



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: KOOME, MUSINGA & GATEMBU J.J.A.)**

**CIVIL APPLICATION NO. 13 OF 2020**

**BETWEEN**

**NURU BADI SAID.....APPLICANT**

**AND**

**OKUMU PAUL.....1<sup>ST</sup> RESPONDENT**

**BERNARD ODHIAMBO OKUMU.....2<sup>ND</sup> RESPONDENT**

*(Being an application to strike out the respondents' Notice of*

*Appeal against the Judgment of the High Court of Kenya at Kisumu*

*(Cherere, J.) dated 16th May 2019 in Ksm. H.C.C. Case No. 5 of 2016)*

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**RULING OF THE COURT**

1. Before us is an application dated 27<sup>th</sup> January 2020 made under Rules 82, 83 and 84 of the Court of Appeal Rules seeking an order that the respondents' Notice of Appeal dated 24th May 2019 and filed in Court on the same date be struck out.

2. The background in brief: On 31<sup>st</sup> May 2014, Nuru Badi Said, the applicant, was walking along Kisumu-Ahero Road when she was knocked down by a motor vehicle owned by the 2<sup>nd</sup> respondent and driven by the 1<sup>st</sup> respondent. As a result, she sustained serious injuries following which she filed suit against the respondents before the High Court at Kisumu. In a judgment delivered on 16th May 2019 by **Cherere, J.** found the respondents liable and awarded the applicant general and special damages in the amount of Kshs.16,268,132.50. Aggrieved by the judgment, the applicants lodged the Notice of Appeal on 24th May 2019 which is the subject of the present application to strike it out.

3. In her affidavit in support of the application, the applicant deposes that although the Notice of Appeal was filed and served within the prescribed period of time, the respondents have not filed or served a record of appeal within the period provided under Rule 82; that she is a paraplegic confined to a wheelchair and in dire need of advanced and specialized medical treatment management and attention abroad as recommended by her doctor; that as a record of appeal has not been filed in time, the notice of appeal should be deemed to have been withdrawn.

4. In his replying affidavit, **Peter Karanja**, the advocate for the respondents deposes that he promptly filed a notice of appeal and served the same; that on 30th May 2019 he applied for the typed proceedings and judgment and decree; that he has thereafter diligently followed up with reminders to the Deputy Registrar on 19th June 2019, 10th September 2019, 11<sup>th</sup> December 2019, 31st January 2020 and 4<sup>th</sup> February 2020, copies of which letters were exhibited to his affidavit; that despite his efforts, the proceedings have still not been provided. He urged us to dismiss the application.

5. We have considered the application, the affidavits and the written submissions by Nyasae & Co advocates for the applicant and those by Peter M. Karanja advocate for the respondents as well as the authorities cited. Based on the material, there is no doubt that the notice of appeal was filed within the 14 days period prescribed under Rule 75 of the Court of Appeal Rules.

6. The applicant's gripe is that the memorandum and record of appeal were not filed within 60 days as required under Rule 82 of the Rules. Counsel for the respondents has however demonstrated that he promptly applied for a copy of proceedings within 30 days of the date of the decision in accordance with the proviso to Rule 82 and the letter in that regard was, on the face of it, copied to the advocates for the applicant. As the Court stated in Mistry Premji Ganji (Investments) Limited vs. Kenya National Highways Authority [2019] eKLR:

***“...under the proviso to Rule 82 (1) aforesaid, an appellant is afforded some reprieve in so far as computation of time is concerned, if there was delay in preparation of the proceedings upon making a written request for the proceedings. In other words, the computation of the 60 day window within which he should lodge the record of appeal is suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent...”***

7. Apart from the initial letter bespeaking proceedings, there are, on the record numerous reminders sent by the advocate for the respondents to the Deputy Registrar to expedite the preparation of the proceedings. Those letters are also, on the face of them, copied to the advocates for the applicant. In the circumstances, and although we sympathize with the applicant's desire to have the matter concluded speedily, we do not think the respondents can be blamed for the delay in the processing of the proceedings. The assertion by the applicant that the respondents have not exhibited a certificate of delay does not hold. We expect that the certificate of delay can only be issued after the preparation of the proceedings is complete.

8. What we have stated suffices to demonstrate that the applicant's application to strike out the notice of appeal or to have it deemed as withdrawn is premature. It is accordingly dismissed with costs to the respondents.

Orders accordingly.

***Dated and delivered at Mombasa this 18<sup>th</sup> day of December, 2020.***

**M.K. KOOME**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**