



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: ASIKE-MAKHANDIA, SICHALE & KANTAL, JJ.A]

CIVIL APPLICATION NO. 366 OF 2019

BETWEEN

ANTHONY MBWABI KHAYIMBA.....APPLICANT

AND

LAXMANBHAI CONSTRUCTION LIMITED.....RESPONDENT

(An application to strike out the Notice of Appeal filed by the respondent on 8th November, 2018

against the judgment of the High Court of Kenya at Nairobi (L. Njuguna, J)

dated 25th October, 2019

in

CIVIL CASE NO. 223 OF 2016)

RULING OF THE COURT

The applicant, **Anthony Mbwabi Khayimba** filed a Notice of Motion dated **20th November, 2019** predicated upon Rules 82, 83 and 84 of this Court's Rules (the Rules). In the main, the applicant seeks to strike out the respondent's (**Laxmanbhai Construction Limited**) Notice of Appeal dated **7th November, 2019** and filed in court on **8th November, 2019** expressing its intent to file an appeal against the judgment of **Njuguna, J** delivered on **25th October, 2018**.

In the applicant's supporting affidavit sworn on **20th November, 2019**, he deposed that the respondent has failed to file an appeal within sixty (60) days from **25th October, 2018** (the date of the judgment) as provided by Rule 82 of the Rules; further that the said Notice of Appeal was filed for the sole purpose of enabling the applicant obtain an order of stay and that being paraplegic and confined to a wheel chair, he needs to access the fruits of his judgment which will enable him seek further medical treatment abroad.

In his written submissions dated **17th September, 2020**, the applicant reiterated that the respondent has failed to file its appeal within sixty (60) days from the date of judgment as required by Rule (82(1)) and that Rule 82(1) cannot avail the respondent as it did not serve upon the applicant its request for proceedings (if at all).

In opposition to the motion, **Charles Mochoge**, the Legal Officer of the respondent swore an affidavit dated **27th October, 2020**. He deposed that the respondent filed its Notice of Appeal dated **7th November, 2018**, together with the letter bespeaking the proceedings on **8th November, 2018**; that it served the applicant's counsel with the Notice of Appeal and the letter bespeaking the proceedings on **8th November, 2018**; that the respondent has made several follow ups by way of letters and the proceedings have not been availed to the respondent by the court. On **9th November, 2020**, the motion came up before us for consideration

“on written submissions, on no appearance of counsel”.

Firstly, we note that the respondent's letter dated **7th November, 2018** which was annexed as exhibit "**CM-2**" by the respondent, is a letter

bespeaking the proceedings. This letter is copied to “**Nyasae & Associates**”, the applicant’s counsel. Further, the letter has the stamp of the firm of **Nyasae & Associates** as having been received on **8th November, 2018**.

Given the above, it is therefore not true that the respondent’s letter of **7th November, 2018** bespeaking the proceedings was not copied to the applicant’s counsel on record then. It is also not true that the applicant’s counsel was not served with the said letter, as the letter has the applicant’s counsel’s office stamp acknowledging receipt of the letter on **8th November, 2018**. In our view, the respondent has brought itself within the ambit of Rule 82 (1) of this Court’s Rules as the letter bespeaking the proceedings was copied and served upon the applicant as stipulated under Rule 82 (2).

Given that the respondent took all procedural steps in its application for proceedings for the purpose of filing an appeal, the delay in availing the proceedings having been occasioned by the court, the respondent cannot be faulted for the delay.

We find no merit in the motion. It is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 19th Day of February, 2021.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR