IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, JJ.A.)

CIVIL APPLICATION NO. 37 OF 2017

BETWEEN

CFC STANBIC BANK LIMITED.....APPLICANT

AND

CONSUMERS FEDERATION OF KENYA (COFEK)

(Being sued through its officials namely:

STEPHEN MUHORO, EPHRAIM, GITHINJI KAMAKE and

HENRY MESHACK OCHIENG.....RESPONDENT

Application to strike out the Notice of Appeal against the ruling of the

High Court of Kenya at Nairobi ***(Mabeya, J)*** *dated* ***5th December, 2014***

in

H.C.C.C. NO. 315 OF 2014)

****

RULING OF KIAGE, JA

The motion dated 27th February, 2017, filed by **CFC Stanbic Bank Limited** (the applicant), seeks to strike out the notice of appeal filed at the High Court by the **Consumer Federation of Kenya (COFEK),** on 9th December, 2014, under **Rule 83** of the Rules of this Court. The said notice of appeal is dated 8th December, 2018 and signified COFEK's intention to file an appeal against a ruling of that court (Mabeya J) delivered on 5th December, 2014.

The grounds on which the motion is premised appear on its face as;

> ***"(a) The respondent has failed to institute the appeal since December, 2014,***
>
> ***(b) It is the duty of advocates pursuant to the overriding objectives to ensure that matters are conducted expeditiously,***
>
> ***(c) The respondent has not taken any initiative to follow up on the typed proceedings with a view to instituting the appeal,***
>
> ***(d) The notice of appeal should be struck out with costs on account of indolence and breach of the overriding objective."***

The applicant's Head of Legal, one **Eliud Ogutu**, swore an affidavit on 27th February, 2017, in which he deponed that following the impugned ruling, COFEK filed the notice of appeal and applied for proceedings by a letter dated 19th December, 2014. It also applied, for an order of stay of proceedings pending the intended appeal and the same was granted on 10th November, 2017. Thereafter, it took no steps towards lodging the intended appeal yet the main suit at the High Court remains stayed on account of the said intended appeal.

In response and opposition to the motion, **Francis Athimbu Kurauka,** COFEK's advocate swore a replying affidavit on 7th March, 2019, in which he swore that the motion before us *"is superfluous, incompetent, frivolous, vexatious, does not lie, fatally defective, lacks merit* and *is an abuse of the court process."* He went on to swear that after the impugned ruling which granted the applicant's application for injunctive orders, the applicant *"became greedy and started engaging in side shows"* by filing an application to strike out COFEK's defence. That application was dismissed due to the applicant's intransigence, COFEK having "been magnanimous" to offer an out of court settlement. The deponent castigated a further application by the applicant dated 23rd January, 2015 as having; *"logically distorted and adversely interfered with the typing and preparation process of the proceedings."*

He then swore, rather curiously, that the applicant has never served COFEK with a notice of appeal against the dismissal of its application aforesaid, stating that it would be in the interests of justice that the motion before us be dismissed, the deponent expressed himself as willing, ready and capable of lodging a record of appeal *"within 14 days of obtaining typed proceedings and a certificate of delay."* He concluded by swearing that it would be inappropriate to jump the queue and exert unreasonable pressure to court typing staff given the backlog of pending proceedings, which he invited us to take judicial notice of.

At the hearing of the motion, learned counsel for the applicant **Mr. Kigata,** who was holding brief for **Mr. Gichuhi,** and his learned counterpart, **Mr. Kurauka,** for the respondents, relied on those affidavits. Mr. Kagata added that pursuant to **Rule 82(1)** of the **Court of Appeal Rules**, the notice of appeal should be deemed as withdrawn due to the deponent's failure to file the record of appeal in time. Moreover, the respondent failed to offer any explanation for the failure to file a record of appeal for over 4 years.

On his part, Mr. Kurauka, while conceding that the respondent has not filed the record of appeal, made this startling submission;

> ***"The delay was occasioned by the applicants who filed a notice of motion for striking out the respondents' defence."***

He went on to indicate that he and his client were awaiting a letter from the Registrar of the court below to advertise them of the readiness of proceedings, which letter is yet to come.

I have carefully considered the application before us, the rival affidavits and submissions, the Rules of this Court and the law. There is no dispute that by dint of **Rule 82(1)** of our Rules, a person who has filed a notice of appeal is required to institute the appeal by lodging within 60 days;

> ***"(a) a memorandum of appeal in quadruplicate;***
>
> ***(b) the record of appeal in quadruplicate;***
>
> ***(c) the prescribed fee;*** and
>
> ***(d) security for costs of the appeal."***

The proviso to the sub-rule is to the effect that such time as may be certified by the registrar of the court appealed from as having been required for the preparation and delivery of a copy of the proceedings shall be excluded in the computation of time, provided that such copy was requested in writing within thirty days of the impugned decision; and copied to the deponent.

Where there is default in taking an essential step in the proceedings, a person affected by an appeal may apply under **Rule 84** to strike out the notice or the appeal itself, if already instituted. It is under this Rule that the applicant has moved us, asserting, which is common ground, that the respondent has failed to take the essential step of instituting the appeal by, *inter alia*, lodging the record of appeal within the time prescribed.

Rule 84 itself has a proviso 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."*

I am satisfied that the application before us is within the timelines in Rule 84. What is said to have been defaulted in is the lodging of the record of appeal. It is yet to be filed and served. The rule permits the bringing of an application to strike out a notice of appeal either before, or after, the institution of the appeal. In this case the application was brought before the institution of the appeal and is properly before us.

It seems to me quite clear that where, as here, there is such long and obvious delay in the institution of an appeal, a respondent's application to strike out a notice of appeal is quite unanswerable.

A period of over 4 years is so long that it would be unconscionable to keep the respondent in a state of paralysis or limbo, unsure whether the threatened appeal will ever materialize or not. There has to be closure and an end to litigation.

The case before us is one in which even had the applicant not moved the Court, we ought on our motion to have made an order under Rule 83 of the Rules of Court which is in unequivocal terms;

> ***"83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time <u>he shall</u> <u>be deemed to have withdrawn his notice of appeal</u> 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,*** while dealing with an application such as is before us, a bench of this Court (Waki, Kiage and M'inoti, JJA) had occasion to speak to **Rule 83** in the following terms which I adopt, *in extensor,* as I remain of the same persuasion;

> ***"We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.***
>
> ***Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon, and we take judicial notice of it, for such notices to be lodged ex abundanti cautela by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences.***
>
> ***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 lodgement 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 motu, 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."***

I have said enough to show that the application is for allowing. I would not allow this Court and the Justice Project to be dragged at the snail's pace of those who would lodge notices of appeal but do nothing to show themselves serious litigants or genuine seekers after justice. Nor would I allow our system to be clogged and chocked by notices unfollowed by instituted appeals.

I respectively reiterate what we said in ***MARTIN KABAYA -vs- DAVID MUNGANIA KIAMBI, Nyeri Civil Application No. 12 of 2015;***

> ***"The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a 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 plaints, petitions, applications or appeals are vexed when those who summoned then 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."***

As Murgor JA agrees, the notice of motion is allowed, and the notice of appeal dated 8th December, 2014, be and is hereby struck out with costs. The applicant shall have the costs of this motion also.

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

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

RULING OF GATEMBU, J.A

(e) My brother Judge, The Hon. ***Mr. Justice Kiage, J.A*** has in his ruling captured the background and the rival arguments with respect to the motion by the applicant dated 27th February 2017 seeking to strike out the notice of appeal filed by the respondent on 9th December 2014. I therefore need not repeat.

(f) I would however observe that under the proviso to Rule 84 of the Rules of the Court, 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. I am not sure that the applicant's application was within time.

(e) In ***Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & another, Kisumu Civil Application No. 22 of 2015 [2016] eKLR***, the Court expressed:

> ***"It is not at all in dispute that this application was filed outside the period of 30 days after the notices sought to be struck out***

were lodged and served. The above proviso is couched in mandatory terms and we have no discretion to second guess what was intended by the framers of the Rules when they gave a time frame. See the case of Gichuki King'ara & Co Advocates v AL Jalal Enterprises Ltd & Others, Civil Appl. No. NAI 211 of 2012 (unreported) where this Court stated in reference to Rule 84 as follows;

"The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought."

4. That appears to me to be the position here. However, if I am wrong in that regard, I think counsel for the respondent has endeavoured to explain the efforts made with a view to obtaining proceedings so as to file the appeal, although in doing so he, unconvincingly sought to pass the buck, as it were, to the appellant.

5. Alive to the realities, *inter alia*, of backlog in our system, I would have ordered the respondent to file the record of appeal within 30 days from the date of delivery of this Court's ruling herein and in default the notice of appeal to stand struck out without further ado. I would have awarded the costs of the application to the applicant in any event.

6. As the majority are of a contrary opinion, the motion shall be disposed of along the lines proposed by ***Kiage, J.A.***

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

RULING OF A.K. MURGOR, JA

I have read the ruling of Honourable Mr. Justice P.O. Kiage, JA and, I am in agreement with it.

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

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR