



IN THE COURT OF APPEAL

AT NAKURU

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

CIVIL APPLICATION NO. NYR 26 OF 2018

BETWEEN

NEXUS STRATEGY LIMITED.....APPLICANT

AND

SAMUEL NJIRAINI NGABIA.....RESPONDENT

*(Being an application to strike out the Notice of Appeal from the judgment of the High Court of Kenya (R. P. V. Wendoh, J.) dated 28th February, 2014*

*in*

*Nakuru HC Civil Appeal No. 3 of 2011)*

\*\*\*\*\*

RULING OF THE COURT

Before us is a notice of motion dated 5th March, 2018 under **Rules 82 and 83** of the **Court of Appeal Rules, 2010** and **sections 3A and 3B** of the **Appellate Jurisdiction Act, Cap 9 Laws of Kenya**, substantively seeking for orders:

- “1) That the respondent’s notice of appeal dated 6th March, 2014 and filed on the 7th March, 2014 be deemed as withdrawn.**
- 2) That the costs of this application be borne by the respondent/ appellant.”**

It is supported by grounds on its body and a supporting affidavit sworn by **Kibet Cheboswony** together with annexures thereto. It is not opposed. It was canvassed virtually through the applicant’s sole pleadings and written submissions without oral highlighting.

The background to the application albeit in a summary form is that, the applicant herein purchased property known as **Dundori/Lanet Block 5/35** at an auction following AFC’s exercise of its statutory power of sale after the respondent herein failed to service a loan advanced to him by AFC (K) Ltd which auction the respondent never challenged resulting in the applicant receiving the necessary transfer documents in its favour. The litigation resulting in the filing of the impugned notice of appeal was triggered by the respondent’s conduct of interference with the applicant’s quiet enjoyment of the suit property, necessitating the applicant to file **Nakuru CMCC No. 1463 of 2010, Nexus Strategy Ltd vs. Samuel Njiraini Ngabia** vide which on 31st December, 2010, the Court issued eviction orders against the respondent.

Aggrieved, the respondent unsuccessfully appealed against the eviction order vide Nakuru High Court Civil Appeal No. 3 of 2011. The merit disposal of the said appeal is what resulted in the orders of **Wendoh, J.** issued on 28th February, 2014 dismissing the respondent’s appeal. Undeterred, the respondent timeously filed a notice of appeal dated 6th March, 2014 and lodged on a date not visible from the copy annexed to the application. The respondent also timeously applied for a certified copy of proceedings for appeal purposes vide a letter dated 6th March, 2014. The Deputy Registrar of the Court appealed from notified the respondent that the proceedings were ready for collection vide a letter dated 5th May, 2016. No record of appeal has been filed to date. The record is also silent as to whether the respondent collected certified copies of the proceedings as advised by the Deputy Registrar of the High Court hence applicant’s application under consideration seeking to deem the impugned notice of appeal as withdrawn.

The applicant therefore, submits that it is approximately 6 years from the date the respondent lodged his notice of appeal and about 4 years since he was notified by the Deputy Registrar of the court appealed from that proceedings were ready for collection. The respondent has therefore failed, neglected and/or ignored to file his appeal contrary to the prerequisite in **Rule 82(1)** of the **Court of Appeal Rules** which

required him as an aggrieved party to file his appeal within sixty (60) days of the lodging of the notice of appeal. It is, therefore, the applicant's contention that on the basis of the uncontroverted facts highlighted above, it has laid sufficient basis to warrant the relief sought.

The failure of the applicant to controvert the application notwithstanding, we are in law obligated to determine its merit which we hereby proceed to do.

Our invitation to intervene on behalf of the applicant has been sought under **Rule 82(1)** and **83** of the **Rules** of this Court. **Rule 82(1)** 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.**

while **Rule 83** on the other hand 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”.**

This is not the first time the Court is being confronted with an application of this nature. It has numerously already expressed itself on the threshold for invocation and application of the above **Rules** in an application of this nature. We take it from the case of **Charles Wanjohi Wathuku vs. Githinji Ngure & Another [2016]eKLR**, wherein 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.”**

Considering the above, we agree with applicant's uncontroverted position that the correct position in law is that an aggrieved party as was the respondent in the instant application is obligated to file and serve a record of appeal onto the opposite party within sixty (60) days of the lodging of the notice of appeal unless the prevailing circumstances in the particular appeal fall within those covered by the proviso to the said **Rule**. In the absence of any rebuttal from the respondent, the proviso does not operate to provide succor for the impugned notice of appeal.

Turning to **rule 83**, the court, and which we fully adopt as the correct position in law in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** [supra], 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”.**

**Rule 83** of the Court's Rules applies where the Court has either moved *suo motu* or on application by a party to strike out the notice of

appeal. Herein the Court has been moved by the applicant as the aggrieved party. We are, therefore properly seized of the application under consideration.

In light of the above exposition by the Court on the parameters for invocation and application of both rules in favour of a deserving party and especially in the absence of evidence in rebuttal of the applicant's assertion highlighted above, we find merit in the application as laid before us. We accordingly allow it as prayed.

**DATED and DELIVERED at NAIROBI this 19th day of March, 2021.**

**W. OUKO (P)**

.....

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**