



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 268 OF 2018

BETWEEN

MABEL KIBORE..... APPLICANT

AND

NATIONAL OIL CORPORATION OF KENYA LIMITED.....RESPONDENT

(An application to strike out the respondent's Notice of Appeal filed on 8th November 2017 against the decision and Ruling of Hon. Mr. Justice Nzioki Wa Makau on 8th November, 2017

in

ELRC NO. 1993 of 2017)

RULING OF THE COURT

This matter before us concerns an application to strike out the respondent's Notice of Appeal dated 8th November 2017, and along with it, the stay of execution orders of this Court (Githinji, Okwengu and J. Mohammed, JJA) issued on 23rd February 2018 be vacated.

The application was premised under *rules 42 (1), 75, 82 (1) and (2), 83 and 84* of the *Court of Appeal rules* and was brought on grounds that the respondent's Notice of Appeal was lodged on 8th November 2017, but no action in pursuance of the appeal was taken; that on 23rd March 2018 the respondent obtained a stay of execution of the orders from this Court, and armed with this order, the respondent proceeded to terminate the applicant's services; that despite this, it did not request to be supplied with certified copies of the proceedings, and since then has not shown any desire to pursue its appeal, as no leave to file its appeal out of time was sought; that in the circumstances it would be fair and just to strike out the Notice of Appeal so as to enable the applicant proceed with her suit in the Employment and Labour Relations Court.

The application was grounded on the applicant's affidavit in support sworn on 19th September 2018 where it was deponed that she was unprocedurally dismissed from employment of Head of Human Resource and Administration on 3rd August 2017 by the respondent; that thereafter together with a Memorandum of Claim, she filed a Notice of Motion dated 5th October 2017 under urgency, seeking for temporary reliefs, in particular that pending the hearing and determination of the application, a conservatory order to restrain the respondent, whether by itself or its agent, from recruiting or employing any person to the position of Head of Human Resources and Administration or replacing the claimant with any such recruited person, and a stay of execution of further disciplinary proceedings against her; that in addition, the termination letter or decision dated 3rd August 2017 be stayed and the applicant reinstated to her position of employment.

The applicant further deponed that the application was heard on 24th October 2017 and the ruling delivered on 8th November 2017 granting the orders sought. The respondent was dissatisfied with the decision of the trial court and filed a Notice of Appeal on 8th November 2017 against that decision. On filing the Notice of Appeal, the respondent sought for an order of stay of execution of the trial court's orders of 8th November 2017, and in a ruling of 5th December 2017 the application was dismissed with costs. On the strength of the dismissal of the application, the applicant averred that she resumed her employment with the respondent, but when she was denied her salary, she filed another application, this time seeking to cite the Chief Executive Officer, MaryJane Mwangi for contempt of Court.

It was deponed that in the meantime, the respondent sought for and obtained an order of stay of execution from this Court on 23rd March 2018, and that after they were served with the order of this Court, the applicant's counsel noticed a letter dated 8th November 2017 addressed

to the deputy Registrar ELRC requesting for copies of the typed proceedings and the ruling delivered on 8th November 2017 which letter was not served on the applicant or her counsel; that the failure to serve the applicant with the request for proceedings was in contravention of this Court's Rules. It was averred that the respondent had not taken any other steps in pursuit of the appeal since obtaining the stay of execution orders and it continues to enjoy the consequences of the stay of execution order obtained from this Court, yet there is no valid appeal before this Court.

The applicant further averred that by virtue of the stay of execution orders, she is unable to prosecute her claim in the trial court on account of the stay of execution obtained, which continues to cause her inconvenience and suffering, particularly as there is no appeal pending before this Court; that in the interest of justice the notice of appeal should be struck out.

In a replying affidavit sworn by Pauline Kimotho, the Corporation Secretary of the respondent, it was contended that on 7th November 2018 after delivery of the judgment of the ELRC, the respondent wrote to the Deputy Registrar on 8th November 2017 requesting for the certified typed proceedings, which letter was served on the applicant's counsel; that another letter requesting for the proceedings was sent on 12th January 2018 which letter elicited no response from the deputy Registrar. Several other reminders were sent on 20th April 2018, 23rd April 2018, 29th October 2018 and 28th February 2019 were also dispatched to the Deputy Registrar, but to no avail; that be that as it may, the proceedings have yet to be supplied, and until such time as the respondent obtains the proceedings it is unable to file the record of appeal.

Submitting before us, learned counsel for the applicant **Mr. K.D. Mwaura** reiterated the averments in the applicant's supporting affidavit, but went on to state that since the orders of stay of execution were obtained, one year on, the respondent had failed to lodge the record of appeal; that the copy of the request for the certified proceedings was not served on the applicant's counsel, which is evident as the applicant counsel's stamp is conspicuously absent from the copy of the letter attached to the respondent's replying affidavit. Counsel asserted that it was only after the notice of motion was filed herein that the respondent's counsel sent the letters of reminder to the Deputy Registrar. So, clearly the respondent has demonstrated its unwillingness to comply with the rules of this Court.

Learned Counsel for the respondent **Mr. R. Momanyi** also relied on the respondent's replying affidavit but added that, the letter requesting for the proceedings was not copied to the applicant's counsel, but that it was nonetheless served upon them. It was further contended that under **rule 84** of this Court's rules the application was incompetent as the rule stipulates that an application to strike out should not be brought after 30 days of service of the Notice of Appeal; that the Notice of Appeal was filed on 8th November 2017, and this application was filed on 14th December 2018 which was well beyond the stipulated period, as a consequence of which it should be dismissed with costs.

In reply, **Mr. Mwaura** contended that even though the application has not been brought within the 30 days period stipulated by **rule 84**, the respondent could not hide behind the fact that it has yet to file the appeal; that all letters so far received by the applicant from the respondent's counsel have been stamped with its stamp, but only the letter requesting for the proceedings had not been stamped, which indicated that the letter requesting for the proceedings was not served on the applicant's counsel. Counsel concluded that on this basis, the respondent was not entitled to compute the days of preparation of the proceedings, as a consequence of which any appeal filed will have been filed out of time.

This being an application to strike out the Notice of Appeal, it becomes necessary to consider whether the essential steps in the filing of the appeal have been adhered to.

The applicant's main contention is that when the respondent requested the Deputy Registrar to be supplied with the proceedings vide the letter of 8th November 2017, he was not copied or served with a copy of the request within the stipulated seven days from the date of request. Therefore, it would not be entitled to benefit from the proviso to **rule 82 (1)** which allows time for computing of the period taken for preparation of the proceedings to be excluded from the period of delay. So that, the respondent should have filed the record of appeal within the stipulated 60 days from the date of lodging the Notice of appeal which would have lapsed on 8th January 2018. It was the applicant's case that todate the respondent has not lodged the appeal, which has exposed her to immense hardship, particularly as the suit in the ELRC has been stayed and remains in abeyance pending the hearing and determination of the appeal.

Rule 82 (1) provides;

“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) the prescribed fee; and

(d) security for the costs of the appeal;

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 appellants of such copy”.

What is really in contention here is whether the respondent served the applicant with a copy of the request for proceedings so as to enable it benefit from the proviso to **rule 82 (1)** which essentially allows it to exclude the period of preparation of the proceedings from the

computation of time. In addressing this issue, we turn to the replying affidavit of Pauline Kimotho the respondent's corporation secretary. At paragraph 4 it is deponed that,

"...I am advised by the Respondent's Advocates on record, which I verily believe to be true on 7th November 2018 after the delivery of the judgment in the superior court, the Respondent's Advocate issued a letter to the Deputy Registrar requesting for typed proceedings and Ruling."

To begin with, it is instructive that the respondent was not conscious of the fact that the ELRC's decision was rendered on the 8th November 2017 and not the 7th November 2017. But what is more significant is that the respondent's letter requesting for the proceedings bears no stamp showing that it was served on the applicant. It was also not copied to them. No return of service was produced to show who served the letter on the respondent's advocate's office, or who even received it. And neither did the replying affidavit offer any of these particulars.

It is quite apparent that there is nothing that demonstrates that the letter was served on the applicant's counsel at all, which leads us to the undeniable conclusion that a misstep in filing of the appeal occurred in that the letter requesting for proceedings was not served on the applicant's counsel. The direct consequence of this misstep is that the respondent cannot benefit from the proviso to **rule 82 (1)**.

In seeking to counter the application to strike out, the respondent has referred us to the proviso to **rule 84** which specifies 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.*", and that since this application was brought long after the Notice of Appeal was filed, it was therefore incompetent.

But when **rule 84** is read in conjunction with, **rule 83** it becomes evident that where a party has lodged a notice of appeal and has failed to institute an appeal within the stipulated 60 days, that party will be deemed to have withdrawn the notice of appeal. More particularly the rule provides;

"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."

In ***Mae Properties Limited vs Joseph Kibe & another, Nbi Civil Appeal (Application) No. 201 of 2016***, where in a similar application this Court sought to explain the remit of **rule 83**, it was observed that;

"It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 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. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo moto, on its own motion and at its sole discretion, presumably with neither notice nor reference to the parties. The Court has this inherent power to make the formal order of the notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure."

In the instant case, the applicant's complaint is that since the request for certified proceedings were not served on either herself or her counsel, the respondent cannot benefit from the exclusion of time permitted by the proviso to **rule 82 (1)**. And if it cannot benefit from the exclusion of preparation time, then it ought to have filed its appeal within 60 days of filing of the Notice of Appeal which should have been by 8th January 2018 or thereabouts. Since no record of appeal has to date been lodged, the Notice of Appeal is already deemed to be withdrawn, in which case, application of **rule 84** to the circumstances of this case cannot be said to arise.

As such, the notice of motion is allowed, and the Notice of Appeal dated 8th November 2017 is hereby struck out with costs. As a consequence of that order, the stay of execution orders of this Court issued on 23rd February 2018 are hereby vacated.

It is so ordered

DATED and delivered at Nairobi this 6th day of August, 2019

P. N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR