



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: WAKI, NAMBUYE & MAKHANDIA, JJA]

CIVIL APPEAL NO. 304 OF 2017

BETWEEN

RASHID JENEBY.....APPLICANT

AND

PRIME BANK LIMITED.....RESPONDENT

(Being an appeal against part of the Award and the entire decree of the Employment and Labour Relations Court at Nairobi (L. Ndolo) dated 15th May, 2015 in Nairobi Cause No. 1156 of 2012)

RULING OF THE COURT

The background to the ruling is that the applicant herein filed Industrial Cause No. 1156 of 2012 in the Industrial Court of Kenya at Nairobi (now ELRC) vide a claim dated 4th July, 2012 seeking various reliefs. The respondent filed a response thereto dated 19th November, 2012. The merit disposal of the opposing interests in the said cause is what resulted in the award dated 15th May, 2015.

The respondent was aggrieved by that decision and filed a Notice of Appeal dated 20th May, 2015; pursuant to which the record of appeal dated 25th August, 2017 was filed on the 28th August, 2017. On 2nd October, 2017, the applicant filed a Notice of Motion dated the 29th September, 2017, under Rule 84 of the Court of Appeal Rules, 2010, seeking one substantive relief namely that:

“(i) The record of appeal dated 25th August, 2017 and filed on 28th August, 2017 being Civil Appeal No. 304 of 2017 be and is hereby marked as struck out with costs to the respondent.”

The application is supported by the grounds on its body and a supporting affidavit. No replying affidavit was filed in opposition to the said notice of motion, but counsel for the respondent opposed the same on points of law.

On the 31st October, 2017, learned counsel for the parties appeared before the Deputy Registrar of the Court for pre-trial procedures. It was in the cause of the above pretrial procedures that the Deputy Registrar gave directions on the disposal of the appeal as follows:

“Both the Application dated 29th September, 2017 and the appeal shall be canvassed simultaneously. The appellant shall file and serve within 21 days, a replying affidavit to the application and the supplementary record. Thereafter parties to file written submissions”.

When parties appeared before the Court on the 24th January, 2018, they elected to dispose of the application first. The application was canvassed by way of oral submissions. Learned counsel **Miss Ouma B.A** appeared for the applicant while learned counsel **Mr. Mwangi** appeared for the respondent.

Miss Ouma reiterated the contents of the grounds in the body of the application and the supporting affidavit. In summary, the applicant has invited us to fault the record of appeal filed by the respondent for the failure to: annex a certified copy of the decree contrary to Rule 87 (1) of the Rules of the Court; formally apply for a certified typed copy of the proceedings with a copy thereof to the applicant contrary to Rule 82(2) of the Rules of the Court; include documents relied upon by the respondent at the trial; provide a statement of addresses of service as prescribed under Rule 87 (1) (b) of the rules of the Court. In light of the above omissions, counsel contended that the record of appeal as filed by the respondent stood vitiated; that the respondent would not therefore rely on the details on the certificate of delay for the failure to

comply with rule 82 (2) of the rules of the Court and that without the support of the certificate of delay the respondents' record of appeal is deemed to have been filed out of time and without leave and therefore an exercise in futility. It is therefore not sustainable and should be struck out. It is also counsel's claim that the applicant's application in law stands unopposed for the respondent's failure to file any response in opposition thereto.

In response, **Mr. Mwangi** conceded that he had neither filed a replying affidavit to the applicant's notice of motion. In counsel's view having been granted leave by the Deputy Registrar to file a supplementary record of appeal and which was timeously filed thereby addressing satisfactorily the concerns raised by the applicant in their notice of motion, there was no justification for them to file a response to the applicant's application. Alternatively, that the rules allegedly offended by the respondent's commissions and or omission as highlighted above, also gave the applicant liberty to introduce any relevant document(s) that may have been omitted by the respondent when compiling and filing the record of appeal to which submission, **Miss Ouma** made no reply.

We have given due consideration to the application in light of the above rival submissions. Our invitation to intervene on behalf of the applicant has been invoked under Rule 84 of the Rules of the Court – 2010. It provides as follows:

“84. Application to strike out notice of appeal. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Provided 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”.

Our construction of the above rule is that jurisdiction of the Court to intervene on behalf of an aggrieved party under the said rule is dependent on the aggrieved party seeking the requisite court's intervention within thirty days of service upon the aggrieved party of the Notice of Appeal or the record of appeal. In the instant application, it is the record of appeal. As already observed above, the record of appeal is dated 25th August, 2017 and was lodged in the Court's Registry on the 28th August, 2017. The applicant had deposed in paragraph 2 and 3 of the supporting affidavit that his advocate was served with volume 1 of the record of appeal on the 25th August 2017, while Volume 2 thereof was served on the 11th September, 2017. The application under review was filed on the 2nd October, 2017 and therefore within the timeline stipulated in the said Rule. It is therefore properly before us. We shall therefore proceed to examine its merits.

The reason the applicant has advanced for faulting the respondents' record of appeal is the failure to comply with the prerequisites in Rules 82 (2) and 87 (1) (b) (f) (h) of the rules of the Court. Rule 82 (2) required the respondent to apply for a certified copy of the High Court proceedings in writing and with a copy of the such a letter to the applicant. It is also a requirement of the rules of the Court that a record of appeal when lodged should contain a statement showing the address of service of the appellant and the address of service furnished by the respondent to the appeal. Sub-rule 1 (f) requires the record of appeal to include not only the oral evidence but also the supportive documentary evidence relied upon by the parties at the trial in support of their opposing positions in the matter.

Rule 87 (1) (b) (f) & (h) is however not absolute. It is subject to sub-rule (3) thereof which is not applicable in the instant application as it relates to proceedings before the High Court, and rule 88 of the Rules of the Court. It provides as follows:

“When a document referred to in Rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in the supplementary record of appeal filed under Rule 92(3) and thereafter with leave of the Deputy Registrar on application”

It is not disputed that the respondent did not comply with the above rules hence the explanation for the failure to file either a replying affidavit in rebuttal of the applicant's notice of motion. It is further our observation that the respondent did not take advantage of the fifteen (15) days reprieve period to remedy the default highlighted above. As already mentioned, leave was granted to the respondent by the Deputy Registrar of the Court during the hearing of the pretrial proceedings to introduce the missing documents by way of a supplementary record of appeal. The respondent complied with the Deputy Registrar's directions on 30th November, 2017 when the supplementary record of appeal was filed. In the respondent's counsel's oral reply to the application, he intimated to the Court that all the concerns raised by the applicant in his notice of motion had all been addressed by the filing of the supplementary record of appeal, to which the applicant made no reply as already stated.

The above being the position, it is our finding that the applicant's application has been overtaken by events by the respondent's action of complying fully with the pretrial directions given by the Deputy Registrar which are still on record and therefore binding.

In the result, the application is dismissed. We direct each party to bear own costs of the application.

Dated and delivered at Nairobi this 8th day of February, 2019.

P.N. WAKI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.