



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 48 OF 2018

BETWEEN

FREDRICK ODHIAMBO NDEDE.....APPLICANT

AND

MAKUENI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

MAKUENI COUNTY GOVERNMENT.....2ND RESPONDENT

(Being an application from the Ruling of the Employment and Labour Relations Court of Kenya at Nairobi (M. Mbaru, J.) dated 8th October, 2015

in

Cause No. 2106 of 2014)

RULING OF THE COURT

The suit filed at the Employment and Labour Relations Court of Kenya at Nairobi was accompanied by an application where various prayers were made. These prayers were for injunction and an order directing the respondents to immediately pay the applicant his salary from June, 2013 to October, 2014 and continue to pay the said salary when due until the suit was heard and determined. **Mbaru, J.** heard the application and in a ruling delivered on 8th October, 2015 the Judge ordered that pending the hearing and determination of the claim, the applicant be paid all salaries due and unpaid from June, 2013 and such salaries continue to be paid unconditionally until the final determination of the suit. The respondents promptly filed a Notice of Appeal dated the next day 9th October, 2015.

Following the filing of the said Notice of Appeal, **Fredrick Odhiambo Ndede** moved us by notice of motion said to be brought under **rules 42(1) and 43(1), 82 and 83** of the **rules of this Court** and “**Section 3A of the Civil Procedure Act**” praying:

“THAT the Notice of Appeal filed herein on 12th October 2015 be and is hereby marked as withdrawn ...”

It is stated in the ground in support of the motion and in an affidavit of the applicant that there has been inordinate and unexplained delay by the respondents in filing the intended appeal; that the respondents did not comply with the orders issued by the Employment and Labour Relations Court; that the respondents obtained orders to stay execution of the said orders pending appeal but had not filed a record of appeal; that the respondents had sat back and had not taken any tangible steps to file an appeal and the Notice of Appeal should be struck out.

Joshua Wambua, the **County Secretary** of the 2nd respondent, in a replying affidavit depones amongst other things that the motion had been served on their lawyers with inordinate delay; that the respondents had on 8th October, 2015 written a letter to court bespeaking proceedings which had not been availed and that:

“... the delay in filing the record of appeal was not intentional and therefore does not amount to an abuse of court process as stated in paragraph 10 of the supporting affidavit ...”

Finally, that the intended appeal is arguable with high chances of success and Notice of Appeal should not be struck out.

When the motion came up for hearing before us on 22nd May, 2019 Mr. **Kabene**, learned counsel appeared for the applicant while **Miss Esami**, learned counsel, appeared for the respondents. In addition to a reiteration of what we have set out from the affidavits filed; Mr. Kabene informed us that the main suit at the Employment and Labour Relations Court had been heard and judgment had been delivered on 7th December, 2018.

Miss Esami conceded that record of appeal had not been filed. She gave as reason for not filing, that, typed proceedings had not been availed to the respondents. She pointed to a letter dated 8th October, 2015 bespeaking proceedings which she however conceded had not been copied to the other side as required by the Rules of this Court. They intended to appeal against the judgment delivered on 7th December, 2018.

Rule 82 of the **rules of this Court** requires that an appeal be lodged in the appropriate registry within 60 days of lodging Notice of Appeal by filing Memorandum of Appeal and Record of Appeal amongst other requirements in the said Rule. By **Rule 83** of the Rules, a person who has lodged a Notice of Appeal but fails to institute an appeal within the appointed time is deemed to have withdrawn the notice of appeal and the Court is entitled to make that order.

The Notice of Appeal was lodged at the Employment and Labour Relations Court on 15th October, 2015. Although the respondents requested for proceedings by a letter dated 8th October, 2015 that letter was not copied to the applicant's lawyers which was in breach of **Rule 82** of the Rules where a party who requests for proceedings but does not serve a copy of the letter to the other side is not entitled to the proviso on exclusion of time taken to prepare proceedings.

No Memorandum or Record of Appeal was filed within the time required by the Rules of this Court, therefore the respondents are deemed to have withdrawn Notice of Appeal. Moreover, since the main suit has been heard and determined the intended interlocutory appeal has been overtaken by events. For the said reason the Motion dated 21st February, 2018 succeeds and is allowed. The Notice of Appeal lodged on 15th October, 2015 is deemed as withdrawn under **Rule 82** of the **Rules of this Court**. As the main suit has been heard and determined we make no order as to costs of the motion.

Dated and delivered at Nairobi this 27th day of September, 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