IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 17 OF 2020

BETWEEN

PAUL THUKU GACHORA.....APPLICANT

AND

NAIVAS COMPANY LIMITED .....RESPONDENT

(An Application for a finding that the notice of Appeal dated 19th May, 2016 be deemed as withdrawn on account of default to institute an appeal and to rescind the order of stay of execution (G.B.M. Kariuki, J.) dated 12th July, 2017

in

Nyeri Civil Application No. 26 of 2017

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RULING OF THE COURT

Before us, is a Notice of Motion dated 28th January, 2020, under **Rule 57(2), 83** of the **Court of Appeal Rules 2010** and **Sections 3A** and **3B** of the Appellate Jurisdiction Act together with all other enabling provisions of the law, substantively seeking orders of the Court to: deem the notice of appeal dated 19th May, 2016 and lodged on the same day by the Respondent as withdrawn for failure to institute an appeal within 60 days as prescribed by **Rule 82 (1)** of the Court of Appeal Rules, 2010; rescind the order of stay of execution granted in favour of the Respondent on 12th July, 2017 pursuant to the motion dated 2nd, March, 2017 in Nyeri Court of Appeal **Civil Application No. 26 of 2017 Naivas Company Limited vs. Paul Thuku Gachora**; dismiss the motion dated 2nd March, 2017 and award costs of this application; the one dated 2nd March, 2017 and those arising from the withdrawn notice of appeal to the Applicant.

It is supported by grounds on its body and a supporting affidavit of **Paul Thuku Gachora** the Applicant, together with annextures thereto. It has been opposed by the Respondents' replying affidavit sworn by **Paul Thuita Kiiru** on 3rd March, 2021 together with annextures thereto and written submissions. It was canvassed virtually through rival averments and written submissions in the absence of learned counsel for the respective parties and without oral highlighting.

Supporting the application, the Applicant avers that he is the holder of a decree against the Respondent issued in his favour by Employment and Labour Relations Court (ELRC) in Nakuru Cause No. 229 of 2013 - **Paul Thuku Gachora vs. Naivas Company Limited.** The Respondent was aggrieved and filed a notice of appeal on 19th May, 2017, a period of three (3) years and seven (7) months ago. Todate neither a memorandum of appeal nor a record of appeal have been filed and served either on him or his advocate.

That the Respondent successfully anchored on the notice of appeal Civil Appeal Application No. 26 of 2017 **Naivas Company Limited vs. Paul Thuku Gachora**, in respect of which a ruling was delivered by the Court on 12th July 2017 granting them an order of stay of execution of the judgment pending the hearing and determination of an intended appeal. It is over two (2) years and six

(6) months since the delivery of the said ruling. Neither a memorandum of appeal nor a record of appeal have ever been lodged or served either on him or his advocate hence the application to deem the notice of appeal filed herein withdrawn pursuant to **Rule 83** of the **Court of Appeal Rules**. According to the Applicant, the continued maintenance of the order of stay in favour of the Respondent is not only unfair but also highly prejudicial and oppressive to him as he is unable to access the fruits of his judgment delivered on 6th May, 2016, especially when also according to him, the Respondent does not seem to be in any hurry to institute and progress its appeal for merit determination. This conduct on the part of the Respondent according to Applicant militates against the spirit of **Article 159** of the Constitution of Kenya 2010 whose core ideal dictates that justice shall be done to all without undue delay, hence the prayer that the application be allowed with costs to him.

To buttress the above submissions, Applicant relies on the case of **Quick Lubes E.A. Limited vs. Kenya Railways Corporation [2014] eKLR**, on the parameters for invocation and application of Rule 83 of the Court of Appeal Rules as an anchor for an application of this nature. Also the case of **Nguruman Limited Vs. Shompole Group Ranch & Another [2014] eKLR** is cited on the parameters for invocation and application of **Rule 57(2)** of the Court of Appeal Rules on the exercise of the Court's sparing, cautious and restrictive power, to recall, review and rescind its own orders.

In rebuttal, the Respondent relying both on its averments in the replying affidavit and written submissions submits that on 19th May, 2016 they simultaneously filed the notice of appeal and a letter to the Deputy Registrar of the Court bespeaking proceedings for appeal purposes. They concede that they also sought and were granted orders staying execution of the impugned judgment pending appeal; and that they have not yet filed and served a record of appeal on the Respondent. They however explain that they are not at fault. Neither have they been indolent in the pursuit of their appellate process as they duly paid for copying charges of the record. They have also been sending reminders to the Deputy Registrar of the Superior Court seeking supply of the same but todate they have not been successful. According to them, they are in the circumstances entitled to benefit from the proviso to **Rule 82(1)** of the Court of Appeal Rules. They also add that they are ready and willing to comply with the prerequisites of **Rule 82(1)** of this Court's Rules as soon as they are supplied with a certified copy of proceedings together with the attendant certificate of delay.

To buttress the above submissions, the Respondent rely on the case of **Kenya Ports Authority vs. Maur Aballalla Bwana Meka [2018] eKLR** and also on the intent and import of **Rule 83** of the **Court of Appeal Rules**.

Our invitation to intervene on behalf of the Applicant has basically been invoked substantively under **Rules 82 (1) (2)** and **83** of the **Court of Appeal Rules**. The rest of the rules cited are peripheral in the determination of an application of this nature. It is therefore sufficient for us to state for purposes of the record only that **Rule 57(2)** as already mentioned above enshrines the sparing, and cautious residual power of the Court to recall, review, or otherwise rescind its decisions. No doubt this Rule was invoked in support of the Applicant's request for us to recall and rescind the order granting stay which is not in our view a condition precedent for interrogation of an application of this nature. We find nothing turns on it in the disposal of this application. We therefore find it prudent not to delve into the parameters for invocation and application of the said rule and instead confine ourselves to Rule 82& 83 prerequisites.

Section 3A with its twin sister **section 3B** of the Appellate Court Act on the other hand enshrines the overriding objective principle of the Court. We also find it unnecessary to embark on any serious interrogation of the parameters for invocation of the said principle. It is sufficient for us to state that, its core ideal is the expeditious dispensation of justice which we shall bear in mind in the determination of this application.

Turning to **Rule 82** of the Court's Rules, it provides:

> ***"(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."***

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 costs 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."***

Turning to **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 succor. 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 exposition in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** [supra], the Respondent having lodged a notice of appeal on 19th May, 2017 was obligated to file the record of appeal within sixty (60) days of that date. It can only escape the penal consequences of noncompliance with that provision if it can bring itself within the ambit of the proviso to the said rule of which it contends herein that it has. Reliance is placed on the initial letter bespeaking proceeding as well as two reminders. The last one is dated 17th May, 2018, a period of almost two years and ten (10) months ago to the hearing of the application. It is also our observation that there is nothing in the Respondent's averments to demonstrate that upon service upon it of the application under consideration, it took any initiative to find out from the Deputy Registrar of the ELRC the progress in the supply of the proceedings. The circumstances prevailing herein therefore calls for the exercise of a balancing act by applying the principle of equality of arms in the dispensation of justice to the parties herein. This enjoins us to balance Applicant's right to enjoy the fruits of his judgment and the Respondent's right to pursue its timeously initiated but currently slackened appellate process. Considering the length of time, the Respondent has taken to make a follow up on the last reminder sent to the Deputy Registrar for the supply of proceedings; it is our view that a conditional order in the disposal of this application would serve interests of justice to both parties.

In the result, the order that commends itself for us to make in the disposal of this application is this:

1) **Prayer (1) of the application is granted on condition that if no appeal is filed within sixty (60) days of the date of the delivery of this ruling, the notice of appeal lodged on 19th May, 2017 shall be deemed to have been withdrawn.**

2) **Costs of the application in the intended appeal. However, if none is filed, the same shall be payable to the Applicant.**

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

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR