Court has the power to rescind orders in accordance with Rule 59(2), it behoved the applicants to give a reasonable explanation for their failure to attend court and no cogent explanation was supplied. The respondent protests that the applicants have continued to enjoy the order of stay of execution granted to them without a corresponding obligation of filing the record of appeal to pave way for the hearing and eventual disposal of the intended appeal. He complains that the applicants have unfairly continued to deprive him of the fruits of the judgment and the compensation awarded to him in a claim for defamation for a period of over 16 years.

14. At the hearing of the application, Mr Masika and Ms Ochwal, respective learned counsel for the parties, relied on those affidavits, their filed submissions and authorities to canvas the rival positions.

15. We began by probing Mr Masika whether the application had been lodged within the stipulated time pursuant to Rule 58(4) of the *Court of Appeal Rules, 2022*. The Rule requires an application of the nature brought by the applicants to be made within 30 days of the aggrieved party first hearing of the impugned decision. We also pointed out to counsel that the said Rule only applies to a party who ought to have been served with the hearing notice of the matter, but was not served. In this case, the Court reminded counsel that the applicants' counsel had been served and hence they could not benefit from the Rule. Counsel's response to this curial question was that we should not be ham strung by the Rules, rather, we should be guided by the Court's overriding objective of upholding substantive justice.

16. Mr Masika proceeded to submit that the applicants had been impeded from compiling their record of appeal by the failure of the High Court's Deputy Registrar to provide them with the typed proceedings despite a court order directing the same, and several visits to the registry by the applicants to follow up on the supply of those proceedings. We sought to know from counsel whether the applicants had sworn to the specific dates when they made visits to the registry. Counsel replied that they had not attested as to the specific dates but that there were the foresaid two letters on record which they had written to the registry requesting for proceedings.

17. Mr Masika urged that notwithstanding the applicants non compliance with the timelines prescribed in Rule 58(4), the Court should not close its eyes to their right to be heard, which is a right protected under the *Constitution* as a cornerstone of the rule of law. For this argument counsel relied on this Court's decision in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commmission & 2 others* [2013] eKLR. We queried counsel as to why the applicants never considered seeking extension of time as provided under Rule 4 of the Court's *Rules*. Mr Masika's answer was that they were inhibited from seeking extension of time by the exigencies of time and the urgency of the matter.

18. In the written submissions, counsel further argued that failure to attend court on May 11, 2022 when the application to deem the applicants' Notice of Appeal as withdrawn came up for hearing was an inadvertent mistake on the part of the applicants' advocates that ought not be visited upon the applicants. It was submitted that the applicants' counsel only became aware of the ruling issued on May 11, 2022 following the application by the respondent at the High Court on September 22, 2022 seeking construction of a skeletal file for purposes of carrying out execution proceedings in respect of the decretal sum that had been awarded to him. Placing reliance on *D. T. Dobie & Co. (K) Ltd v Joseph Mbaria Muchina* [1980] eKLR, Counsel asserted that the power to dismiss an appeal should only be exercised sparingly. In conclusion, we were beseeched to allow the motion and reinstate the Notice of Appeal.

19. For the respondent, Ms. Ochwal opposed the application submitting that this Court was bereft of jurisdiction to hear the instant application by dint of Rule 58(4). Counsel's reason for that assertion was because the application was lodged outside the set out 30 days' timeline, yet no leave for extension of time had been obtained. Counsel contended that since the applicants had admitted that they had received the hearing notice and the link for the hearing of the application following which their Notice of Appeal was deemed as withdrawn, but had failed to attend, it behoved them to write to the Court to check on the outcome of the matter since it had been listed on the said date.

20. Ms. Ochwal submitted that while the applicants were seeking refugee under section 3A of the *Appellate Jurisdiction Act*, such protection could not be granted to them as they had been negligent and had delayed the course of justice. Counsel argued that in as much as the applicants were relying on Article 159 of the Constitution, justice is a double-edged sword and the Court should note that the respondent has been denied the fruits of the judgment that was made in his favour for a period of over 16 years. In the end counsel urged that no plausible explanation had been placed before the Court to warrant its

exercise of discretion in support of the applicants and thus the application should be dismissed with costs.

21. In a short reply to those submissions, Mr Masika implored us to uphold Article 159(2)(d) of the *Constitution* and administer justice without undue regard to procedural technicalities.

22. An application such as is before us seeks the exercise of the Court's discretion. The applicants seek to set aside our decision of May 11, 2022 wherein we deemed as withdrawn their Notice of Appeal dated May 23, 2007 on application of the respondent. While marking the Notice as withdrawn, we noted that there was no appearance by the present applicants and neither was there any response to the application filed. More fundamentally was the stark fact that the Notice had been filed some 14 years and 6 months previously without any Record of Appeal being lodged.

23. The applicants have now approached this Court beseeching us to vary that decision. It is common ground that prior to the respondent making the application that led to the impugned decision, he had previously made two similar applications which this Court had dismissed in favour of the applicants on grounds that the Registry had not issued them with typed proceedings to enable them to compile a Record of Appeal. We think the Court has been too gracious to the applicants considering that the only evidence on record evincing that they had followed up with the registry with regard to the processing of typed proceedings, without more, were the two letters written in the year 2016. We are wholly unpersuaded by the excuse that the applicants were hindered from preparing the Record of Appeal because the High Court file was destroyed. By their own admission, that destruction happened as recently as February 17, 2022. They had failed to file the record of appeal for the blatantly inordinate period of 15 years!

24. Indeed, upon the respondent approaching the Court for the third time praying for the same orders, we were minded that justice is not a one-way street, aiding only one party to a legal contest. We cannot ignore the telling and eloquent fact that there was neither response nor appearance for the applicants despite being served with the motion and the hearing notice, respectively. Besides, as conceded by the applicants' counsel, this application was in clear violation of the very Rule pursuant to which it was instituted. Rule 58(3) and (4) of the *Court of Appeal Rules, 2022* stipulates the following as regards non-appearance by a party;

> "(3) Where an application has been dismissed or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re- hear it, as the case may be, if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called on for hearing.
>
> (4) An application made under sub-rule (3) shall be made within thirty days of the decision of the Court, or in the case of a party who would have been served with notice of the hearing but was not so served, within thirty days after that party's first hearing of that decision." [Emphasis ours]

25. We observe that the applicants were well aware of the date of the hearing but failed to show up. They thereafter never followed up with the Court to establish the proceedings of the day. Notably, the instant application was made way after the prescribed 30-days' period, and with no attempt to seek leave of Court for extension of time. We think, with respect, that the applicants' conduct is a clear indication of disinterest in prosecuting the matter. We state so noting that there has been a delay of over 16 years in litigating the matter, a period that is inordinately long requiring this Court's intervention.

We would restate what this Court observed in *Bamburi Cement Ltd Vevanson Mwawasi Mwadime* [2018] eKLR;

> Be that as it may, we find that the inexcusable and inordinate delay of about 9 years to file an appeal within the prescribed timeline under Rule 82(1) of the Rules coupled with the obvious lack of interest to oppose the application are indicative that the respondent is no longer keen on pursuing an appeal. We also find that the respondent placed himself squarely within the operation of Rule 83. This Court while discussing the import of Rule 83 in Quicklubes EA Limited v Kenya Railways Corporation [2014] eKLR aptly observed:
>
> > "Rule 83 gives this court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of court but fail to inform the court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allow the court to invoke Rule 83 suo motu if the respondent in the intended appeal does not move the court."

26. In the oft-cited case of *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR, we were emphatic that where an appeal is not lodged within 60 days as required by law, and there is no extension of time, unless the court is persuaded by some compelling reasons, the notice of appeal dies in the eyes of the law. The Court held;

> "It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice nor reference to the parties. The Court has this inherent power to make the formal order of the notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house cleaning measure.
>
> Under the same Rule 83, and assuming that the Court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply make the order deeming the notice of appeal as withdrawn."

27. We do not find satisfactory the explanation proffered by the applicants for failing to institute the appeal within the stipulated timelines, hence, we are unable to exercise our discretion in their favour.

28. In the result, the motion is devoid of merit and accordingly fails. It is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2023.

....

P. O. KIAGE

JUDGE OF APPEAL

....

MUMBI NGUGI

JUDGE OF APPEAL

....

F. TUIYOTT

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR