



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI 241 OF 2017

BETWEEN

HON. JUSTUS ALOO OGEKA.....1ST APPLICANT

OUMA JUMA.....2ND APPLICANT

SEBASTIAN NGORWE.....3RD APPLICANT

RICHARD ONGORO.....4TH APPLICANT

MARK AMIMO.....5TH APPLICANT

MONICA KENDI.....6TH APPLICANT

NANCY JERUTO.....7TH APPLICANT

AND

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....RESPONDENT

AND

REGISTRAR OF TRADE UNIONS.....1ST INTERESTED PARTY

BANKING INSURANCE

AND FINANCE UNION (K).....2ND INTERESTED PARTY

(Being an application to strike out a Notice of Appeal dated 25th January 2016 against the judgment

and decree of the Employment and Labour Relations Court at Nairobi

(L. Ndolo, J.) delivered on 22nd January 2016

in

Employment & Labour Relations Appeal No. 1A of 2012)

RULING OF THE COURT

By a Notice of Motion lodged on 23rd June 2017, the applicants have applied to strike out the respondent's notice of Appeal dated 25th January 2016 under **rules 4, 47, 83 and 84** of the **Court of Appeal Rules 2010** or alternatively, that the notice of appeal be deemed as withdrawn.

The application is premised on the grounds that in the judgment delivered on 22nd January 2016, the Employment and Labour Relations Court ordered the immediate registration of the applicants' proposed Kenya National Union of Cooperative Staff (*the Union*), subsequent to which the Registrar of Trade Unions entered the name of the Union in the register of Trade Unions and thereafter issued a certificate of registration to the applicants; that the respondent was aggrieved by the decision of the court and filed a notice of appeal on 25th January 2016; that following the respondent's application for stay of execution of the lower court's orders dated 26th January 2016, the court granted a stay of execution on 12th February 2016, pending an appeal to this Court; the court also ordered that the status quo be maintained pending further orders of this Court.

The motion further stated that to date, the respondent had failed to institute the intended appeal within the prescribed period, had failed to serve the applicants with the impugned notice of appeal and also failed to transmit the notice to this Court. It was also contended that the respondent was not interested in pursuing its appeal, but had filed the notice of appeal merely to obtain the order of stay of execution; that the extensive delay in filing the record had resulted in the unlawful suppression of the Union operations; and that in the interest of justice, the impugned notice of appeal should be struck out.

The application was supported by the affidavit of **Hon. Justus Aloo Ogeka** on 16th October 2017, which reiterated the various grounds of the application.

In a replying affidavit sworn by the Secretary General of the respondent, **Boniface Kavuvi** on 13th November 2017, it was deponed that the application was a replication of the applicants' various applications filed in the Employment and Labour Relations Court, some of which were dismissed while others were pending before that court. It was further deponed that following their instructions, the firm of Nyabena Nyakundi & Company Advocates had filed a notice of appeal, and requested for the typed proceedings from the registry; that the applicants had made various applications in the lower court which had impeded and interfered with the registry's ability to prepare the typed proceedings; that numerous attempts were made by their advocate to obtain the proceedings, but to no avail, as a consequence of which, the respondent was precluded from pursuing its appeal.

On the assertion that the applicants had not been served, it was also deponed that the applicants' advocates were served on 1st February 2016 with the notice of appeal and the letter requesting for proceedings, which the applicants had failed to stamp, and which omission should not be visited on the respondent. It was further averred that the applicants' motion was bad in law, an afterthought, lacked merit and was an abuse of the court process and that the only order capable of being issued in the circumstances was for the lower court to expedite the preparation and supply of the typed proceedings.

The 2nd interested party, **Banking, Insurance and Finance Union**, also filed a replying affidavit sworn by **Isaiiah Kubai**, the Secretary General on its behalf, wherein it was deponed that the proceedings had yet to be supplied by the registry.

In the submissions before us, **Mr. Miyare**, learned counsel for the applicants, relied on the affidavit in support, and submitted that the respondent was in violation of the law and the rules of this Court, in that since the notice of appeal was filed over 2 years ago, the respondent had failed to file the record of appeal and had not proffered reasons for the delay in filing such record; that as a consequence the notice of

appeal should be struck out.

Mr. Motende, learned counsel for the 1st interested party supported the application and adopted the applicants' submissions.

On his part, **Mr. Nyabera**, learned counsel for the respondent, opposed the application. Counsel complained that this was one of several applications that had been filed by the applicants. Counsel further submitted that the respondent had requested to be supplied with the proceedings by a letter dated 25th January 2016, and that since then, several attempts to obtain the proceedings had been made, but without success. It was further submitted that the notice of appeal was served on the applicants, that the respondents have a right of appeal, and were unable to file the record without the proceedings. Counsel pointed out that, a draft memorandum of Appeal was filed raising pertinent issues for this Court's determination, and that concerning the transmission of the notice of appeal to this Court, it was asserted that this was an administrative issue, and not the respondent's responsibility.

Ms. J. Guserwa, learned counsel for the 2nd interested party, also opposed the application. Counsel submitted that the applicants' application was vexatious and premature, as the reason for the delay was that the proceedings were not ready and were yet to be supplied and that without them, the record of appeal could not be filed.

In reply, Mr. Miyare responded that the notice of appeal alluded to in the respondent's affidavit bore the wrong address on its face, despite the respondent being aware of the applicants' correct address, but in any event, there was nothing to show that the applicants or any of the other parties were served with it. Counsel added that the respondent's failure to produce any reminders to the registry to show that they had assiduously pursued the proceedings sufficiently demonstrated that it was not interested in pursuing its appeal. In support of this proposition, counsel cited the case of **Elizabeth Wanjiku Muchai vs The Standard Limited [2017] eKLR**. As a consequence, counsel urged us to strike out the notice of appeal.

We have considered the application, the replying affidavits and the parties' submissions. The application turns on whether the respondent has complied with **rules 77** and **82** of this Court's Rules concerning service of the notice of appeal and the request for proceedings on the applicants and other affected parties, and the requirement to file a record of appeal within the stipulated 60 days' period.

To begin with, it is not controverted that the respondent filed the notice of appeal on 25th January 2016, and simultaneously requested the Deputy Registrar for the certified proceedings and copies of the judgment. What is in controversy is firstly, whether the applicants and the affected parties were served with the notice of appeal and the request for proceedings, and secondly, whether there was a delay in filing the record of appeal.

Beginning with the question of service of the notice of appeal and the request for proceedings, **rule 77** provides;

“(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be exparte, within seven days after lodging the notice of appeal, direct that service may not be effected on any person who took no part in the proceedings before the superior court.”

In the case of **Sheikh vs Sheikh [1985] KLR 649** this Court held in respect of **rule 76 (1)**, which is the current **rule 77** of the Court of Appeal Rules 2010, that;

“The object of rule 76 (1) of the Court of Appeal Rules in obliging an appellant to serve copies of the notice of appeal on the parties directly affected by it is that the rights of a party likely to be directly affected by the result of the appeal should not be affected without the party being

provided an opportunity of being heard”.

In the case of ***Mradula Suresh Kantaria vs Suresh Nanalal Kantaria Civil Appeal (Application) No. 277 Of 2005*** this Court enunciated the consequences of failure to serve the notice of appeal on affected parties when it observed that;

“It follows that although Rule 76 is a procedural rule based on the Appellate Jurisdiction Act, it has deeper roots in the Constitution so as to safeguard due process. Indeed, in the hierarchy of fundamental rights, the right of hearing ranks very high. For this reason we think that failure to serve the notice of appeal renders a notice of appeal incompetent including the record of appeal itself. This is because Rule 76 (1) is a mandatory requirement and provides that all persons directly affected by the appeal, must be served with a notice of appeal or the Court is requested upon an application by the appellant which may be ex parte, to direct that service need not be effected on any person who took no part in the proceedings in the superior court.

In other words, a notice of appeal and in effect, the appeal itself would be rendered incompetent and liable to be struck out if the mandatory requirement of service of the notice of appeal on the affected parties was not complied with.

On the request for proceedings, ***rule 82*** provides, inter alia, that an appeal shall be instituted by lodging a record of appeal within 60 days. But the proviso to the rule states in relevant part that;

“.....Provided that in 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 appellant of such copy.”

Rule 82 (2) provides that an appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for copies of the proceedings was in writing and a copy of it was served on the respondent, in this case the applicants.

The above stated provisions make it clear that, a respondent ought to serve the notice of appeal and the request for proceedings on the applicants, or risk having them struck out for failure to comply with the rules. And where the respondent fails to serve the request for the proceedings on the applicants, it would be prohibited from excluding the period of preparation of such proceedings in computing time, and would instead be required to file the record of appeal within 60 days.

So, in this case, were the applicants served with the notice of appeal and the request for proceedings or not? The applicants assert that they were not served with the notice of appeal. The respondent on the other hand claims that they were served, but, their advocate had refused to stamp the notice of appeal, and the letter requesting for proceedings, which action estopped them from alleging that they were not served.

A review of the notice discloses that it was addressed to the firm of “*Atonga Miyare & Associates, Menelik Court, 2nd Floor, Left Wing, Off Ngong Road*” P.O Box 37568-00100 Nairobi”. The applicants’ position is that their advocates’ correct address for service, and of which the respondent was aware, was *Miyare & Company Advocates, ACK Garden House, 3rd Floor, Wing B, 1st Ngong Avenue, Off Ngong Road, P O Box 37568-00100 Nairobi.*

Despite the averments, the respondent did not produce any return of service that showed that an attempt at service of the notice and the request was made on the applicants’ advocates, or the applicants. There was nothing to demonstrate that the applicants declined or refused to accept service of the notice and the request for proceedings. Without any evidence to support the contention that the applicants were served, the only conclusion that can be reached is that the notice of appeal and the request for proceedings were not at any time served on the applicants, their advocates or on any other firm of advocates for that matter.

As observed by this Court in *Kantaria vs Kantari (supra)*, the retired constitution guaranteed the applicant the right to a fair hearing. More particularly for the purposes of this case, **Article 50 (1)** of the current Constitution, entitled the applicants to a fair hearing, and service of the notice upon them was a necessary prerequisite to uphold this constitutional guarantee. A failure to serve the notice was therefore tantamount to condemning the applicants unheard. On this basis, we find that the failure to serve the notice of appeal in itself rendered it incompetent and liable to be struck out.

But that is not all. We would go further to add that, the respondent's appeal was placed in further jeopardy following the failure to serve the request for proceedings on the applicants. This is because, on the one hand, **rule 82**

1. makes it clear that the record of appeal must be filed within 60 days of filing of the notice of appeal, while on the other, the proviso to **rule 82 (1)**

stipulates that the period for preparation and delivery of the typed proceedings could be excluded from the computation of time to file the record of appeal if the request for proceedings was made to the registry and the applicants were served with and a copy of such request.

As seen above, the respondent failed to serve the request for proceedings on the applicants. The effect of this failure was to preclude the respondent from applying the proviso to rule 82(1) to exclude the period of preparation when computing time to file the record. Without the ability to exclude the preparation period, it was imperative for the record to be filed within 60 days from the date the notice of appeal was filed. It is against this backdrop, that it then becomes apparent that the reason advanced by the respondent that it was unable to file the record because it had yet to be supplied with the proceedings by the registry, essentially falls by the wayside, and it mattered not that the registry had not supplied the proceedings.

That said, was the record filed within the 60 days' period? The judgment was delivered on 22nd January 2016, and the notice of appeal was filed on 25th January 2016. The record of appeal ought therefore to have been filed by the 24th March 2016. This application was filed on 19th October 2017, which was 1 year and 9 months from the date the notice of appeal was filed, and yet by the date of the application, the respondent had yet to file a record of appeal. From this computation, it is evident that, the 60 days' period specified by the rules had long since lapsed without a record of appeal having been filed.

Accordingly, we are satisfied that the failure to serve the notice of appeal on the applicants, and to file the record of appeal within the 60 days' period has rendered the intended appeal incompetent. The Notice of Motion lodged on 23rd June 2017 is merited, with the result that the notice of appeal

dated 25th January 2016 and filed on the same day is hereby struck out with costs to the applicants.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of January, 2018.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRA