Wanyoike & 23 others v Pan Africa Insurance Company Limited & 2 others (Civil Appeal (Application) 83 of 2018) [2022] KECA 1281 (KLR) (18 November 2022) (Ruling)

Neutral citation: [2022] KECA 1281 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 83 OF 2018

MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA

NOVEMBER 18, 2022

BETWEEN

JANE NJERI WANYOIKE & 23 OTHERS ..... APPLICANT

AND

PAN AFRICA INSURANCE COMPANY LIMITED ..... 1ST RESPONDENT

MAE PROPERTIES LIMITED ..... 2ND RESPONDENT

RUNDA WATER LIMITED ..... 3RD RESPONDENT

(Being an application to strike out the notice of appeal and the entire record of appeal arising from the judgment/decree of the Employment and Labour Relations court (Hon. M. Mbaru, J.) dated 19th October 2017 in Nairobi))

RULING

1. Before us is a notice of motion dated April 4, 2018, premised on rules 83, 83 and 87 (1)(c)(f) and (k) of the *Court of Appeal Rules 2010*, seeking an order that the memorandum of appeal dated March 15, 2018 together with the entire record of appeal filed on March 16, 2018 be struck out. That subsequent to the grant of the above prayer, the court do deem the notice of appeal dated November 1, 2017 and filed on November 1, 2017 as withdrawn.

2. The application is supported by the grounds on its face and which are reiterated in the supporting affidavit of Jane Njeri Wanyoike, the 1st applicant together with annexures thereto. The grounds are that the respondents who are the appellants are in breach of rule 87 (1)(c)(f) and (k) of the *Court of Appeal Rules 2010* as they had not included all the documents which had been tendered in evidence during the trial. That the two sets of the record of appeal filed do not include the 16th applicant's witness statement dated April 1, 2016 together with several annexures thereto. That the said documents were very material to the determination of the issues in contest, hence comprise the primary documents

which must form part of the record as envisaged by the rules. If the record of appeal is struck out, then the grace period granted by virtue of the Certificate of Delay will have lapsed and as such this Court can invoke rule 83 of this Court's *Rules* and deem the respondents' notice of appeal filed as withdrawn.

3. The application is opposed by the respondents through the replying affidavit of Emma Wachira dated September 6, 2018, the group Company Secretary/Chief Legal Officer of the 1st and 2nd respondents. It is their averment that they had not breached any of the mandatory rules as claimed by the applicant. That the record of appeal filed was confined to the essential documents needed for the determination of the appeal. That further under rule 88 of this Court's rules, the applicants can also file documents that they think were left out of the record which right they have not exercised. That in any event, the alleged documents were in the record of appeal at pages 299-300, 303 to 318 and a further amended witness statement at pages 355 to 359 of the first record of appeal.

4. Parties filed written submissions in support of their respective positions. When the application came up for plenary hearing, Mr Odhiambo, Mr Sumba and Mr Kuloba, learned counsel appeared for the applicants and respondents respectively. The applicants' submissions merely reiterated the averments in the motion and the affidavit in support thereof hence no need to rehash. The applicants though have cited several authorities for the proposition that both article 159 of the *Constitution* and sections 3A and 3B could not be used to cure a notice of appeal filed out of time. They further rely on the case of *Kenya Airways Corporation Limited v Tobias Ong'any Auma & 5 others* Civil Application No 13 of 2002 which was to the effect that failure to file primary documents rendered the appeal incurably defective as rule 85(1) of this court rules had been couched in mandatory terms. That, in the premise therefore the application should be allowed.

5. The respondents' submissions equally reiterated the averments in their replying affidavit. However, they maintain that the documents referred to by the applicants did not form part of what are known as essential documents as contemplated under rule 2 of this court's Practice Directions, 2015. They rely on this court's decision in *Sacco Societies Regulatory Authority v Biashara Sacco Society Ltd* [2013] eKLR for the proposition that the respondents too are at liberty by virtue of rule 92 to file missing documents in court and that failure to file any such document was therefore curable by the said rule. That further, the notice of appeal was filed within the stipulated time and the record of appeal was filed within 54 days after the Certificate of Delay was issued well within the 60 days' window period in line with the requirement of the rules.

6. We have considered the record in light of the pleadings of the parties. It is not in dispute that on October 19, 2017, M Mbaru, J delivered the impugned judgment in the Employment and Labour Relations Court (ELRC) at Nairobi in ELRC Case No 2001 of 2015. The appellants who are the respondents herein were dissatisfied with the whole decision and timeously filed a Notice of Appeal dated November 8, 2017. This is not in dispute and therefore the respondents complied with the prerequisites in rules 75 and 77 of the *Rules* of the Court. They followed up by filing the record of appeal within the timelines provided for in rule 82 of the Court's *Rules*.

7. The issue in contestation by the applicants is that the record of appeal as filed does not contain some primary documents necessary for the determination of the issues in this appeal. The application is predicated on rules 83, 84, and 87 (1)(c)(f) and (k). Rule 83 provides as follows:

> " 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 on any persons on whom the notice of appeal was served".

8. An exposition on the above rule was made in the case of *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR, the Court had this to say about the intent and purport of Rule 83:

> " This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succor. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice".

9. In light of the above exposition, rule 83 of the Court's *Rules* applies where the Court has moved suo motu to strike out the notice of appeal which is not the position herein. Rule 84 on the other hand provides as follows:

> " A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

10. Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

11. The guiding principle therein is that the application must be filed within thirty (30) days of service on the opposite party of either the notice of appeal or the record of appeal. It is evident from the record that the applicants' complaint is not hinged on the service of the notice of appeal but on the service of the record of appeal. That the said record which was filed on the 16th March 2018 was served on the applicants on the 22nd March 2018. The current application was made within the 30 days' window period as required by law.

12. It is therefore our finding that the application under consideration was filed within the timeline stipulated for in rule 84 of the Court's *Rules*, therefore falls for merit consideration.

13. The only issue for our consideration is whether the documents said to be missing are essential or primary documents and whether they are really missing and whether there is a remedy provided for under the law. Whilst the applicant claims that the witness statement of the 16th respondent and the annexures thereto are missing, we have had the opportunity to look at the record. Indeed, those documents are on record, and even though we have had trouble comparing the documents from both

parties on the issue of dates. However, parties will have the opportunity to question the authenticity or otherwise of the same at the hearing the appeal for that is a matter that cannot be determined at this stage. Having said that the documents are on record, we may point out that the applicant only came to adumbrate on the missing documents in his submissions. Looking at the list accompanying the affidavit on the documents, it is a long list and these documents were not specifically mentioned in the motion but rather in the submissions. Again, we doubt whether the said documents are primary documents.

14. However, even if the documents were not on record, rule 92 (1) of this Court's *Rules* provides a remedy. It provides:

> " 92(1). If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal".

15. Therefore, the rules provide for the filing of a supplementary record by the applicants in the event that the record of appeal is incomplete. Indeed, in *SACCO Societies Regulatory Authority v Biashara SACCO Society Ltd* [*supra*] this court held:

> " We cannot strike out a competent appeal because it is alleged that a document that ought to have been in the record of appeal was not included. If that were the case Rule 92 would serve no purpose."

16. We also revert to the decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* (*supra*) that cautions against the drastic approach of striking out appeals on the basis of procedural infractions. It was held thus:

> "Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness." (Emphasis added).

17. The upshot of the above is that the applicants have not demonstrated that the appeal is deserving of the drastic order of striking it out as prayed. We find no merit in the motion dated April 4, 2018, which is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR