



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OKWENGU, MURGOR & KANTAI J.J.A.)

CIVIL APPLICATION NO. 33 OF 2017

BETWEEN

RTD GENERAL DAUDI TONJE.....1<sup>ST</sup> APPLICANT

PERIS K. TONJE.....2<sup>ND</sup> APPLICANT

AND

JOHN BARTINGA TONJE.....RESPONDENT

*(An application to strike out the Notice of Appeal arising from the judgment of the High Court*

*of Kenya at Nakuru (Ouko, J (as he then was)) dated on 25<sup>th</sup> April 2012 in HC SUCC NO. 177 of 2005)*

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RULING OF THE COURT

This matter before us concerns an application to strike out the respondent's Notice of Appeal lodged on 30<sup>th</sup> April 2012. The application was premised under **rules 42 (1), 43 (1), 82 (1), 83 and 84** of the **Court of Appeal rules** and was brought on the premises that after the Notice of Appeal was lodged on 30<sup>th</sup> April 2012, the respondent had not taken any further steps to prosecute the appeal; that in addition, the respondent had not followed up the request to be supplied with the certified copies of the proceedings made on 12<sup>th</sup> April 2012, and as a result, 4 years had lapsed since the Notice of Appeal was lodged, thereby denying the applicants enjoyment of the fruits of their judgment.

The motion dated 16<sup>th</sup> March 2017 was supported by the affidavit of **Kisilah Daniel Gor**, Advocate who is seized of the conduct of the matter on behalf of the applicants', in which he reiterated the contents of the grounds of the motion.

In a replying affidavit sworn on 10<sup>th</sup> June 2017, the respondent deponed that having been dissatisfied with the judgment of the trial court, he had indeed filed a Notice of Appeal dated 30<sup>th</sup> April 2012, and had subsequently thereto applied for copies of the typed proceedings so as to enable him prepare the record of appeal; that preparation of the proceedings took a long time; that his advocate was subsequently notified that they were ready for collection, and on 30<sup>th</sup> October 2017, he was issued with a Certificate of Delay. He deponed that before he could prepare the record of appeal, the applicants filed this application to strike out the Notice of Appeal. The respondent denied having lost interest in the intended appeal, and blamed the delay in filing the appeal on the length of time it had taken to obtain the proceedings.

Thereafter, by an undated supplementary replying affidavit filed on 17<sup>th</sup> February 2020, the respondent further deponed that after collection on 25<sup>th</sup> October 2017, the proceedings were found to be incomplete. On 11<sup>th</sup> February 2019, he instructed the firm of Frank Mwangi & Company advocates to take over the appeal from the firm of Nancy Njoroge & Company advocates and obtained a complete set of the proceedings which were received on 28<sup>th</sup> March 2019. It was further averred that the record of appeal was filed on 23<sup>rd</sup> May 2019 as Civil Appeal No. 32 of 2019, and was served on the applicants on 27<sup>th</sup> May 2019, and that therefore any delay in filing the appeal was not occasioned by delay on his part.

In the submissions, **Ms. IM Sambu** learned counsel for the applicants relied on the applicants' affidavit and submitted that despite filing the Notice of Appeal, and requesting for the proceedings, the respondent had done nothing to file the record of appeal in the past 4 years. It was

further argued that the request for proceedings was not filed and served on the applicants or their counsel, as a consequence of which, the proviso to **rule 82** of this Court's rules could not come to the respondent's aid; that consequently, the respondent was required to file the record of appeal within 60 days from the date of filing the Notice of Appeal, but instead, the record of appeal was filed and served on the applicants on 27<sup>th</sup> May 2019, a period of 7 years' delay, which has not been explained. It was counsel's submission that the result was that the Notice of Appeal, and the recently filed record of appeal should be struck out.

Opposing the application, **Ms. Kimoriot** submitted that **rule 84** required that the application be brought within 30 days of service of the Notice of Appeal; that the Notice of Appeal was filed way back on 20<sup>th</sup> April 2012, and as a consequence, **rule 84** had not been complied with.

Regarding the certified proceedings, counsel argued that the delay in obtaining a complete set of proceedings had occasioned the delay in filing the record of appeal. Counsel nevertheless conceded that the letter requesting for the proceedings was not copied to the applicants which was due to the inadvertence of the respondent's former counsel.

In a reply, Ms. Sambu submitted that the application herein was brought under **rule 83** which does not specify any time limit for filing of an application to strike out, or withdraw an appeal.

This is an application to strike out the Notice of Appeal. In determining whether or not the Notice of Appeal should be struck out, the question for determination is whether or not, essential steps in filing the appeal were adhered to.

The applicants' complaint is that since lodging a Notice of Appeal on 30<sup>th</sup> April 2012, the respondent has failed to take any further steps to file the record of appeal, the main contention being that, when the respondent sought to be supplied with the judgment and the certified copies of the proceedings on 12<sup>th</sup> April 2012, such request was not filed and served on them; that consequently, the respondent could not rely on the proviso to **rule 82 (1)** to exclude the time taken for preparation of the certified proceedings from the period of delay.

**Rule 82 of the Court of Appeal Rules** stipulates;

***"(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. ...***

***d. ...***

***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."***

**Sub rule (2)** of **rule 82** goes on to provide that;

***"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"***. (emphasis ours)

Essentially, **rule 82** makes provision for the period of delay in the supply of the proceedings by the registry to the effect that, provided the prerequisites set out in the provision are complied with, then the time taken for preparation of the proceedings can be excluded from the total period of delay. **Sub-rule (2)** makes it clear that for an applicant to rely on the proviso, it must demonstrate that firstly, a request for proceedings has been made in writing to the registrar, and secondly, that a copy of such request has been served on the respondent.

So did the respondent satisfy the requirements of **rule 82 (2)** so as to benefit from the proviso? The respondent filed a Notice of Appeal on 30<sup>th</sup> April 2012. On the same day a request for the proceedings was made. The letter was not however copied to the applicants or their counsel, and in turn the applicants aver that they were not served with a copy of that letter.

The respondents on the other hand argue that the proceedings took too long to be supplied, and further that when ready, the typed proceedings were incomplete, which necessitated their having to wait a further period before they obtained a complete set of proceedings. They assert that on this account they should not be penalized for the delay in filing the record of appeal.

From the above, the respondent failed to copy the request for proceedings to the applicants, with the result that when computing whether or not there was a delay in filing the record of appeal, he cannot enlist the aid of **rule 82** to exclude the period of preparation of the certified proceedings. This means that he would have had to file the record of appeal within stipulated 60 days from the date of filing the Notice of Appeal, which he did not do.

In seeking to counter the application to strike out the Notice of Appeal the respondent's counsel referred us to the proviso to **rule 84** which specifies 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.*". It was argued that since this application was brought long after the Notice of Appeal was filed, it was therefore incompetent.

That may be so, but it is not lost on us that the applicants also brought their application under **rule 83** which is with reference to instances where a party has lodged a Notice of Appeal, but has failed to institute an appeal within the stipulated 60 days. More particularly the rule provides;

***"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."***

It is not in dispute that by the time of filing this motion on 16<sup>th</sup> March 2017, 60 days had lapsed and the respondent had yet to file his record of appeal. Such record was only recently filed on 23<sup>rd</sup> May 2019. Given the lapse of time between the filing of the Notice of Appeal and the record of appeal, the applicants were entitled to bring a motion under **rule 83** to have the Notice of Appeal deemed as withdrawn. In the alternative, this Court can make such order *suo moto*, on its own motion. In ***Mae Properties Limited vs Joseph Kibe & another, Nbi Civil Appeal (Application) No. 201 of 2016***, this Court countenanced a similar argument in respect of **rule 83**, when it observed that;

***"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 nor reference to the parties. The Court has this inherent power to make the formal order of the 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."***

Since the respondent has not explained the delay in filing the record of appeal by virtue of having failed to bring himself within the proviso of **sub rule 1 of rule 82**, and whereas, by the time of this motion, a record of appeal had yet to be filed, we are satisfied that in terms of **rule 83**, the Notice of Appeal would be deemed to have been withdrawn. In this case however, the applicants have sought for orders that the Notice of Appeal be struck out instead of seeking to have the Notice of Appeal deemed as withdrawn. But in view of the circumstances, and the stipulations of **rule 83**, we consider that the order that lends itself to us is an order on the Court's own motion, to deem the Notice of Appeal as having been withdrawn.

As such, the notice of motion dated 16<sup>th</sup> March 2017 is allowed, save that the Notice of Appeal dated 30<sup>th</sup> April 2012 is hereby deemed as withdrawn with costs to the applicants.

***It is so ordered***

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE, 2020.**

**H. OKWENGU**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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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.*

*Signed*

**DEPUTY REGISTRAR**