



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) NAMBUYE & KOOME, J.J.A)

CIVIL APPLICATION NO. 65 OF 2019

BETWEEN

KENYA BUREAU OF STANDARDSAPPLICANT

AND

CENTURION ENGINEERS & BUILDERS LTD.....RESPONDENT

(An application for an order to deem the Notice of Appeal as withdrawn for failure to file a Record of Appeal within appointed time of 30 days as ordered (Makhandia, Murgor & Odek, J.J.A) dated 22nd November, 2016

in

CIV. APPL. No. NAI 282 of 2016)

RULING OF THE COURT

1. On 23rd November, 2018 this Court (Makhandia, Murgor & Odek, J.J.A) granted **Centurion Engineers and Builders Ltd (respondent)** leave to file an appeal to this Court against the High Court's decision (Tuiyott, J.) which had been delivered on 9th December, 2016 in **HCCC No. 506 of 2012**. The grant of the leave was conditional upon the respondent filing the Record of Appeal within thirty (30) days from the date of the ruling which was 23rd November, 2018. On 1st March, 2019 after expiry of what counsel for the applicant referred to as ninety (90) days and the respondent having failed to file the appeal as ordered, the instant application was filed. It seeks in the main; -

“That the Honourable Court be pleased to issue a declaratory order that leave to appeal earlier granted by this Court to the respondent in the ruling dated 23rd November, 2018 in Civil Application No. NAI 282 of 2016 Centurion Engineers and Builders Ltd v Kenya Bureau of Standards (Applicant) has lapsed and or expired upon default to file a Record of Appeal within appointed time.”

2. The Notice of Motion is supported by the grounds stated in the body thereto and an affidavit sworn by **Jotham Okome Arwa** on 27th February, 2019. The same reasons in the body of the application are reiterated. That is the respondent failed to comply with the conditional order requiring it to file an appeal within 30 days; that failure to file the appeal was indicative that the respondent had lost interest in the appeal; moreover, after the lapse of time granted, there was no competent appeal that could be filed; thus under **Rule 83** of the Court of Appeal Rules, this Court had unfettered discretion to deem the Notice of Appeal as withdrawn.

3. We have not seen a replying affidavit in opposition to this application but there are written submissions filed on 4th October, 2019 pursuant to the leave granted to the respondent on 19th September, 2019 when the matter had come up for hearing. There is also a Notice of Motion on record dated 4th March, 2019 by the respondent which is an application under **Rule 4** of this Court Rules in which the respondent is seeking extension of time for filing and serving the Record of Appeal from the decision of the High Court, (Tuiyott, J.) dated 9th December, 2016. From the said documents the respondent's explanation for the delay is that it was not able to file the Record of Appeal within the stipulated 30 days as had been directed by this Court.

4. The respondent blames the High Court registry for the delay in providing the proceedings that were necessary for the preparation of the Record of Appeal. It is indicated that counsel for the respondent wrote several letters to the High Court registry bespeaking of the proceedings. However, it was not until **17th January, 2019** that they received a letter from the registry notifying them that the proceedings

were ready for collection. They paid for the proceedings on the 18th January, 2019 but a certified copy of the ruling and order were not available for collection until 31st January, 2019. A certificate of delay issued on 8th February, 2019 indicated that;

“Time taken by this court to prepare and supply the copies of the proceedings and ruling was from 23rd November, 2018 to 23rd January, 2019 which is 61 days.”

Counsel for the respondent also claims that by a twist of bad luck **Mr Nyadieka** who was handling the matter became indisposed with stomach infection on 13th February, 2019; that he required two weeks of treatment and bed rest until 4th March, 2019 when he resumed work and filed the application seeking extension of time on the 5th March, 2019. Meanwhile the applicant had filed and served the application seeking to deem the Notice of Appeal as withdrawn on 1st March, 2019.

5. When this matter came up for plenary hearing on the 19th September, 2019 both **Mr. Arwa** learned counsel for the applicant and **Mr. Nyandieka** learned counsel for the respondent indicated their wish to rely on their respective submissions and list of authorities and did not make any oral highlights.

6. On the part of the applicant emphasis is placed on the provisions of **Rule 83** which is couched in mandatory terms that 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. The respondent was also faulted for filing an application under **Rule 4** for extension of time which was termed as a belated knee jerk reaction to the applicants’ motion to deem the Notice of Appeal as withdrawn. Counsel cited the case of; **Quicklubes E.A Limited vs. Kenya Railways Corporation [2014] e KLR** where this Court had the following to say;

“Rule 83 gives this Court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of Court but fail to inform the Court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allows the court to invoke Rule 83 suo motu if the respondent in the intended appeal does not move the Court.”

Further, counsel submitted that the respondent cannot rely on the overriding objective principles in the as the same cannot be invoked to aid an indolent litigant who has not given justification for failing to comply with the Rules and an express order by this Court. Counsel urged us to allow the application and deem the Notice of appeal as withdrawn.

7. We have also considered the submissions by the respondent that are summarized in the foregoing paragraphs in lieu of a replying affidavit. Counsel in addition to the reasons cited for the delay in filing the appeal relied on the provisions of **Rule 82** of the Court of Appeal Rules which provides for the exclusion of the time that was certified as having been utilized to prepare the proceedings. The cases of **Stanely Kahoro Mwangi and 2 Others vs. Kanyamwi Company Limited - Nakuru Civil App No 287 of 2014** and **George Kagima Kariuki & 2 Others vs. George Gichimu and 2 Others [2014] eKLR** were referred to, to buttress the point that there is no minimum or maximum period of delay that is set by the law. All an applicant has to do is to offer a plausible and satisfactory explanation for the delay. Counsel urged us to take into account the totality of factors surrounding this matter from when the respondent was granted leave to file an appeal and find in favour of the respondent by allowing an extension of time to file the appeal.

8. We have considered the rival submissions, and deliberated on all the material that were placed before us, the central issue remains whether the notice of motion should be allowed. On the other hand, the respondent has filed an application seeking leave to extend the time within which to file an appeal. The respondent’s application to extend time was perhaps filed as a reaction to the one seeking to deem the Notice of Appeal withdrawn. This is because the respondent was informed the proceedings were ready for collection on **17th January, 2019** and if it had an intention of seeking extension of time, such an application would have been made thereabout.

9. The respondent urged us to bring to bear the overarching objectives in the administration of justice as provided for under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** and also **Article 159 (d)** of the Constitution and grant the orders sought for extension of time. It has been said time without number that the overriding principle does not debunk the valued and well settled rules of procedure which the courts have applied persistently and consistently over the years in ensuring uniform standards and predictability in the administration of justice.

10. Be that as it may, the instant application is founded on **Rule 83** of this Court Rules which provides;

“Effect of default in instituting appeal:

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.”
(Emphasis added)

The Rule is clear as it essentially prescribes the legal penalties for failure to institute an appeal within the time provided. It goes without saying that the Rule is also couched in mandatory terms. This Court aptly described the consequences of failure to follow the Rule in the case of **Mae Properties Ltd vs. Joseph Kibe & Another [2017] eKLR** as thus;

“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”.

11. In this case the respondent was given a conditional leave to file an appeal within thirty (30) days while noting that failure to comply with the timelines the order would lapse. What reasons has the respondent proffered for its failure to file an appeal pursuant to leave granted? The respondent blames the High Court registry for failure to provide the proceedings. However, the Certificate of delay that the respondent attached to the application for extension of time, shows that counsel for the respondent requested for the proceedings on 23rd November, 2018 and they were notified that the proceedings were ready for collection on 17th January, 2019. Counsel paid for the proceedings on 18th January, 2019 but collected the certified copies of the ruling on the 23rd January, 2019.

12. From the certificate of delay which is the official document that would testify to the credibility of the respondent’s contention of when the proceedings were applied for, how long it took the court to prepare the proceedings and when they were finally received by counsel for the respondent, this document shows that the respondent did not apply for the proceedings after the Ruling they intend to appeal against which was delivered on 9th December, 2016. This is because the certificate of delay shows the proceedings were applied for on 23rd November 2018. So had the respondent gone to slumber from when the ruling was delivered on 9th December, 2016? That aside, the respondents’ counsel seems to have been going to court to fetch one document at a time, on the 18th January, 2019 he paid for the certified copies of the proceedings; after 20 days he applied for a certificate of delay and on the 4th March, 2019, he applied for extension of time. As matters stand, there is no Record of Appeal that has been filed.

13. To us these are feeble steps that were taken by counsel for the respondent in a rather lacklustre manner and are with respect reminiscent of implicit indifference by a party who is totally unmindful of the Court Rules and who was incidentally operating under a very stringent conditional order of extension of time which had in any event lapsed. We are therefore not persuaded by respondent’s explanation that failure to comply with the Rules and the conditional leave granted were caused by circumstances beyond their control. The respondent has not demonstrated to us that it is deserving of an exercise of this Court’s discretion.

14. Accordingly, we find the application before us dated 1st March, 2019 merited. In the result, we allow it and order that the notice of appeal dated 22nd December, 2016 be and is hereby deemed as withdrawn with costs to the applicant.

Dated and delivered at Nairobi this 20th day of December, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR