



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ. A)

CIVIL APPLICATION NO. NAI 108 OF 2019

BETWEEN

DALMAS OTIENO.....APPLICANT

AND

REV. DR. STEPHEN KANYARU M'IMPWII.....RESPONDENT

(An application to have the Notice of Appeal filed on 3rd August, 2016 emanating from the judgment of the High Court of Kenya at Nairobi (Ougo, J) delivered on 29th July, 2016

in

HCCC NO. 614 OF 2007

RULING OF THE COURT

1. **Dalmas Otieno** (the applicant) was the plaintiff in **High Court Civil Case No. 614 of 2007**, while **Rev. Dr. Stephen Kanyaru M'Impwii** was the defendant, in a claim whereby the applicant sought damages for defamation. Having heard the parties, the High Court (R. E. Ougo, J.) in a judgment rendered on 29th July, 2016 found in favour of the applicant and awarded him Ksh 1,500,000 together with costs and interest from the date of judgment till payment in full.
2. Being aggrieved by the said judgment the respondent filed a Notice of Appeal on 1st August, 2016 through the firm of Kamau Kuria & Co. Advocates. Subsequently, on 31st October, 2016 the respondent filed a notice of motion seeking orders of stay of execution of the judgment dated 20th July, 2016 pending "the lodging, hearing and determination of the defendant's intended appeal to the Court of Appeal".
3. The Court gave stay orders on condition that the respondent herein would deposit Ksh. 750,000 in a joint interest earning bank account in the names of both counsel within 30 days from the date of the said order. The respondent was further ordered to deposit security for the balance of the decretal amount within the same period. Those orders were given on 21st September, 2017, more than one year after the notice of appeal was filed.
4. Nothing seems to have happened in the matter until 4th April, 2019 when the applicant filed the notice of motion, the subject of this appeal pursuant to **Rule 83 of the Court of Appeal Rules** (the Rules) seeking an order that the notice of appeal in question be deemed as withdrawn; that the Ruling and Orders of the High Court made on 21st September, 2017 be set aside; and the money deposited pursuant to the order of court referred to earlier be released to counsel on record for the applicant herein.
5. The notice of motion is supported by an affidavit sworn by the applicant on 4th April, 2019 in which he gives the history of the matter as we have summarised above. According to the applicant, the respondent has not endeavoured to pursue the appeal and has nothing to show that he has been following up the matter with the Registrar of the High Court. He deposes further that the respondent has become complacent but in the meantime the applicant continues to be denied enjoyment of the fruits of his judgment.
6. Vide a replying affidavit sworn on 9th December, 2019, the respondent has opposed the notice of motion. The gist of the depositions in the said affidavit is that after filing the notice of appeal, the respondent's advocates wrote the letter bespeaking the proceedings to the Registrar of the High Court on 3rd August, 2016 and copied the same to the applicant's advocates on record. He further deposes that his advocates have been following up the matter with the Registrar of the High Court but the information he has received from them is that the proceedings have not been typed. We must however state that such information which the respondent says was passed on to him by one

Nixon Muhatia, a clerk in his advocates' office, is hearsay in the absence of an affidavit sworn by the said clerk. The same is therefore inadmissible.

7. That notwithstanding, we also note that no correspondence from the Registrar of the High Court to that effect has been annexed to the said affidavit. According to the applicant, the court should strive to save the appeal as opposed to dismissing it on what he calls "technicalities".

Lastly, the respondent opposes the setting aside of the conditional orders of stay issued by the High Court and urges us to dismiss this application.

8. At the plenary hearing of the application, learned counsel Mr. Kuloba and Mr Ndung'u holding brief for Dr. Kamau Kuria appeared for the applicant and the respondent respectively. According to Mr. Kuloba, after filing the notice of appeal and writing the letter bespeaking proceedings, the respondent's counsel did nothing else. He reiterated the contents in the applicant's affidavit and added that the respondent has not produced even a single letter addressed to the Registrar of the High Court to demonstrate that they have been following up the matter. Moreover, Mr. Kuloba has not been served with copies of such letters if indeed they were written. He submitted that since the judgment is for a liquidated sum, even if it is released to the applicant and the court thereafter orders that the same be refunded, the amount can be so refunded. He urged us to allow the application and deem the appeal as having been withdrawn.

9. On his part, Mr. Ndung'u relied on the respondent's affidavit and reposes the predicament his client finds himself in at the doorstep of the court, saying that the duty to compile proceedings lies with the court and not with his client. He said that the appeal will be rendered nugatory if the application is allowed.

10. We have considered the application, the rival affidavits, oral submissions by counsel and the law. To start with we need to clarify that the application is not one for striking out the appeal pursuant to **Rule 84** of the Rules. The notice of motion is not therefore subject to the proviso under Rule 84 on limitation of time. It is therefore properly before the court.

11. As such, of interest to this matter is **Rule 83** of the Rules which stipulates:

"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."

The rationale and criteria for a notice of appeal being withdrawn under the aforementioned rule were succinctly discussed by this Court in **Quicklubes E. A. Limited vs Kenya Railways Corporation [2014] eKLR** where the Court expressed itself as follows:

"Rule 83 gives this court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of court but fail to inform the court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allow the court to invoke Rule 83 suo motu if the respondent in the intended appeal does not move the court."

See also this Court's decision in **Evans Achimba Vs Stitch Masters Limited) 2019 eKLR**

12. Does this application fall in the above category? It is not disputed that the Notice of Appeal was filed in August, 2016 almost 4 years ago. It is also admitted by counsel for the applicant that they were served with a copy of the letter bespeaking the proceedings. The elephant in the room is what has happened thereafter. The respondent has not placed before us any evidence to show that he has been following up the proceedings with the Registrar of the High Court for the last three years. There has not been even one letter of reminder filed in Court to demonstrate eagerness on the part of the respondent to proceed with the appeal. The Court has not even been shown any evidence to the effect that the deposit required to be paid before the court can commence the typing of the proceedings was paid.

13. Whereas we agree that the duty to compile proceedings lies with the court and not with the appellant, the duty to ensure that the deposit is paid and that the proceedings have been typed lies with the appellant. Writing a letter to the Deputy Registrar asking for proceedings and undertaking to pay for the same is not sufficient to jumpstart the typing process. We are certain learned counsel for the appellant/respondent is aware of this fact. Had the respondent attached a copy of the receipt showing that they had paid the deposit for the typing of the proceedings, coupled with evidence of follow up of the process with the Deputy Registrar, we would have been persuaded that the respondent is serious about his appeal. As things stand now, the only logical conclusion one can make is that having filed the Notice of Appeal, requested for the proceedings and obtained the conditional stay, the respondent herein went to slumber. In the meantime, the applicant cannot enjoy the fruits of his judgment, nor can he access any of the funds deposited in the bank account as stated.

14. That is prejudicial to the applicant who has no way of knowing if the respondent has lost interest in the appeal. The respondent has not laid before us sufficient reasons to prompt us to invoke this Court's discretion in his favour. Equity favours the diligent and not the indolent. We find merit in this application and allow it with the result that the Notice of Appeal dated 1st August, 2016 is hereby deemed as withdrawn under **Rule 83 of the Rules of this Court**.

15. The applicant is also awarded costs of the suit. The applicant be and is at liberty to move the High Court for the release of the money deposited pursuant to the order of that court issued on 29th January, 2018 as this Court has no jurisdiction to grant prayers 2 and 3 of the

Notice of Motion before us.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR