IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OUKO(P), NAMBUYE & SICHALE JJ.A.)

CIVIL APPLICATION NO. 27 OF 2018

BETWEEN

JUDITH JEMELI KESE.....APPLICANT

AND

MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT

(Being an application to be deemed to have been withdrawn; the

notice of appeal against the decision of Employment and Labour Relations

Court (N. Marete, J.) dated 21st February, 2017 in Kericho ELRC Claim No. 98 of 2016)

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RULING OF THE COURT

Before us is a notice of motion dated 15th February, 2018 under **Rule 42(1), 43(1), 82(1) and (2), 83** and **84** of the **Court of Appeal Rules**, substantively seeking orders that:

> **a) The notice of appeal herein dated 4th October, 2017 be deemed as withdrawn.**
>
> **b) Costs of this application be borne by the applicant.**
>
> **c) This Honourable Court deems this notice of appeal withdrawn, the applicant having failed to institute the appeal within 60 days of filing of the notice of appeal.**

The application as drawn and filed by the firm of **Josephat Mutuma Kirima** has misdescribed the correct litigating position of the respective parties herein. Although we do not take such casual manner of drafting pleadings lightly, we find it prudent not to vitiate the application on that ground. We invoke the Courts inherent power enshrined in **Rule 1(2)** of the **Court of Appeal Rules** to reflect the respective parties correct litigating positions herein and pass the application for merit consideration to save on judicial time as required of us by the overriding objective principle of the Court enshrined in **sections 3A and 3B** of the **Appellate Jurisdiction Act, Cap 9 of Law of Kenya** and the non-technicality principle enshrined in **Article 159 2(d)** of the Constitution of Kenya. Having properly clothed ourselves with mandate as above, we proceed to indicate the correct litigating positions of the respective parties herein as hereunder.

The impugned notice of appeal dated 29th September, 2017 and lodged in the Employment and Labour Relations Court (ELRC) at Kericho indicates explicitly that the party aggrieved with the decision of **Marete, J.** given at Kericho on 21st February, 2017 and the party who intended to appeal against the whole of that decision is **Judith Jemeli Kese** who was the claimant in **Kericho ELRC Cause No. 98 of 2016**. The respondent to that cause was **Moi Teaching and Referral Hospital**, the correct party seeking to deem the said notice of appeal as withdrawn for failure to comply with the rules cited above. The above being the undisputed correct position on the record, the respective parties litigating position is corrected to read as follows: by **"applicant"**, we shall be referring to **Moi Teaching and Referral Hospital,** while by "respondent" we shall be referring to **Judith Jemeli Kese**.

Having put the record straight, we now proceed to interrogate the merits of the application canvassed virtually through sole pleadings and

written submission of the applicant, in the absence of the respective parties and without oral highlighting. The application is supported by grounds on its body and a supporting affidavit of **Josephat Mutuma Kirima**. In summary, it is the applicant's averments that the respondent filed a claim against the applicant in the above mentioned cause seeking various reliefs, which was dismissed on 21st February, 2017. The respondent was aggrieved and desired to appeal against the whole of that decision. She, however, failed to comply with the timeline set in **Rule 75(1)** and **(2)** of the **Court of Appeal Rules** with regard to the time line within which to lodge a notice of appeal. To remedy that default, the respondent successfully sought and obtained extension of time within which to comply vide a notice of motion dated 31st March, 2017 and filed on 7th April, 2017. Leave was granted on 27th September, 2017 paving the way for the lodging of the impugned notice of appeal dated 29th September, 2017 and filed on 10th October, 2017.

Since the lodging of the said impugned notice of appeal, the respondent has not taken the necessary procedural steps provided for in **Rule 82(1)** of the **Court of Appeal Rules** to progress her initiated appellate process, hence the filing of the application under consideration to vitiate the impugned notice of appeal. As already stated above, the application is not opposed. That position notwithstanding, we are obligated in law to give a merit determination, which we hereby proceed to do.

The application is substantively brought under **Rules 82(1)** and **(2), 83** and **84** of the Court's **Rules**. **Rule 82** provides as follows:

> **(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –**
>
> > **(a) a memorandum of appeal, in quadruplicate;**
> >
> > **(b) the record of appeal, in quadruplicate;**
> >
> > **(c) the prescribed fee; and**
> >
> > **(d) security for the costs of the appeal:**
> >
> > **Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.**
>
> **(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.**
>
> **(3) .....**

In the case of **Charles Wanjohi Wathuku vs. Githinji Ngure & Another [2016]eKLR,** this court reiterated the position taken in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others [2016]eKLR** on the intent and purport of **Rule 82** of the Court's rules as follows:

> **"That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days."**

In light of the above threshold, we have no hesitation in ruling that the respondent's failure to bring her timeously initiated appellate process within the ambit of either **Rule 82** itself or the proviso to **Rule 82(1)** of the Court's **Rules** is fatal to her appellate process as laid.

The above finding now leads us to the determination as to whether we have been procedurally invoked to vitiate that process. The answer lies in our construction of the **Rules** cited as the core access provisions which is **Rule 83** of the Court's **Rules**. It 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".**

In the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** [supra], 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 succour. 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".

In light of the above exposition by the Court and which we fully adopt as the correct position in law with regard to invocation and application of the above Rule to an application of this nature. It is our finding that applicant's application is properly anchored on **Rule 83** of the Court's **Rules**. We are, therefore, properly seized of the application hence justification for us to delve into its merit. **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.

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."

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, which was not the position herein. We find **Rule 84** has no application herein. It is, therefore, discounted.

In light of the exposition in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** [supra], we entertain no doubt in our minds that the respondent having been granted leave to file the impugned notice of appeal out of time, was obligated to process the filing and service of the record of appeal within sixty (60) days stipulated for in **Rule 82(1)** of the **Court's Rules** or alternatively within the time envisaged in the proviso to the said rule. No such efforts were made prompting the applicant to seek the Court's intervention under both **Rules 83** and **84** of the Rules of the Court. We have ruled above that **Rule 83** has no time limit within which to seek the Court's intervention. It is, therefore, the proper anchor for the application under consideration, while applicability of **Rule 84** was discounted.

In the result, we find sufficient basis laid for the invocation and application of **Rule 83** of this **Court's Rules** in favour of the applicant as no record has been filed in furtherance of the respondent's initiated appellate process. The law has to take its own course. We allow the application dated 15th February, 2018 as prayed with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR