



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, MUSINGA & SICHALE, JJ. A.)

CIVIL MISCELLANEOUS APPLICATION NO. 141 OF 2020

BETWEEN

JEREMIAH MAKORE WETENDE.....1ST APPLICANT

MICHAEL KARANI GAKUYA.....2ND APPLICANT

JAMES MWANGI MUCHIRI.....3RD APPLICANT

AND

POPULATION SERVICES KENYA.....RESPONDENT

(Being an application to strike out a notice of appeal arising from the Judgment of Employment and Labour Relations Court at Kisumu (Nduma, J.) dated 4th November 2019)

in

ELRC Cause No. 253 of 2016.)

RULING OF THE COURT

1. The applicants' Notice of Motion dated 27th November 2020 seeks an order to strike out the notice of appeal dated 5th November 2019 for reasons that: it does not indicate whether the respondent intends to appeal against the whole or part of the impugned judgment; the proper address of service of the applicants is not stated; and that the notice of appeal was not served upon the applicants in accordance with the rules of this Court.
2. The affidavit in support of the application was sworn by the applicants' advocate, **Hammerton J. Maloba**. He stated that the respondent, being dissatisfied with the judgment of the Employment and Labour Relations Court delivered on 5th November 2019, lodged a notice of appeal on 12th November 2019; that he became aware of the notice of appeal on 4th November 2020 when the respondent's counsel served an application for stay of execution of the judgment; that the notice does not state whether the respondent intends to appeal against the whole or only a part of the impugned judgment; and that the applicants' proper address of service is not shown on the notice.
3. In a replying affidavit sworn by **Allan Ngunze**, the Respondent's Human Resource Director, he states, *inter alia*: that the notice of appeal is clear that the respondent was dissatisfied with "**the judgment**" and not "**part**" thereof; that the applicants were then represented by M/s Situma & Company Advocates upon whom the notice of appeal was served, and not Mr. Hammerton Maloba who was then an associate with the firm of Situma & Company Advocates; that on 2nd February 2021 when the respondent's application for an injunction to restrain the applicants from executing the trial court's judgment pending appeal came up for hearing, it was agreed by consent that the respondent herein do deposit the decretal amount of **Kshs.3,679,404** in an interest earning account in the joint names of the advocates for the parties at any branch of the Co-operative Bank of Kenya within 30 days and that has been done; that therefore the application to strike out the notice of appeal is an afterthought and has been brought long after the 30 days within which it ought to have been filed. For those reasons, the respondent urged us to dismiss the application.
4. The application was canvassed virtually by way of written submissions and case digest filed by the parties, which we have carefully considered.
5. **Rule 75(3)** of this Court's Rules states as follows:

“(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellants and shall state the names and addresses of all persons intended to be served with copies of the notice.”

6. The notice of appeal that was filed by the respondent through its advocate stated that the respondent was “**dissatisfied with the judgment**” of the trial court delivered on 4th November 2019. In our view, the use of the phrase “**the judgment**” makes it clear that the respondent intended to appeal against the whole of the decision and not a part of the decision. The applicants cannot say that they have been misled by the said notice of appeal or prejudiced by it in any way.

7. Secondly, the notice of appeal clearly shows that:

“It is intended to serve a copy of this Notice of Appeal on the Claimant through Situma & Company Advocates, Bungoma Teachers Sacco Plaza, 3rd Floor Room 126, P.O Box 680-50200, Bungoma.”

It is not denied that the applicants herein were being represented by the firm of Situma & Company Advocates and that Mr. Hammerton Maloba was then an associate in that firm. In the circumstances, there is no evidence that the notice of appeal was not served upon M/s Situma & Company Advocates.

8. Lastly, it is a fact that a few weeks ago the parties were before this Court (***Musinga, Gatembu & Sichale, JJA***) in ***Civil Application No. 156 of 2020, Population Services Kenya v Jeremiah Makore Wetende & 2 Others***, when by consent, the respondent’s application for injunctive relief was withdrawn on condition that the decretal sum be deposited in an interest earning account in the joint names of the advocates for the parties within 30 days from the date thereof (2/2/2021), and that the respondent’s **Civil Appeal No. 3 of 2021** be set down for hearing on priority basis. The respondent has annexed to its replying affidavit a copy of the SWIFT Cash transfer dated 2nd March 2021.

9. In view of all the foregoing, this application is bereft of merit and was not made in good faith. Consequently, we hereby dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 19th day of March, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR