



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 48 OF 2016

BETWEEN

KIZITO SAVALI.....APPLICANT

AND

MARSHALLS EAST AFRICA LIMITED.....RESPONDENT

(Being an application to strike out the Notice of Appeal dated 16th August 2013

from the Judgment and Decree of the Industrial Court of Kenya at Nairobi

(Mathews Nduma Nderi, J.) delivered on 14th August, 2013

in

Cause No. 1264 of 2010)

RULING OF THE COURT

The motion on notice dated 23rd February, 2016 was made under **rules 83 and 84** of the **Court of Appeal Rules, 2010**. It is prayed that we be pleased to strike out the Notice of Appeal dated 16th August, 2013 or in the alternative to deem the said notice as having been withdrawn. There is also a prayer that orders of stay of execution granted on 16th April, 2015 be discharged. In the grounds in support of the motion and in an affidavit of the applicant **Kizito Savali** it is stated that the respondent was in breach of an order of this Court issued on 16th April, 2015 directing the respondent to file a record of appeal within 45 days from the date of that order but that the respondent had failed to do so to date. It is stated in the alternative that the respondent had failed to lodge the record of appeal within 60 days of being notified that typed proceedings were ready for collection and that the respondent had lost interest in prosecuting the appeal in a situation where the applicant should enjoy the fruits of a judgment delivered by the then Industrial Court on 14th August, 2013. There are various annextures to the application.

A brief perusal of the judgment intended to be appealed shows that there was an employer - employee dispute between the applicant and the respondent. In the judgment delivered on the stated date the respondent was ordered to pay money to the applicant. A notice of appeal drawn by **Odhiambo M.T. Adala** advocate for the appellant dated 16th August 2013 was filed against that judgment. There is a letter dated 29th April, 2015 by **Kalove and Company Advocates** to the Deputy Registrar of the Industrial Court of Kenya requesting for proceedings for purposes of an appeal. The letter is copied to **M/S Iseme Kamau and Maema Advocates** and to **M/S Odhiambo M.T. Adala Advocate**. It would appear from the record that an application for stay of execution of the said judgment pending appeal was filed resulting in orders of this Court made on 16th April, 2015. A conditional stay of execution of the judgment of the Industrial Court was granted by this Court relevant to this application being the order that the respondent do file a record of appeal in 45 days from the date of that order and in default stay of execution was to be discharged automatically. A record of appeal was not filed within that time or at all.

In submissions before us when the motion came up for hearing **Mr. K. Melly**, advocate for the applicant, recounted the history of the matter and asked us to allow the application.

Mr. Odhiambo M.T. Adala counsel for the respondent was unable to explain why there were two law firms apparently on record for the respondent and why the record of appeal has not been filed as ordered. According to him Mr. Kalove advocate was his assistant but that was not supported by the record because Kalove and company advocates dealt with the matter independently. Mr. Adala asked us to consider the interests of justice and to ensure the same are served and not be influenced by procedural technicalities.

In a brief reply Mr. Melly pointed out a letter from the Registrar of this Court dated 13th September, 2016 directing the respondent to file the appeal for hearing in lieu of the present application.

We note that it is required by the Rules of this Court that a record of appeal be filed within 60 days of the date when a Notice of Appeal was lodged. The record of appeal here was not lodged within 60 days or at all. This was in contravention of the Rules of the Court and also in contravention of the order given by this Court by consent of the parties on 16th April, 2015 when it was ordered that a record of appeal be filed within 45 days of that date.

The following passage appears in the case of **MAE PROPERTIES LIMITED v JOSEPH KIBE AND ANOTHER [2017] eKLR**:

“It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of sixty 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.”

In **MARTIN KABAYA v DAVID MUNGANIA KIAMBI Nyeri Civil Application No. 12 of 2015** this Court stated:

“The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is at the desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by complaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.”

We conclude that the respondent lost interest in the intended appeal and the notice of appeal lodged died a natural death. The same is struck out and we grant costs of the motion to the applicant.

Dated and delivered at Nairobi this 24th day of May, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

M.K. KOOME

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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.

DEPUTY REGISTRAR