IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, WARSAME & KIAGE, JJA)

CIVIL APPLICATION NO. 25 OF 2020

BETWEEN

KAMAU AIDI & 47 OTHERS.....APPLICANTS

AND

SALARIES AND REMUNARATION COMMISSION (SRC)....RESPONDENT

(Being an application to strike out the Notice of Appeal dated 14th June 2018 in an intended appeal by the respondent from the judgement of the Employment and Labour Relations Court of Kenya at Nyeri (Nzioki wa Makau, J) delivered on 4th *June 2018)* **in Constitutional Petition No. 6 of 2017**

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RULING OF THE COURT

1. The application before us is brought under **Article 159 of the Constitution** and **Rule 83 and 84** of the **Court of Appeal Rules, 2010** for orders striking out the appeal herein. The appeal emanates from the judgment of the Employment and Labour Relations Court in Constitutional Petition No. 6 of 2017 wherein the respondents were found to have erred *inter alia*; in branding the applicants, in denying the applicants the right to be heard in an evaluation exercise, in discriminating against the applicants in the manner that they were classified and in unlawfully downgrading the applicants. As a result the trial court (Nzioki wa Makau, J.) issued orders for a permanent stay of the implementation of the Job Evaluation for the Public Sector in relation to the Clerks of the County Assembly and the grading structure of the 1st to 47th applicants.

2. The respondent being aggrieved by the decision of the trial court in favour of the applicants, filed a Notice of Appeal dated 14th June 2018 and lodged on 18th June 2018. The respondent has since been faulted for failing to comply with **Rules 77(1) and 82** of the **Court of Appeal Rules** which provide;

> **"77 (1) An intended appellant shall, before or within 7 days after lodging the notice of appeal serve copies thereof on all the persons affected by the appeal.**
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> **82 (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-**
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> **a. A memorandum of appeal, in quadruplicate;**
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> **b. The record of appeal, in quadruplicate;**
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> **c. The prescribed fee; and**
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> **d. Security for the costs of the appeal."**

3. The issue in the instant application is whether the notice of appeal lodged on 18th June 2018 is properly on record. The applicants maintain that the respondent is expected to have instituted its appeal within sixty (60) days of lodging its notice of appeal, on or before 18th August, 2018 and that it has been 253 days since the respondent lodged the notice of appeal. It was further deposed that intended appeal was merely to obtain orders for stay evident from the respondent's failure to explain the reasons for the delay. Nor did the respondent proffer any explanation as to why the letter seeking the proceedings from the trial court was not copied to or served on the applicants.

4. During the plenary, this Court was urged to consider its holdings in **Daniel Nkirimpa Monirel v. Sayialel Ole Koilel & 4 Others** ***[2016] eKLR*** *and* ***Patrick Kiruja Kithinji v. Victor Mugira Marete*** ***[2015] eKLR*** in circumstances where a notice of appeal is considered withdrawn and whether the overriding principles can be invoked in curing procedural technicalities in violation of **Rule 77 and 82** of the Rules. It was observed that whether or not an appeal is filed out of time goes to the jurisdiction of this Court. It is trite law that this Court has jurisdiction to entertain appeal filed within the requisite time and/or appeals filed out of time with leave of the Court.

5. In consideration of the material placed before us in the instant application, the grounds in support thereof, both written and the able submissions of counsel and the law, we note that the general trend, following the enactment of **section 1A and 1B** of the Civil Procedure Act, **sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Article 159 of the Constitution**, is that courts strive to sustain rather than to strike out pleadings on purely technical grounds. (See. ***Nicholas Kiptoo Arap*** **Korir Salat v. Independent Electoral and Boundaries Commission & 6 others** ***[2013] eKLR).*** The rules of practice are intended to be that of a handmaiden rather than a mistress and that the court should not be so far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case. (See. ***Githere v. Kimungu*** ***[1976 – 1985] E.A. 101).*** Yet rules do serve a salutary purpose in ensuring a level-playing ground.

6. However, in the instant matter we are unable to sustain this appeal in view of the respondent's conduct, who is not only in violation of **Rule 77 and 82 of the Rules** but has failed to furnish the applicants with proof that it requested for typed proceedings from the trial court and did not attach a Certificate of Delay to justify the delay. We further note that during the hearing, the respondent was not in attendance which leaves little to imagination, we have no doubt the respondent is not even interested in prosecuting this appeal. The filing of the notice of appeal was merely to deny the applicants the fruits of their judgment.

7. In the words of this Court in **Mae Properties Limited v. Joseph Kibe &** ***Another*** ***[2017] eKLR*****;**

> **"We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.**
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> **Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;**
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> **"83. 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 of any persons on whom the notice of appeal was served."**
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> **We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party** *shall be deemed* **to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.**
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> **Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged** ex abundanti cautela **by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper – with the attendant risks, prospects and consequences.**
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> **It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court** suo motu**, on its own motion and at its sole discretion, presumably with neither notice nor reference to the parties. The Court has this inherent power to make the formal order of the notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure."**

8. In view of the above, we find merit in the application dated 1st March, 2019 which we accordingly allow with costs to the applicants.

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

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR