



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MURGOR J.J.A.)

CIVIL (APPEAL) APPLICATION NO. 295 OF 2017

BETWEEN

PATRICK NJUGUNA KARIUKI.....APPLICANT

AND

DELMONTE KENYA LIMITED.....RESPONDENT

(An application to strike out the Notice and Record of Appeal arising from the judgment and decree of the Employment and Labour Court (B. Ongaya, J)

dated on 26th October 2012 in Industrial cause No. 953 of 2011)

RULING OF THE COURT

In this Notice of Motion dated 25th September 2017 **the applicant Patrick Njuguna Kariuki**, seeks to strike out the respondent's Record of appeal lodged on 21st August 2017. The application was brought under **rules 42, 43, 82 (1) and 84** of the **Court of Appeal rules** and **Article 159 (2) (c)** of the **Constitution** and was premised on grounds that the Notice of appeal was filed on 8th November 2012 and thereafter, the Record of appeal was filed on 21st August 2017, and served on 25th August 2017; that the respondent cannot benefit from the proviso to **rule 82 (1)** of this Court's rules to file the Record of appeal since it did not serve the applicant with the letter requesting for proceedings with the result that it ought to have filed the Record of appeal within 60 days from delivery of the Judgment, which it had failed to do, so that the appeal was filed out of time, and should be struck out.

The motion was supported by the affidavit of **Elijah Mwangi Njeru**, Advocate who was seized of the conduct of the appeal on the applicant's behalf, which reiterated the contents of the motion. But the respondent did not file any affidavit in reply.

By consent both parties submitted orally on the motion, which was pending, instead of the respondent's appeal that had been fixed for hearing before us.

On behalf of the applicant, learned counsel, **Mr. Elijah Mwangi** submitted that the respondent had failed to serve the applicant with a copy of the letter requesting for the certified proceedings, and further that no application was filed to extend time to file the record of appeal out of time. It was argued that the record of appeal that was filed on 21st August 2017 was not filed within the 60 days period stipulated by the rules, and that therefore the respondent had simply disregarded the rules of this Court, and sought to argue an incompetent appeal.

On their part learned counsel for the respondent **Mr. M. Khamala** submitted that though the letter requesting for proceedings was not copied to or served on the applicant, the issue was raised during the hearing of an application for stay of the proceedings, where the Court granted the requisite extension, which rendered a formal application for time to be extended to file the record of appeal unnecessary. Counsel urged that this being a procedural application, the Court should apply **Article 159 (2)** of the **Constitution** to the circumstances of this case, since the question of extension of time to file the record had already been addressed. It was also pointed out that in any event, the entire decretal sum had already been paid to the applicant.

In reply Mr. Mwangi stated that since the respondent had omitted to request for time to be extended for serving the letter of request for the typed proceedings, the appeal was incompetent and ought to be struck out.

We have considered the motion and the parties' submissions. The applicant's complaint is that after the respondent lodged its Notice of appeal on 8th November 2012, and sought to be supplied with the judgment and the certified copies of the proceedings, such request was not served on the applicant; that consequently, the respondent cannot 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 mine)

Essentially, **rule 82** makes provision for exclusion of the period of delay in the preparation and supply of the proceedings by the registry, provided that in accordance with **sub-rule (2)** an appellant can demonstrate that firstly, a request for proceedings has been made in writing to the deputy registrar, and secondly, that a copy of such request has been served on the respondent.

According to the Certificate of delay to be found in the Supplementary record of appeal, the respondent's letter requesting for certified proceedings was filed on 20th December 2012. There is no indication that the letter was copied to or served on the applicant, or his counsel. More importantly, the respondent's counsel has conceded that the letter of request was not served on the applicant for the reason that the issue had already been canvassed before this Court, and further that it had not filed any application seeking to extend time to file the record of appeal.

But the strictures of **rule 82** are clear. Without having served a copy of the letter requesting for certified proceedings on the applicant, the respondent cannot enlist the aid of **rule 82** to exclude the period of preparation of the proceedings, with the result that the respondent should have filed the Record of appeal within 60 days from the date of filing the Notice of appeal. Instead, the record of appeal was not filed until the 21st August 2017, which was long after the expiry of 60 days.

And with respect to the invocation of **Article 159** of the **Constitution**, our view is that the circumstances of this case do not warrant its application, particularly owing to deliberate missteps on the respondent's part notwithstanding the clear provisions of the Court's laid down rules.

As such, the respondent having failed to file the appeal in accordance with this Court's rules, the record of appeal lodged in this Court on 21st August 2017 is hereby struck out.

In sum, the notice of motion dated 25th September 2017 is allowed, with costs to the applicant.

It is so ordered.

DATED and delivered at Nairobi this 18th day of December, 2020

W. OUKO (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR