Peterkeen Mwiu Kimweli & 47 others v National Social Security Fund Board of Trustees (Civil Application E008 of 2021) [2021] KECA 167 (KLR) (19 November 2021) (Ruling)

Neutral citation: [2021] KECA 167 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E008 OF 2021

RN NAMBUYE, W KARANJA & PO KIAGE, JJA

NOVEMBER 19, 2021

BETWEEN

PETERKEEN MWIU KIMWELI & 47 OTHERS ..... APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ..... RESPONDENT

(An application for striking out a notice of appeal from the Employment and Labour Relations Court of Kenya (H. Wasilwa, J.) dated 26th August, 2020 in Nakuru ELRC Cause No. 212 of 2017)

RULING

1. Before us is a notice of motion dated 4th February, 2021 brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, Rules 47, 82, 83 and 84 of the *Court of Appeal Rules*, substantively seeking an order that the notice of appeal dated 26th August, 2020 be struck out together with an attendant order that costs of and incidental to the application abide the result of the application. It is supported by grounds on its body and a supporting affidavit sworn by Peterkeen Mwiu Kimweli together with annexures thereto. It has been opposed by the respondent's replying affidavit sworn by Mabeya George Masese on 12th May, 2021 together with annexures thereto and grounds of opposition dated 7th May, 2021.

2. It was canvassed virtually via the Go-To-Meeting platform due to the Covid-19 pandemic challenges, through the respective parties rival pleadings, written submissions and legal authorities.

3. Applicants are aggrieved because M. Mbaru, J. delivered a judgment in their favour on 24th August, 2020. The respondent filed a notice of appeal on 26th August, 2020 against the said judgment. On 19th January, 2021 the respondent was granted an order for stay of execution of the said judgment pending appeal.

4. The applicants lament that since then no steps have been taken by the respondent to progress their appellate process hence their application to have the impugned notice of appeal struck out.

5. Theapplicantsrelyon		the	caseofDaniel Nkirimpa
Monire vs. Sayialel Ole Koilel	& 4	Others [2016] eKLR; Patrick	

5. *Kiruja Kithinji vs. Victor Mugira Marete* [2015] eKLR; and *Satyawati vs. Rajinder Singh & Another* [2013] eKLR all in support of their contention that the respondents timeously initiated appellate process stands vitiated firstly for the failure to comply with the prerequisite in Rule 82(1) of the Court of Appeal Rules which obligated them to file the record of appeal within sixty days of the date of the lodging of the impugned notice of appeal. Second, for the failure to serve the record of appeal on them within the timelines provided for in Rule 90(1) of the Court of Appeal Rules. Third, for the failure to timeously lodge and serve on them a letter bespeaking proceedings for appellate purposes. Fourth, the respondent's conduct in the manner they have handled their timeously initiated appellate process amounts to unreasonably withholding applicants from the enjoyment of the fruits of the judgment delivered in their favour.

6. They also rely on sections 3A and 3B of the *Appellate Jurisdiction Act* Cap 9 Laws of Kenya donating mandate to the court to ensure, just, expeditious, affordable and proportionate dispensation of justice, Rules 83 and 84 of the court's Rules for vitiating an already initiated appellate process for a party's failure to comply with the prerequisite in Rule 82(1) of the Court of Appeals Rules.

7. In rebuttal, the respondents contend that: the application under consideration has been overtaken by events as there is already an appeal filed namely E020 of 2021 NSSF vs. Peterkeen M. Kimwelu & 47 Others and are only waiting for directions on disposal; the application is a nonstarter for the applicants' failure to file the same within thirty (30) days from the date of service upon them of the notice of appeal intended to be struck out; they complied with the prerequisites in Rule 82(1) of the Court of Appeal Rules as they lodged a letter bespeaking proceedings on 27th August, 2020 and caused it to be served upon the applicants online as the court did not allow physical service due to the Covid-19 pandemic challenges; they were supplied with a certified copy of the proceedings on 5th February, 2021 and filed their appeal on 9th March, 2021, caused it to be served on the applicants on 23rd March, 2021, which according to them was within the timelines stipulated in the Rules.

8. To buttress the above submissions, the respondent relies on the case of *Abdirahman Abdi vs. Safi Petroleum Products Ltd & 6 Others [2011] eKLR* as approved in *Nicholas Salat vs. IEBC & Others* CA No. Nai 228 of 2013, sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya and Article 159(2)(d) of the *Constitution of Kenya,* 2010 and the case of *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR* and *Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others [2014] eKLR* all of which according to them provide sufficient basis for the court to decline the applicants' application as according to them interests of justice herein demand that the appeal already filed and served be heard on its merits.

9. We have considered the record in light of the above respective parties rival pleadings and applicants' sole submissions. Our invitation to intervene on behalf of the applicants, has substantively been invoked under the provisions of law cited above. Starting with sections 3A and 3B of the *Appellate Jurisdiction Act*, it is sufficient for us to state that these twin provisions enshrine the overriding objective principle

of the Court which inter alia donates power to the Court to discharge its mandate with great latitude. Rule 82 of the court's Rules provides as follows:

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 –

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) .....

10. The Court has already pronounced itself on consequence for non-compliance with the prerequisites in Rule 82(1) and (2) of the Court of Appeal Rules. We take it from the case of *Mae Properties Limited vs. Joseph Kibe* (supra) in which the Court expressed itself as follows:

> " 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 moto, on its own motion and at its sole discretion, presumably with neither 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.
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> Under the same Rule 83, and assuming that the Court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply made the order deeming the notice of appeal as withdrawn."

11. See also the case of *Charles Wanjohi Wathuku vs. Githinji Ngure & Another [2016] eKLR*, in which the Court reiterated the position takenin 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."

Rule 83 on the other hand provides as follows:

> "(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 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 expressed itself as follows on the intent andpurport 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".

12. As was succinctly stated in the case of *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [*supra*], the respondent was obligated toprocess the filing and service of the record of appeal within sixty (60) days of the lodging of the notice of appeal as stipulated in Rule 82(1) of the Court's Rules or alternatively within the time envisaged in the proviso to the said rule. It is common ground that the respondent was not able to lodge their appeal within sixty (60) days of their lodging of the notice of appeal. They have sought succor in the proviso to Rule 82(1) of the Court's Rules. It is their unrebutted contention that they not only timeously filed but also served the letter bespeaking proceedings on applicants online. They were subsequently supplied with certified copies of proceedings on 5th February, 2021. They lodged their appeal on 9th March, 2021 and caused it to be served on the applicants on 25th March, 2021 which according to them is within the timeline stipulates in the proviso to Rule 82(1) and Rule 90(1) of the Court of Appeal Rules taking into consideration the certificate of delay exhibited herein.

13. The applicants have invited us not only to vitiate the certificate of delay exhibited herein but also the record of appeal anchored on it through their written submissions. The position in law and which need no scholarly exposition is that a party is bound by its pleadings. Second, a court of law has no mandate to grant a relief not prayed for in a party's reliefs nor pleaded in a party's pleadings. We therefore, reject the applicants' invitation through their written submissions for us to vitiate both the certificate of delay and the record of appeal anchored on it. As long as the certificate of delay is sustained, the applicants stand nonsuited on their request to vitiate the impugned notice of appeal as well as the record of appeal filed pursuant thereto.

14. As for Rule 84 of the Court's Rules also cited as an access provision. It provides:

> " 84. A person affected by 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."

Our plain reading of this Rule is that in order for it to provide succor for relief, the remedy has to be sought within thirty days of service upon the aggrieved party of the process sought to be vitiated. The applicants have not disclosed in their pleadings when they were served with the impugned notice of appeal for us to compute the requisite thirty (30) days period. Rule 84 of the Court of Appeal Rules is therefore discounted as an access provision for want of sufficient particulars for its application.

15. In the result and for reasons given in the assessment, the application is dismissed. Costs of the application to abide the outcome of the appeal already filed.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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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