



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, VISRAM & J. MOHAMMED, J.J.A)**

**CIVIL APPLICATION NO. NAI 174 OF 2018**

**BETWEEN**

**GRACE WANGUI NGENYE .....APPLICANT**

**VERSUS**

**TOM MSHINDI .....1<sup>ST</sup> RESPONDENT**

**THE STANDARD GROUP LIMITED.....2<sup>ND</sup> RESPONDENT**

(An application to strike out the respondents' notice of appeal filed on 10<sup>th</sup> March, 2016 against the Judgment of the High Court of Kenya at Nairobi (**A. Mabeya, J.**) delivered on 24<sup>th</sup> February 2016 in *H.C. C. C. No.795 of 2005*)

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**RULING OF THE COURT**

[1] By a notice of motion dated 14<sup>th</sup> June 2018 the applicant herein seeks two substantive orders namely; that the Notice of Appeal lodged in Court on 10<sup>th</sup> March, 2016 be struck out and that the order of **L. Njuguna J.** given on 14<sup>th</sup> July, 2017 be vacated and the money held in an escrow account at Family Bank, Kenyatta Avenue be released to the applicant's advocates. The application is opposed by the respondents on the grounds in the replying affidavit sworn by **Millicent Ngetich**, the Company Secretary of the 2<sup>nd</sup> respondent.

[2] By a judgment dated 24<sup>th</sup> February, 2016, **Mabeya, J.** awarded the applicant a total of Shs. 8.5 million against the respondent for libel. Apparently the judgment was delivered by another **Mboghli Msagha, J.** on behalf of **Mabeya, J.** On 10<sup>th</sup> March, 2016, the respondents filed a notice of appeal dated 9<sup>th</sup> March, 2016 against the judgment. The notice of appeal indicated that the intended appeal is against the judgment of **Mboghli Msagha, J.** delivered on 24<sup>th</sup> February, 2016. This was an inadvertent error which does not affect the validity of the Notice of Appeal. The Notice of Appeal was served on the applicant's advocates on 5<sup>th</sup> May, 2016.

[3] By a notice of motion dated 30<sup>th</sup> May 2016, the respondents applied for stay of execution of the judgment; a stay of proceedings and a review of the judgment. The application for review was dismissed by **L. Njuguna, J.** in a ruling dated 31<sup>st</sup> October, 2016. The respondents filed a further application dated 20<sup>th</sup> March, 2017 for stay of execution of the judgment pending appeal.

On 14<sup>th</sup> July, 2017 the application was allowed on terms that respondents herein pay Shs. 5,000,000/- to the applicant herein and the balance of the decretal sum be deposited in a joint account in the names of the advocates for the parties. It is a common ground that the respondents complied with the terms.

[4] The present application is brought on the grounds *inter alia*, that the notice of appeal was filed outside the statutory 14 days from the date of the judgment; that no application for extension of time to file the notice of appeal out of time has been made; that the respondents' advocates never served a copy of a letter requesting for proceedings upon the applicant's advocate; that the respondents have not taken steps to prosecute the appeal; that there was no judgment by **Mboghli Msagha J.**, and that the notice of appeal is incurably defective.

[5] The respondents state in the replying affidavit that by a mistake of their counsel on record, the notice of appeal was filed one day late; that they requested for a copy of proceedings by a letter dated 14<sup>th</sup> March, 2016; that copies of the proceedings have not been supplied; that the record of appeal can only be filed once the proceedings are availed and that the respondents have demonstrated that they intend to proceed with the appeal to its logical conclusion.

[6] At the hearing of the application **Mrs. Githae** learned counsel for the respondents intimated that the respondents have filed Civil Application No. 226 of 2016 seeking the extension of time to file the notice of appeal and the record of appeal; that the application came for hearing on 21<sup>st</sup> November, 2018 but before a single judge but the applicants advocates objected to the hearing of the application as it would affect the present application; that the court adjourned the application generally and that the respondents have filed a reference to full court against the order of the single judge; that the respondents would like to be heard on the reference and that the practice of the court is to hear both the application for extension of time and an application to strike out at the same time.

However, **Mr. Mwaura** learned counsel for the applicant insisted that the matter should be heard. The court acceded to the request and the applicant’s counsel prosecuted the application. One of the points raised by the respondents’ counsel in reply is that the application to strike out the notice of appeal was filed outside the 30 days stipulated by proviso to **Rule 84** of the **Court of Appeal Rules**.

[7] The respondents’ counsel submitted that the application to strike out the notice of appeal was filed outside the 30 days stipulated by the proviso to Rule 84 of the Court of Appeal Rules. Counsel relied on the Ruling of this Court in **Pickwell Properties Limited v Kenya Commercial Bank [2016] eKLR**, (Pickwell Properties Limited) for the proposition that such an application is incompetent. The question of the competence of the application should be determined first, for if the application is found to be incompetent, it would not be necessary to consider the merits of the application.

[8] Rule 84 of the Court of Appeal Rules 2010, provides:

**“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 or 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.”**

The notice of appeal in question has the office stamp of the applicant’s advocates showing that they were served with the notice of appeal on 5<sup>th</sup> May, 2016. The applicant’s counsel admitted in his submissions that the notice of appeal was indeed served on that date. In **Pickwell Properties Limited** (supra), this Court struck out an application for striking out a notice of appeal on the ground that it was filed out of the time stipulated in the proviso to rule 84 and stated in part at paragraph 35 of the Ruling thus:

**“35. The application to strike out was brought way out of time after the expiry of the period stipulated by the proviso to rule 84. The application is therefore incompetent as it does not lie in light of the proviso to rule 84. Its purported basis is absent.”**

[9] The instant application was filed on 14<sup>th</sup> June, 2018, which is over 2 years from the date that the notice of appeal in question was served. This is far beyond the 30 days stipulated in the proviso. The applicant could have applied for extension of time under rule 4 of the Court of Appeal Rules for bringing the present application. Apparently no such application was made before the instant application was lodged, and the 30 days limitation period has not been extended. The applicant’s counsel did not even respond to the assertion that the application is incompetent.

[10] In the premises, we find that the notice of motion for striking out the notice of appeal is incompetent and strike it out with costs to the respondents. We so order.

**DATED and delivered at Nairobi this 19<sup>th</sup> day of July, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**