IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE, J.A. (IN CHAMBERS)

CIVIL APPEAL NO. 12 OF 2020

BETWEEN

NATIONAL LAND COMMISSION.....APPELLANT/RESPONDENT

AND

JOHNSON OKIRO MISIGA.....RESPONDENT/APPELLANT

(An appeal from the Judgment of the Employment & Labour Relations Court at Nairobi (Onesmus Makau, J.) dated 1st November, 2019

in

ELRC Cause No. 482 of 2016)

****

RULING

The application before me dated 16th September 2020 is yet another poignant and disturbing reminder that the craft of litigation in this country, and specifically appellate litigation, is fast sinking towards the nadir and calls for urgent and concerted efforts to arrest the slide towards a point of no return, beyond retrieval. I can only hope that Judges, law schools and senior practitioners see the lapses such as revealed in the motion before me as symptomatic of the broken window that, unchecked, can only be a harbinger of worse to come.

First off, it is quite obvious that this application should not have been made to Court at all. The substantive order it seeks, as presented, is;

> ***"2. THAT this honourable court be pleased to grant the respondent/appellant (sic) herein leave to file his response to the memorandum of appeal and cross-appeal outside the time stipulated."***

The Rules of this Court do not anticipate, and do not provide for, a response to the memorandum of appeal as such. Unlike the first instance court where an initial pleading by a plaintiff, claimant or petitioner calls for an answering pleading by way of a statement of defence or response clearly stipulated with timelines, at this Court there is no requirement for a response to the memorandum of appeal. Once the respondent is served with a record of appeal containing a memorandum of appeal, all he needs do is prepare for the hearing of the appeal. He need not file any pleading to answer the appeal.

The closest to a response to a memorandum of appeal, though strictly speaking, it is not a response thereto, *a notice and grounds for affirming the decision* of the court appealed from under ***Rule 94***. This is filed by a respondent in the rare instances where he intends to contend that the decision of the court appealed from should be affirmed "on grounds other than or additional to" those relied upon by the said court, which he then sets out in the notice. There is nothing to suggest that this is what the applicant herein intends to file.

Rule 93 makes provision for a *notice of cross appeal* to be given by a respondent in a filed appeal;

> ***"... who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part."***

Such notice is required to specify the grounds of that respondent's contention and the nature of the order which he proposes to ask the Court to make.

I understand the applicant to be seeking, in the omnibus prayer I have set out above, that I extend the time within which he is to file his *notice of cross appeal* - which he terms 'a cross appeal'. In fact, a proper reading of the prayer seems to suggest that the applicant seeks to file a single document styled *"Response to Memorandum of Appeal and Cross-Appeal"* - much the same way as one files a *"Defence and Counterclaim"* or a *"Response to Petition and Cross Petition"* in the first instance courts. The thing he seeks to file is unknown to this Court.

But even assuming, at my most solicitous and benevolent best, that what the applicant intends to file are the known notice of grounds affirming the decision and notice of cross appeal, ***Rule 94(4)*** provides in explicit terms that in such a scenario, a respondent need not file both and may, instead, "*include such contentions* [for variation or setting aside part of the decisions and that part should be affirmed on additional grounds] *in a notice of cross-appeal under* ***Rule 90*** *and shall not be required to give notice [of grounds affirming such decision] under this rule.*" As I have already indicated, the application and prayer as drafted are both inelegant and obscure and there is no telling with much assurance what exactly is intended.

It is a puzzle to me that the respondent filed the application because, to repeat, there was absolutely no reason to. Regarding the timelines for the filing of both notices that I have discussed, ***sub-rule 2*** of ***Rules 93*** on notices of cross appeals, and ***94*** on notices of grounds affirming decision, are in the following identical terms;

> ***"(2) A notice given by a respondent under this rule*** … ***shall lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal*** ***or not less than thirty days before the hearing of the appeal whichever is the later."*** (My emphasis)

What is evident from those identical provisions is that all a respondent wishing to file either of the notices needs do is file such notice within thirty days of being served with the memorandum of appeal. But failure to do so within those thirty days does not lock such respondent out. If anything, there is a very wide window for filing the intended notice *any time before thirty days to the date of the hearing of the appeal.* It follows then that where, as here, a date for the hearing of this 2020 appeal has not been fixed, the respondent should simply file the notice without much ado. He does not require any leave from the Court to do so. The Rules are abundantly clear on the point, admitting to no ambiguity, and it is therefore strange that the application before me, totally unnecessarily as it is, should have been filed at all.

My surmise, which I am confident is quite correct, is that the respondent's counsel simply did not make any effort to peruse and acquaint themselves with the Court of Appeal Rules, 2010, which is the first indispensable step of practise before us. It would seem they conceived in their mind the idea that they needed to seek extension of time and proceeded to draft an application for the same with scant regard to the rules of procedure, and without the care and attention demanded by the fact that the motion was for filing before this Court of Appeal, a forum of serious contemplation. That much is clear from the elementary blunders with which it is replete.

The Rules of this Court provide a complete code governing our procedure. As such, every conceivable application to Court is provided for and it is for an applicant to simply invoke the appropriate rule. Thus, even assuming that the applicant herein needed extension of time (and he did not) all he needed do is cite ***Rule 4*** of the **Court of Appeal Rules**. Instead, the motion purports to invoke that rule of *The Civil Appeal Rules* (sic) which I am yet to meet. But he did not stop there. He went on to cite ***"Rule 48(1)(a) Article 50(1) of the Constitution. Order 22 Rule 25 of the Civil Procedure Rules and section 1A, 1B, 3A of the Civil Procedure Act …" -*** all of which are inapplicable. The provisions of the **Civil Procedure Rules** do not govern proceedings and procedure before this Court and their invocation is quite clearly misconceived.

I also note that the first prayer on the motion seeks that it be *"certified urgent and be heard ex-parte and service be dispersed (sic) with in the first instance."* Given what I have stated regarding the timelines and the superfluity of the application, the plea of urgency is misplaced. More crucially, the prayer for ex parte-hearing proceeds from a misconception regarding our procedures which, under the Rules as they currently stand, do not admit to ex parte hearings. It is time the growing habit of applicants seeking *ex parte* orders, which we never grant, came to a halt.

Lastly, as can be seen from the title to this ruling, which is a verbatim reproduction of the title of the motion, the applicant heads his application with the number of the appeal without indicating it is an application within the appeal (*Civil Appeal (Application) No. 12 of 2020).* He also describes the application by reference to the appeal itself instead of describing it as an application for extension of time. These omissions and defaults, which one could turn a blind eye on to singly, present a worrying state of affairs when taken together. They speak to a malaise of dereliction or inattention to detail that we ignore at our peril. I say no more.

Ultimately the motion cannot be granted and fails. I dismiss it with costs. I order that the costs be borne by the respondent's advocates as I do not see the justice of the respondent himself being saddled with the costs arising from a completely unnecessary application presented by his advocates who, I fearfully hope, will invest in a copy of, and will take time to thoroughly acquaint themselves with the Rules of this Court.

Order accordingly.

Dated and delivered at Nairobi this 5th day of February, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR