IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 288 OF 2017

BETWEEN

N. P. R. WARREN .....1ST APPELLANT/RESPONDENT

DJC MCVICKER .....2ND APPELLANT/RESPONDENT

L. W. MURIUKI .....3RD APPELLANT/RESPONDENT

K.H.W. KEITH .....4TH APPELLANT/RESPONDENT

Z.H.A ALIBHAI .....5TH APPELLANT/RESPONDENT

RUBINA DAR .....6TH APPELLANT/RESPONDENT

A. BHANDARI .....7TH APPELLANT/RESPONDENT

S. RAVAL .....8TH APPELLANT/RESPONDENT

T/A DALY & FIGGIS ADVOCATES.....9TH APPELLANT/RESPONDENT

AND

CHRISTOPHER MUSYOKA MUSAU .....RESPONDENT/APPLICANT

(Being an application for extension of time to file and serve a supplementary record of appeal out of time in a judgment and decree of the High Court of Kenya (Hon. G. Odunga, J.) dated 20th September 2012

in

Nairobi HCCC No. 1100 of 2003 (OS)

****

RULING OF THE COURT

On 4th of December 2019 learned counsel for the applicant/respondent orally sought and was granted leave of the Court under **Rule 104(b**) of the Court of Appeal Rules to file a preliminary objection to the validity of the appeal as laid. The oral application was likewise orally opposed by learned counsel for the appellants/respondents (respondents). After due consideration, the Court granted leave to the applicant to file the preliminary objection within fourteen (14) days of 4th December 2019 with corresponding leave to the respondents to file a response thereto if need be also within fourteen (14) days of the date of service upon them of the applicant's preliminary objection. It was in compliance with the orders of 4th December 2019 that the applicant filed the application dated 18th December 2019, under Rule 42 and 104(b) of the Court of Appeal Rules 2010. It seeks orders:-

"(i) That the appeal herein be struck out for being incompetent.

(ii) That the costs hereof and costs of the appeal be awarded to the applicant.

The application is supported by grounds on its body and a supporting affidavit of **Christopher Musyoka Musau,** together with annextures thereto. It has not been opposed by any replying affidavit from the respondents. The application was canvassed before us on 30th September 2020 through the sole pleading of the applicant and without oral highlighting by the respective parties.

In summary, it is the applicant's contention that both the judgment and the decree appealed from were made by the High Court on 20th September 2012. A certified copy of the decree which according to the applicant ought to form part of the record in terms of **Rule 87(1)** of this Court's rules has not been included in the record of appeal. Second, the Notice of Appeal timeously filed by the respondent intending to appeal against the said judgment on 2nd October 2012 was subsequently withdrawn by a notice of withdrawal dated 1st October 2012. Third, a subsequent Notice of Appeal was lodged in the High Court on 15th May 2017 indicating explicitly that the respondents intended appeal was against the judgment of the High Court delivered on 20th September 2012. It is on the basis of the aforesaid notice of appeal of 15th May 2017 that the record of appeal was dated and lodged on 16th August 2017 clearly out of time and without leave of court.

It is on the basis of the above uncontroverted factual basis that the applicant contends that the appeal herein is therefore incurably defective and incompetent and should be struck out with costs to the applicant. Lastly, that the respondents having successfully applied for review against the very judgment that they now purport to appeal against, they lost their right to appeal against the same judgment. On the totality of the above contention, the applicant prays for the application to be allowed with costs to them both for the application and the appeal upon striking it out.

It is appreciated that the application is undefended. Lack of contest on the part of the respondent notwithstanding, we are obligated in law to render a merit determination of the application which we hereby proceed to do as hereunder.

Our invitation to intervene on behalf of the applicant has been sought under the rules of the Court cited above. **Rule 42** is merely procedural and needs no further interrogation. What falls for our interrogation is **rule 104(b**) of the Court's rules. It provides:

> **104(b) A respondent shall not, <u>without the leave of the Court</u>, raise any objection to the competence of the appeal which might have been raised by application under rule 84 [emphasis added].**

Our take on the above provision is that we are properly seized of the application as the same was filed pursuant to leave of court granted to that effect as already alluded to above.

The applicant has advanced three reasons as basis for faulting the respondents record of appeal namely:

> (i) Lack of compliance with the mandatory rule as to what should or should not be comprised in a record of appeal.
>
> (ii) Failure to first of all seek leave of court to file a notice of appeal out of time before lodging the record of appeal after the notice of appeal initially filed on 2nd October 2012 having been withdrawn. Second, erroneously relying on the notice of appeal of 15th May 2017 as basis for filing the record of appeal which was clearly out of time from the date of the purported impugned judgment.
>
> (iii) Want of an appellate right to be exercised by the respondent with regard to the judgment of 20th September 2012 on account of an earlier election by the respondent to forego their initially initiated right of appeal in favour of a right to apply for review which they, though, successfully pursued and exhausted was subsequently reversed by this court in this court's judgment delivered on 12th May 2017.

With regard to item (i), the complaint is that a certified copy of the decree is not included in the record of appeal, a position not controverted by the respondents. **Rule 87** of this court's rules is explicit on what should or should not be included in a record of appeal. **Rule 87(1)(h)** is explicit that a certified copy of the decree is one of the primary documents to be included in a record of appeal. The mandatory requirement in **Rule 87(1)** is only subject to **subsection 3** of the same rule which donates jurisdiction to a judge or registrar of the Court appealed from to exercise his/her discretion on application of a party to direct which documents or parts of documents should be excluded from a record of appeal.

Our appreciation of the implication of this rule in our view is that in the absence of giving of the aforementioned directions inclusion of all the documents enumerated in **rule 87** of the Court's rules is mandatory. Non-compliance therefore vitiates the record of appeal as filed by the respondent.

On failure to comply with timelines set in the rules of the Court for initiating an appellate process, it is not disputed that the respondents were aggrieved by the impugned judgment of the High Court dated 20th September 2012 and timeously filed and served a notice of appeal in compliance with **rules 75** and **77** of the rules of the Court, but which was subsequently withdrawn by a notice of withdrawal dated 1st October 2012 and filed on 2nd October 2012 as already alluded to above. The respondents thereby abandoned the appellate process as had initially been intended and settled for a successful review process granted them vide the High Court's ruling of 18th January 2013 which the applicant successfully contested on appeal to this Court, as this court by a judgment dated 12th May 2017 set aside the judgment of the High Court appealed against and restored the earlier judgment thereby restoring the parties *"ante"* to the position they were in as at 20th September 2012, when the impugned judgment was delivered by the High Court. The respondent riding on the Court of Appeal judgment of 12th May 2017 filed a Notice of Appeal on 15th May 2017 on which the record of appeal filed on 16th August 2017 is anchored. **Rule 75(1)** of the rules of the Court explicitly provides as follows:

> **75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. Rule 75(2)** requires such a notice to be lodged within fourteen (14) days of the decision. It provides:
>
> **75(2) Every such notice shall, subject to rules 84 and 97, so lodged within fourteen days of the date of the decision against**

which it is desired to appeal.

Since the respondents appeal is clearly indicated as an appeal against the High Court's judgment of 20th September 2012, it was imperative for it to be anchored on a notice of appeal either timeously filed within fourteen days of that date pursuant to the prerequisites in **rule 75(1)** and **(2)** (supra). Alternatively, on a notice of appeal that had been sanctioned by the Court pursuant to orders granted to that effect under **Rule 4** of this court's rules. In the absence of such compliance and considering what we have stated above that the notice of appeal timeously filed with the initial intention of appealing against the impugned judgment was subsequently withdrawn in favour of an application for review, there is no way the notice of appeal subsequently filed by the respondents on 15th May 2017 and without leave of court could suffice as basis for the filing of the record of appeal herein. Once this notice of appeal is vitiated there is no valid record of appeal.

The above findings notwithstanding and which in our view is sufficient to dispose off the application under consideration, we are obligated to interrogate the last issue and make findings thereon as the applicant not only raised it before us but also made submissions thereon. The approach we take is as was taken by the Court in **Misc. Application No. 66 of 2016 (UR. 52/2016), The Hon Attorney General, Chief of Defence Forces and Army Commander Kenya Army vs. David Wanyonyi** in which observations were made therein as follows:

> **"Order 45 rule 1(1) of the Civil Procedure Rules permits a party to seek review from an order in respect of which no appeal has been preferred.**
>
> **Order 45(2) on the other hand permits a party who is not appealing to seek review of the judgment. The same sub rule does not permit the pendence of two parallel processes namely that of an appeal and for review. The only instance when such a parallel process can be permitted to co-exist is where the pendence of an appeal arising from the same judgment has been initiated by a party other than the party applying for review. It is however silent as to whether a party losing on review can revert back to pursue the abandoned appellate process."**

Further that:

> **"Where an appeal is lodged earlier in time, an aggrieved party has leave to seek review during the pendence of the appeal but once the review application has been fully determined he/she cannot revert back to the appellate process. .... once the review application is determined the position of the parties as regards the original appeal process is altered. .....a party can only appeal against the refusal to review or otherwise."**

In the case of **African Airlines International Limited versus Eastern & Southern African Trade & Development Bank (PTA Bank) [2003] KLR 140**, the following observations were made:

> **"The Courts' jurisdiction to hear a review is not taken away if after the review petition an appeal is filed by any other party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with."**

Our take on the above expositions is that: the right of review is in competition with the right of direct appeal; the right of review has primacy over the right of appeal where it is invoked earlier in time and it can even be determined notwithstanding the pendence of an appeal filed later in time over the same substratum. The converse is however also true that there is no jurisdiction to entertain an application for review during the pendence of an appeal which was filed earlier in time. See also the case of **Origo & Another vs. Mungala [2005] 2KLR 307**, in which the Court held *inter alia* that a person who files a Notice of Appeal which is struck out cannot thereafter proceed by way of review. In **Harris Horn Senior, Harris Horn Junior vs. Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007** when confronted with similar arguments, the Court made observations therein *inter alia* as follows:

> **[32] As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."**

Applying the above threshold to the applicant's uncontested arguments herein, it is our finding that the respondents having successfully elected and exhaustively pursued the review and setting aside procedure, cannot in law revert back to pursue the direct appellate process as of right. It matters not that the review process procedurally pursued to its logical conclusion was subsequently reversed on appeal by this court at the instance of the applicant. Our hands are therefore tied.

In the result, we find merit in the application. It is allowed. We make orders as follows:

(1) Application dated 18th December 2019 is allowed.

(2) Costs of the application to the applicant.

(3) The record of appeal dated 16th August 2017 and filed in court on the same date is accordingly found incompetent and therefore struck out.

(4) Costs of the appeal to the applicant.

Dated and Delivered at Nairobi this 20th day of November, 2020.

R. N. NAMBUYE

……..

JUDGE OF APPEAL

HANNAH OKWENGU

……

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR