IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 77 OF 2018

BETWEEN

NATIONAL OIL CORPORATION OF KENYA.....APPELLANT

AND

SULEIMAN MOHAMED SAID

SULEIMAN AL-BUSAIDY.....1ST RESPONDENT

ALI MOHAMED SAID SULEIMAN AL-BUSAIDY.....2ND RESPONDENT

SHELL COMPANY OF EAST AFRICA .....3RD RESPONDENT

VIVO ENERGY KENYA LIMITED..... 4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Mombasa (A. Omollo, J.) delivered on 22nd March 2018

in

Mombasa ELC C. No. 16 of 2016)

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RULING OF THE COURT

1. This ruling relates to two applications. The first is an application dated 9th July 2018 and filed on 12th July 2018 (the first application). In it, Suleiman Mohamed Suleiman Al-Busaidy and Ali Mohamed Said Suleiman Al-Busaidy, as the legal representatives of Mohamed Said Suleiman Al-Busaidy, deceased, seek an order that the notice of appeal dated 9th May 2018 and the record of appeal dated 19th June 2018 filed by National Oil Corporation of Kenya Limited be struck out. In effect, that this appeal, being Civil Appeal No. 77 of 2018 be struck out.

2. The second application is by National Oil Corporation of Kenya Limited. (We will hereafter refer to it as *"the appellant"*). The application is dated 12th July 2019 and was filed on 15th July 2019 (the second application). In it, the appellant seeks an order for extension of time within which to file its notice of appeal and its record of appeal and that its notice of appeal dated 9th May 2018 and its record of appeal dated 19th June 2018 be deemed to have been duly filed and served.

3. On 22nd July 2019, the Court gave directions that the two applications would be heard together. Accordingly, we heard counsel on both applications on 25th November 2019.

4. Some background will provide context. On 1st April 1937, Shell Company of East African Limited, the 3rd respondent, leased the property known as Land Reference Number Mombasa/Block XVIII/244 situated at Digo Road, Mombasa (the property) from the registered owner, Mohamed Said Suleiman Albusaidy (the deceased) for a term of 99 years from 1st July 1936. It took possession of the property and constructed a petrol station. Shell Company of East African Limited (Shell) subsequently changed its name to Vivo Energy Kenya Limited (Vivo Energy), the 4th respondent. In effect, although Shell and Vivo Energy, the 3rd and 4th respondents respectively, were sued in the lower court as separate entities, they are one and the same person.

5. The deceased died in 1988. His estate is administered by Suleiman Mohamed Suleiman Al-Busaidy and Ali Mohamed Said Suleiman Al-Busaidy, the applicants in the first application (the applicants). Sometimes in 2012, Vivo Energy transferred the lease over the property in its favour to the appellant without the consent of the applicants, the administrators of the estate of the deceased.

6. By a plaint dated 9th February 2016 filed before the Environment and Land Court (ELC) at Mombasa in Land Case No. 16 of 2016 the applicants filed suit against Shell, Vivo Energy and the appellant contending, among other things, that Shell and Vivo Energy had fraudulently and irregularly sold and transferred the lease over the property to the appellant and that the appellant had wrongly entered and taken possession of the property. Accordingly, the applicants sought judgement against Shell, Vivo Energy and the appellant for, among other reliefs: a declaration that the lease dated 1st April 1937 had been breached and the same should be deemed as terminated; a declaration that the applicants are entitled to the exclusive possession of the property; an order of eviction of the appellant from the property; and damages.

7. Vivo Energy and the appellant defended the suit and contested the claim. After conducting a trial, the ELC (***A. Omollo, J***.) delivered judgment on 22nd March 2018 upholding the applicants' suit and decreeing that the applicants are entitled to exclusive possession of the property; that the appellant is wrongly and illegally in possession of the property and restraining it from continuing in possession; and ordered eviction of the appellant from the property.

8. Aggrieved by that judgment, on 29th March 2018 the appellant filed a notice of appeal dated 28th March 2018 which was lodged at the ELC on 4th April 2018 and served it on the advocates for the applicants. Vivo Energy filed a notice of appeal dated, filed and lodged on 5th April 2018 and served the same on the advocates for the applicants. A few days later, on 17th April 2018, the appellant filed a notice of withdrawal of the notice of appeal lodged on 4th April 2018 and served the same on the advocates for the applicants.

9. The withdrawal of the notice of appeal was however not to be the end of the matter as far as the appellant is concerned. About a month later, on 9th May 2018, the appellant filed yet another notice of appeal but omitted to serve it on the applicants. The notice of appeal of 9th May 2018 was followed approximately one and a half months later with the institution of the present appeal, Civil Appeal No. 77 of 2018, which was filed on 19th June 2018 and served upon the applicants. Upon service of the record of appeal, the advocates for the applicants discovered the existence of appellant's notice of appeal of 9th May 2018. That is what prompted the applicants to file the first application, the notice of motion dated 9th July 2018 seeking an order to strike out the notice of appeal of 9th May 2018 as well as the record of appeal filed on 19th June 2018.

10. After the first application was scheduled for hearing, and acknowledging that the notice of appeal filed on 9th May 2018 was indeed never served, the appellant, in what appears to be a belated counter strategy to cure the default, filed the second application dated 12th July 2019 seeking an order for extension of time for the notice of appeal and the record of appeal to be admitted out of time.

11. ***Miss. Chepkwony***, learned counsel for the applicants, submitted that the notice of appeal and record of appeal were filed outside the permitted time frames; that the notice of appeal filed on 9th May 2018 was never served, stressing that it came to light upon service of the record of appeal; that the letter addressed to the ELC bespeaking typed proceedings was not served on the applicants and the appellant cannot therefore benefit from the provisions of rule 82 of the Court of Appeal Rules. In that regard, reference was made to the case of ***Salama Beach Hotel Limited vs. Mario Rossi [2015] eKLR***; and that in the absence of a proper notice of appeal, the Court has no jurisdiction and the appeal should be struck out.

12. ***Mr. B. Kongere***, learned counsel for the appellant in opposition to the application to strike out the appeal, while conceding that the notice of appeal filed on 9th May 2018 was filed out of time submitted that the appellant's initial notice of appeal, which was filed and served on time, was withdrawn on the mistaken assumption that the

appellant's interests would be secured through the notice of appeal filed by Vivo Energy; that faced with threat of eviction, and upon realization that Vivo Energy would not apply for orders of stay of execution of the judgment of the ELC, the appellant was constrained to file a fresh notice of appeal which it did on 9th May 2018 but inadvertently omitted service of the notice of appeal on the applicants.

13. It was submitted further that there had been informal discussions between the advocates for the applicants and those of the appellant at which it had been agreed that provided the appellant paid the applicants mesne profits as ordered by the ELC, and serve the record of appeal, then the applicants would concede to orders of stay of execution of the ELC judgment; that pursuant to that conversation the appellant made the payment and transmitted the record of appeal but the applicants turned around after receiving payment and filed the application to strike out the appeal; that the delay in serving the record of appeal was also due to that conversation.

14. It was submitted that although mistakes have been made, a reasonable explanation has been offered and the appeal should be spared and heard on its merits. For the same reasons, Mr. Kongere urged that the appellant's application for extension of time should be allowed as no prejudice will be suffered by the applicants whose interest in the property is receipt of rent payable under the lease.

15. Vivo Energy opposed the applicants' application to strike out the appeal but supported the appellant's application for extension of time. Learned counsel for Vivo Energy, Mr. Mugambi, relied on a replying affidavit sworn by Naomi Assumani, the head of legal and company secretary of Vivo Energy and submitted that Vivo Energy, being itself aggrieved by the judgment of the ELC, duly filed and served a notice of appeal; that there was delay in Vivo Energy obtaining the typed proceedings and judgment from the ELC to enable it file its memorandum and record of appeal; that by the time the same became available, the appellant had already instituted the present appeal and it was therefore unnecessary for Vivo Energy to institute a separate appeal and its notice of appeal is deemed to be a notice of address for service under rule 80 of the Court of Appeal Rules; that Vivo Energy would therefore be highly prejudiced if the present appeal, in which they have an interest, is struck out. According to counsel, this is a proper case for the Court to grant an extension of time as sought by the appellant as Vivo Energy has been diligent in pursuing the matter.

16. In reply and in opposition to the second application for extension of time, Miss. Chepkwony pointed out that judgment was delivered by the ELC on 22nd March 2018 while the notice of appeal was filed on 9th May 2018, hence a delay of 32 days; that although the application to strike out the notice of appeal was filed as early as 9th July 2018, the application for extension of time was not filed until a year later, on15th July 2019, when the appellant was prompted into action after being served with a hearing notice; and that the lengthy delay of 464 days in filing the application for extension of time is not explained and the appellant is not deserving of the exercise of discretion in its favour.

17. Citing the decision of the Supreme Court of Kenya in ***County Executive of Kisumu vs. County Government of Kisumu & 8 others [2017] eKLR***, among other decisions, it was submitted that the appeal should be struck out as it was filed out of time without leave of the Court, and that the applicants will be prejudiced by further delay in the matter as the appellant is carrying on a multi-million business on the property but paying a paltry rent to the applicants.

18. We have considered both applications, the affidavits and the submissions by learned counsel. Beginning with the first application, rule 84 of the Court of Appeal Rules on which the application is founded deals with *"application to strike out notice of appeal or appeal"* and provides in relevant part that:

> ***"A person affected by an 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."***

19. Based on the authorities cited, there are different approaches by this Court to applications to strike out an appeal under that rule on the grounds of non-compliance with procedural requirements. In ***Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR*** for instance, this Court was dealing with an application to strike out an appeal that was filed out of time, "*130 days after lapse of the requisite time frame*" without leave of the Court. In addition, the appellant's letter bespeaking typed proceedings had not been copied to the respondent as required under rule 82 of the Rules of the Court. In rejecting the argument that the delay in filing the appeal should be considered as a procedural technicality capable of being cured under Article 159 of the Constitution, the Court expressed that whether or not an appeal is filed on time goes to the jurisdiction of this Court and that:

> ***"In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with the leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159."***

20. Similarly, in ***Ramji Devji Vekaria vs. Joseph Oyula [2011] eKLR***, the Court was dealing with an application to strike out an appeal on grounds that a notice of appeal, though filed on time, was served late and the record of appeal was also filed late. The letter bespeaking

proceedings was not copied to respondent. In defence of that application, the Court was invited to exercise its discretion under Sections 3A and 3B of the Appellate Jurisdiction Act. In declining the invitation to do so, the Court expressed that those provisions could not be invoked as,

> ***"…this is an omission that goes to the root of the Rules i.e. whether or not a party can file an appeal out of time and without leave of the court. To invoke the provisions of Section 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. Section 3A and 3B were not meant for that."***

21. There are other decisions in the same category. On the other end of the spectrum are decisions with perhaps a more liberal approach to the procedural requirements. An example is the majority decision in ***Nicholas Kiptoo Arap Korir Salat vs.***

> ***Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*** where the Court was dealing with an application to strike out an appeal in an election matter. In that case, the notice of appeal and record of appeal were filed within the prescribed time frames. The notice of appeal was however not served, but was contained, like in the present case, in the record of appeal. In the lead majority judgment ***Ouko, J.A***, while expressing that the power to strike out, being a draconian measure, "*ought to be employed only as a last resort and even then, only in the clearest of cases*" went on to say that:

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."***

The learned Judge however cautioned that:

> ***"It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."*** [Emphasis]

22. In his dissenting opinion in the same case, ***Kiage, J.A*** stated that under the Rules of the Court, "*the notice of appeal occupies a central foundation place without which there can be no appeal*"; and that the notice of appeal "*is a jurisdictional document*". The learned Judge stated further:

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."***

23. His lordship noted in that case that the appellant did not make even a feeble pretence to explain his default and seek the Court's indulgence whether by application for extension of time or even in answer to the application, an acknowledgement, in our view, that where the omission of default is explained to the satisfaction of the court, the court may exercise its discretion and decline to strike out a notice of appeal or an appeal.

24. Equally, in ***Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others [2015] eKLR***, the Court refused to strike out an appeal on the ground that the notice of appeal and the record of appeal were not served within the period provided in the rules. In declining to do so, the Court stated that rules of procedure are intended to serve as the hand maidens of justice and not to defeat it and that in exercising its judicial power, the Court is required to give effect to the overriding objectives under the Appellate Jurisdiction Act to attain the just determination of the proceedings.

25. Citing Article 159 of the Constitution, the Court went on to state that the policy of the Court is to hear and determine appeals on their merits and to eschew very rigid application of rules of procedure where such application will result in miscarriage or subversion of justice; that technical lapses will be excused in appropriate circumstances to obviate injustice. The Court then concluded in that case thus:

> ***"Of our own volition and so as to do justice, and in line with the principles aforestated, we decline the invitation by the applicant***

to strike out the appeal on account of one day lateness in serving the notice of appeal. In the exercise of our discretionary power under Rule 4 of this Court's Rules we deem the notice of appeal to have been duly served on 16th April 2013 and thus effectively enlarge time for service by one day."

26. The decisions of the Court on both sides of the spectrum reflect the tension between the need to enforce procedural rules in order to provide order in the administration of justice and a level playing field for parties in litigation on the one hand, and the need, on the other hand, to render substantive justice notwithstanding lapses in compliance with procedural rules.

27. However, the principle that emerges from the decisions on both sides of the divide, in our view, is that the power to strike out a notice of appeal or appeal under rule 84 is a matter of exercise of judicial discretion dependent on the circumstances of each case. What then are the circumstances in the present case?

28. Undoubtedly, the judgment of the ELC the subject of the appeal was delivered on 22nd March 2018. A person desiring to appeal against that decision was required, under the Court of Appeal Rules to lodge a notice of appeal within 14 days from the date of delivery of the judgment. Under rule 77, the appellant was then required, before or within seven days after lodging notice of appeal, to serve copies thereof on all persons directly affected by the appeal.

29. On 29th March 2018, within the time provided under rule 75(2), the appellant did file a notice of appeal dated 28th March 2018. Alongside that notice of appeal, by a letter dated 28th March 2018, the appellant applied to the ELC for typed and certified copies of the proceedings, judgment and decree. On 5th April 2018, within the 14 days period provided under rule 75(2), Vivo Energy also intending to challenge the same judgment of the ELC filed a notice of appeal and served the same within the required time frame.

30. Twelve days after Vivo Energy's notice of appeal was filed, on 17th April 2018, the appellant withdrew its notice of appeal filed on 29th March 2018. The appellant explained that in withdrawing its notice of appeal, it intended to ride on the notice of appeal filed by Vivo Energy and was under the impression that Vivo Energy would then apply, on the strength of its notice of appeal, for a stay of execution of the ELC judgment. Upon realization that Vivo Energy would not be making an application for stay of execution, and feeling exposed as the ELC judgment required the appellant to vacate or be evicted from the property, the appellant filed a fresh notice of appeal on 9th May 2018.

31. 14 days after delivery of the judgment on 22nd March 2018 lapsed on 5th April 2018. Consequently, the notice of appeal filed by the appellant on 9th May 2018 was late by 34 days. Furthermore, the appellant did not serve that notice on the applicants. The applicants only discovered that notice of appeal after being served with the record of appeal which was filed on 19th June 2018. Assuming that the appellant's notice of appeal had been filed on the last day when it should have, namely 5th April 2018, under rule 82 of the Rules, and subject to the proviso thereto, the appeal should have been instituted on or before 4th June 2018. It was therefore instituted 15 days late. It was on account of those lapses and defaults by the appellant that the applicants presented the present application on 12th July 2018 to strike out the appeal.

32. Taking into account that it was Vivo Energy that transferred, albeit in contentious circumstances, the lease over the property to the appellant on the basis of which the appellant occupied the same, we accept as plausible the explanation that in withdrawing the initial notice of appeal, the appellant expected to ride on the appeal by Vivo Energy but that it was constrained to file a fresh notice of appeal when it realized that Vivo Energy would not be applying for stay of execution of the ELC judgment.

33. With regard to the omission to serve the notice of appeal, ***Mr. Kongere*** explained in his affidavit that he instructed his assistant to file and serve the notice of appeal and assumed that had been done only to learn, upon being served with the present application, that it was never served; that on enquiring, he learnt that his assistant on whom he had entrusted the task had fallen ill on 11th May 2018 and had not implement his instructions. He deponed that the failure to serve the notice of appeal was not deliberate but a mistake and that the applicants were indeed put on notice that the notice of appeal had been filed when the appellant served it with an application dated 10th May 2018 filed before the ELC seeking stay of execution.

34. The appellant's advocates letter dated 28th March 2018 bespeaking typed and certified copies of proceedings, judgment and decree to facilitate preparation of the record of appeal bears the court stamp of the ELC imprinted on 29th March 2018. That letter is on the face of it copied to the applicants' advocates with remarks "*advance copy by email*". Mr. Kongere explained further in his affidavit that that letter, alongside the notice of appeal dated 28th March 2018, were transmitted by his firm to the firm of Kanyi J. & Company advocates, Malindi, to file and serve. That firm served the notice of appeal but failed to serve the letter bespeaking proceedings. Nothing

was however said by the applicants' counsel regarding whether or not the letter was received through the email.

35. Undoubtedly, a series of mistakes have been made by the advocates for the appellant beginning with the ill-considered and premature withdrawal of a compliant notice of appeal; filing a subsequent notice of appeal without leave; failing to follow through to ensure the letter bespeaking proceedings, though timely filed, did reach the applicants' advocates; and failing to ensure the subsequent notice of appeal was served on the applicants' advocates. In all of it, there is no evidence that the defaults were intentional or deliberate on the part of the appellant and the delay involved in filing the fresh notice of appeal and in filing the record of appeal is not, in the circumstances inordinate.

36. As ***Madan, J.A*** stated way back in ***Belinda Murai & 9 others vs Amos Wainaina [1979] eKLR***,

> ***"…the door of justice is not closed because a mistake has been done by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."***

37. In the circumstances of this case, as we have endeavored to set out above, including the consideration that the appellant seeks to exhaust its right to be heard on appeal as to whether it should be evicted from the property, it would, we think, be remiss of us to strike out the appeal when, we think, no prejudice will be occasioned to the applicants for which an award of costs cannot remedy. Adopting the approach taken by this Court in ***Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others*** (above) we are inclined to exercise our discretionary power under rule 4, which we hereby do, and deem the notice of appeal and the record of appeal as duly filed and served.

38. The conclusion we have reached on the first application makes it unnecessary for us to make a determination on the belated second application by the appellant which has accordingly abated.

The appellant will however pay the applicants' costs of both applications.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

……..……....

JUDGE OF APPEAL

A.K. MURGOR

…….……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR