



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO, (P), MUSINGA & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 85 OF 2019

BETWEEN

CREDIT REFERENCE BUREAU AFRICA LTD.....APPLICANT

AND

HARRISON KARIUKI MURU.....1ST RESPONDENT

NATIONAL BANK OF KENYA LIMITE.....2ND RESPONDENT

(An application to strike out the Notice of Appeal lodged on 12th April, 2019 arising from the judgment and decree of the High Court of Kenya at Nyeri (Ngaah, J.) dated 29th March, 2019

in

H.C.C.C No.97 of 2012)

RULING OF THE COURT

By a motion filed on 7th June, 2019, the applicant has urged the Court to strike out the 1st respondent's notice of appeal dated 12th April, 2019. The notice evinces the 1st respondent's intention to challenge the judgment of the High Court dated 29th March, 2019 wherein Ngaah, J. dismissed his suit for defamation against the applicant and 2nd respondent.

The applicant's argues that the 1st respondent, contrary to **Rule 77 (1)** of this Court's Rules, served the notice of appeal upon the applicant 25 days after lodging the same; and that despite notice of this default, by the current motion which was served upon him on 13th June, 2019, the 1st respondent has not made any effort to cure the default in the manner set out in **Pan African Life Assurance Ltd. vs. Carolyne Chegero Vereso** [2015] eKLR.

The 2nd respondent, for its part has supported the motion on the grounds that the notice of appeal was served upon it on 30th April, 2019, that is, 14 days after it was lodged; and that at the time the instant motion came up for hearing the 1st respondent was yet to file and serve the record of appeal.

In response the 1st respondent has argued that the motion was brought under the wrong provision of the law, **Rule 80** as opposed to **Rule 84** of this Court's Rules; and secondly, that the motion was not brought within the prescribed time line with the proviso to **Rule 84**. Whilst admitting the delay in serving the notice of appeal, the 1st respondent argued that the delay was not inordinate and expressed regret for the delay. In his view, the delay neither went to the root of the intended appeal nor prejudiced the applicant or the 2nd respondent hence was excusable.

Beginning with the competency of the motion, we find that it was clear that the substance of the motion was that the 1st respondent had failed

to take an essential step of effecting service of the notice of appeal within the requisite timeframe under **Rule 77(1)** of this Court's Rules. Therefore, notwithstanding the fact that the applicant had cited **Rule 80** as opposed to **Rule 84** it was clear, as can be discerned from the motion and the respondents' response, that the motion was anchored on **Rule 84**.

The proviso to **Rule 84** of this Court Rules unequivocally stipulates that a motion to strike out a notice of appeal, shall not be brought after the expiry of thirty days from the date of service of the notice of appeal. See **Total Kenya Limited vs. Reuben Mulwa Kioko** [2018] eKLR. It is common ground that the notice of appeal was served upon the applicant on 7th May, 2019 thus, the window within which the motion could have been filed was on or before 7th June, 2019 taking into account that the Madaraka day holiday fell on 1st June. As such, the motion which was filed on 7th June, 2019 was filed right on time and is therefore properly before us.

Under **Rule 77(1)** the 1st respondent was required to serve the notice of appeal within seven days of lodging it, that is, on or before 22nd April, 2019. Therefore, there was a delay of about 14 days, excluding Labour Day which fell on 1st May, from the 22nd April, 2019 up to 7th May, 2019 when the notice was actually served on the applicant, which delay is admitted by the 1st respondent.

In the exercise of our discretion and in order to do justice between the parties, weighing the prejudice that is likely to be suffered by the applicant against the prejudice to be suffered by the 1st respondent if the court strikes out the notice of appeal, we believe justice will be served by excusing the delay and saving the notice of appeal. By expressing these sentiments, we are in no way suggesting that procedural improprieties are to be ignored altogether but regard has to be paid to the circumstances of each case. See **Fred Onyoni Nyabuto vs. Kimani Walter** [2021] eKLR.

In our view, the delay of 14 days in service of the notice of appeal was not inordinate and did not occasion any prejudice to the applicant.

The totality of the foregoing is that we reject the motion. We nonetheless direct the 1st respondent to file and serve the record appeal within 30 days of this ruling failing which the notice of appeal dated 12th April, 2019 shall stand struck out without further orders. Costs of the motion shall abide by the outcome of the appeal.

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

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR