



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM; KOOME, SICHALE & KANTAI, JJA)

CIVIL APPLICATION NO 254 OF 2018

BETWEEN

WAMBUA & MASENO ADVOCATES.....APPLICANT

AND

AFRITRACK INVESTMENTS (E.A) LIMITED.....RESPONDENT

(An Application to deem withdrawn the respondent's Notice of Appeal dated 7th October, 2015

from the judgment of the Environment and Land Court at Nairobi (Nyamweya J.)

dated 1st October, 2014

in

ELC Misc. Appl. No. 91 of 2013)

RULING OF THE COURT

[1] Before us for determination is a Notice of Motion dated the 31st August, 2018 which is brought under **Rule 83** of the Court of Appeal Rules. It is taken out by

Ogembo & Associates on behalf of their client, **Wambua & Maseno Advocates (applicant)**. The application seeks to strike out the Notice of Appeal dated 7th October, 2015 which was filed on 7th October, 2015 by **Afritrack Investments (E.A) Limited (respondent)** and that the decretal sum of Ksh 2,500,000 deposited in an interest earning account in the joint names of the counsel of the parties as per the court orders issued on 22nd April, 2016 be released to the applicant.

[2] The application is supported by the grounds stated in the body thereto and the supporting affidavit that was sworn by **Prisca Wambua** on 31st August, 2018. The grounds which we think are vital state that;

1. The ruling intended to be appealed from was delivered on 1st October, 2014.

2. That upon being granted leave to appeal against the said ruling, the respondent herein

lodged its Notice of Appeal in the Environment and Land court registry on 7th October, 2015.

3. That the sixty (60) days allowed by the Rules for preparing and lodging the record of appeal has since expired and no appeal has since been filed.

4. That the respondents have not instituted the appeal 970 days after lodging of their Notice of Appeal.

5. That the respondent's delay is inexcusable and they are guilty of laches.

6. That the delay in prosecuting the Appeal is seriously prejudicing the applicant as they have never been remunerated as advocates for the work carried out way back in the year 2013.

7. That the respondents who are of foreign nationality have closed their place of business and have moved to unknown place and there is reasonable fear and apprehension that they have moved out of jurisdiction of this honourable court.

8. That it is in the interest of the expeditious administration of justice that this application be granted.

[3] The above grounds are reiterated in the supporting affidavit sworn by **Prisca Wambua** as aforesaid. The application was opposed vide a replying affidavit sworn on 29th April, 2019 by **Sabena Wold Yohannes**, the Chief Executive Officer of the respondent. It is deposed that the respondent applied and was granted leave to appeal against the impugned orders on 25th September, 2015. The respondent blames their previous advocates **M/s Wambugu & Co. Advocates** for failing to follow up the matter on their behalf. That the said Advocates applied for proceedings as per a copy of letter attached to the said affidavit on the 10th February, 2016, but they were informed by the court registry staff that the file had gone missing.

[4] The deponent states that she was out of the country having travelled to Ethiopia and was also unwell but since they were given another chance by this Court to file a replying affidavit, they have instructed another firm of advocates to represent them. That the respondent intends to pursue the court file and once the same is located, it will be in a position to file the appeal; in the event that the court file will not be located the respondent will apply for reconstruction of a skeleton file to enable it file an appeal. Consequently, the respondent contended that the delay in filing the appeal was not caused by its mistakes but by circumstances that were beyond its control. This is what the respondent stated in paragraph 18 of the replying affidavit;

“That, in the circumstances the respondent has no other option other than to pursue the court file and once the same is located then it will be in the position to file the appeal and in any event it is impossible to locate the court file the respondent will apply for reconstruction of the skeleton file to enable (sic) to file the appeal”

The respondent denied the allegations that it intended to move its registered offices from Kenya and asserted that it has properties in the country.

[5] During the plenary hearing, **Mr. Ogembo** learned counsel for the appellant reiterated the grounds by emphasizing that there is no appeal that has been filed after 4 years. Also that the respondent had not offered any credible reasons for its failure to lodge an appeal as per the Court Rules. That the allegation, the court file went missing is not supported by any correspondence from the court or even a follow up by counsel for the respondent; even the allegations that the representative of the respondent was out of the country or was indisposed are not supported by any documents. Moreover, there is no affidavit filed by the former counsel to support the allegations made against them or the missing file. All in all counsel urged us to allow the application while relying on the authority in the cases of; **Mae Properties Limited vs. Joseph Kibe & Another [2017] eKLR**

for the proposition that failure to lodge an appeal within sixty (60) days after the filing of a Notice of Appeal, under **Rule 83** of the Court of Appeal Rules, renders an appeal to be deemed to have been withdrawn unless the party in default can demonstrate serious attempts were made to follow the proceedings or to otherwise pursue the lodgement of the appeal.

[6] The Motion was opposed by **Mr. Mantara** learned counsel for the respondent. Relying heavily on his clients replying affidavit and a list of authorities, counsel submitted that this application should be deemed premature as the proceedings are yet to be supplied. Counsel referred to a letter dated 14th October, 2014 addressed to the court registry where they were requesting for the proceedings and to-date they have not been processed. In the event, it is not possible for them to file the record of appeal. Counsel cited the case of; **Kenya Ports Authority vs. Maur Abdalla Bwanamaka [2018] eKLR** where this Court held;

“The import of this provision is that where no application for typed proceedings is made, the appeal must be instituted strictly within 60 days of lodging the Notice of appeal. However, where an application for typed proceedings is made, the time taken to compile the proceedings is exempted in the computation of the 60 days. This means that at the time the proceedings are being prepared, time ceases to run; to enable the parties and the court ascertain when this period was, the deputy registrar of the court below issues what is known as a certificate of delay, detailing the period of exemption”.

We however find the above authority distinguishable from the present application as the record of appeal in the aforesaid case had been filed as opposed to the instant matter where no appeal has been filed.

[7] That said, we have considered the rival submissions, and deliberated on all the material that were placed before us, the central issue remains whether the notice of motion should be allowed. This application is founded on **Rule 83** of this Court Rules which provides;

“Effect of default in instituting appeal:

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.
(Emphasis added)

The Rule is clear as it essentially prescribes the legal penalties for failure to institute an appeal within 60 days as provided therein. It goes without saying the Rule is also couched in mandatory terms. This Court aptly described the consequences of failure to follow the Rule in the case of **Mae Properties Ltd** (Supra) as thus;

“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”.

[8] What reason has the respondent proffered for in failure to file an appeal as provided in the Rules of this Court? In the replying affidavit, the respondent states that since 25th September, 2015 the High Court file went missing. On 1st February, 2016 counsel for the respondent wrote a letter to the High Court, Deputy Registrar seeking assistance in tracing the court file. That is the only letter attached to the replying affidavit. The respondent’s officer states that she was out of the country in Ethiopia and that she was also indisposed. This is not a cogent explanation because the respondent is a company, moreover, the respondent did not attach any documents to back those assertions. The respondent also, in what appears a

very lacklustre manner indicated in one of the paragraphs of the replying affidavit that in the event the court file is not located they intend to apply for a re-construction. What is demonstrated from the respondent's response by way of the replying affidavit and submissions made before us is implicit indifference and a total lack of seriousness in following up the proceedings and to comply with the Rules.

[9] Even if we were to take it from the respondent's word that the court file went missing in February, 2016, the respondent has not been able to back this assertion with a letter from the registry to confirm the position of a missing file. A missing file is a matter of concern even to the court registry that ought to be confirmed in writing. We have also not been shown any flurry of activities by the respondent either seeking the proceedings as there is only one letter to that effect and there is also no application to re-construct a skeleton file. As matters stood, the respondent stated that they planned at a time that is not stated to make such an application. For these reasons we think the respondent has been indolent in the matter of pursuing an appeal.

[10] In view of the above it would be an abuse of our discretion if we exercised it in favour of the respondent in these circumstances. We find the application before us merited, we allow it and order that the notice of appeal dated 7th October, 2015 be and is hereby deemed as withdrawn with costs to the applicant. There being no appeal pending before this Court, we order that the decretal sum of Kshs. 2,500,000 deposited in an interest earning account in the names of the counsel to the parties as per the Court Orders issued on 22nd April, 2016 be released to the applicant as prayed.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of February, 2020.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR