



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & KIAGE, JJ.A)

CIVIL APPLICATION NO. 111 OF 2017

BETWEEN

**BANKING INSURANCE & FINANCE UNION (KENYA).....APPLICANT**

**AND**

**MURATA SACCO SOCIETY LTD.....RESPONDENT**

*(An application to strike out the notice of appeal dated*

*13th October, 2014, for failure to file and serve the*

*Record of Appeal within the prescribed time)*

*in*

***E.L.R.C. NO. 616 OF 2010)***

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**RULING OF THE COURT**

The applicant, Banking Insurance & Finance Union Kenya, by its motion dated 18th May 2017 seeks an order that this Court do strike out the notice of appeal dated 13th October 2014 on the ground that the record of appeal has not been filed and served within the prescribed time. The motion as drawn is expressed as presented under **Rules 80** and **87** of the Court of Appeal Rules but, at its hearing, learned counsel for the applicant made a request, to which we acceded, that it be amended to cite **Rules 80** and **83**.

The specific grounds on which the motion is premised, and which are repeated almost verbatim in the supporting affidavit of **Joseph Ole Tipate** sworn on 18th May, 2017, appear on its face as follows;

***i. The notice of appeal in respect of this appeal dated 13th October, 2014, was filed in court on 13th October, 2014.***

***ii. The intended appellant requested for certified copies of proceedings on the 13th October, 2014.***

***iii. On 8th July, 2015, the intended appellant filed the application under Rules 5(2) (d), 42 and***

*43 of this Court Rules for stay of execution.*

*iv. The said application for stay was granted with conditions on (sic).*

*v. Since the date of filing the notice of appeal and the request of certified copies of proceedings thereof, the intended appellant has not filed the record of appeal, and if he has, he has not served the respondent with the same.*

*vi. A period of over three years has lapsed since the filing of the said notice of appeal. The delay to file and serve the record is inordinate.*

*vii. The said notice of appeal is therefore ripe for striking out as the intended appellant has not acted within the prescribed time.”*

In opposition to the application, the respondent, Murata Sacco Society Ltd, filed a replying affidavit sworn by its Chief Executive Officer, one **James Kimani Mbui**, on 31st October 2017. In it he swore at paragraph 4 as follows;

***“4. That I am advised by the respondent’s advocates, Messrs. Kamau Kuria & Company Advocates, and I verily believe the same to be true that:***

***a. the said application is an abuse of the process of the court;***

***b. the said application is made prematurely as the respondent can only file an appeal upon receipt from the Employment & Labour Relations Court the proceedings it needs to prepare a record of appeal;***

***c. the delay in filing the application is caused by the fact that the proceedings of the Employment & Labour Relations Court have not been supplied.”***

He went on to swear at paragraph 11 that litigants can only move at the pace at which registries move, and at paragraph 17 that the respondent “has not received any letter notifying it that the proceedings are ready for collection.” The deponent then devoted paragraph 18 of the affidavit to legal arguments complete with citations of case law and legal provisions which are clearly inappropriate for an affidavit and should be reserved for submissions. He then made the final substantive assertion at paragraph 19 as follows;

***“19. That the respondent is, therefore, within the time to which to lodge the record of appeal since it has not been notified that the same are ready and moreso, a Certificate of Delay issued by Superior Court will cure the defect complained of by the applicant herein.”***

At the hearing of the application, **Mr. Jessee Kariuki** for the applicant relied on the supporting affidavit we have mentioned. He went on to point out that the respondent’s dilatoriness was further demonstrated by its filing of the replying affidavit aforesaid more than six months after being served with the application. He disputed the respondent’s deposition that the application is premature and asserted its necessity given the respondent’s total inaction for three years without as much as writing a reminder or follow up on the proceedings. He then posed whether a party should simply sit back and wait for proceedings indefinitely without making any effort to follow up.

Citing **PATRICK KIRUJA KITHINJI vs. VICTOR MUGIRA MARETE** [2015] eKLR, a ruling of this Court sitting in Nyeri,

counsel contended that whether or not an appeal is filed within time goes to the jurisdiction of this Court and is not a mere technicality. Answering his own question on what an applicant is to do where there is inordinate delay and inactivity, in this case going over three years, he urged us to allow the application.

On his part **Mr. Munyori**, learned counsel for the respondent, placed reliance on the replying affidavit. He stated that the notice of appeal and request for proceedings were filed timeously and on that basis attempted to distinguish the authorities cited by the applicant. He urged us to dismiss the application and allow the respondent time to file the record of appeal.

In a brief rejoinder, Mr. Kariuki discounted the stay of execution proceedings as a reasonable explanation for the respondent's inactivity. He contended that both before and after the stay application was disposed of, the respondent was indolent. He rested by terming the respondent's conduct as leaving a lot to be desired.

We have given this application, the rival affidavits, submissions and the authorities full consideration. It is not in doubt that the notice of appeal having been lodged on 13th October 2014, the respondent was mandatorily required to have filed its record of appeal, together with the memorandum of appeal, the prescribed fees and security for costs, within sixty days thereafter. That much is clear from **Rule 82(1)** of the Court of Appeal Rules. That Rule, on the time it imposes, is inflexible save as indicated in the *proviso*; that in computing the time, such time as certified by the registrar of the court appealed from as required for the preparation and delivery of a copy of the proceedings shall be excluded, and then only if the request for proceedings was in writing and copied to the respondent in the appeal.

In the matter before us, it is common ground that the request for proceedings was made within time on 13th October 2014. The request was in writing and copied to the intended appellant, the applicant herein. After that request, however, there is absolutely nothing to show that the respondent made any effort to follow up and establish what became of the proceedings. What emerges from the replying affidavit is that the respondent and its advocates literally went to sleep and are still waiting to be roused by communication from the registrar of the Land and Employment Court as and when the proceedings are ready. With respect, we do not perceive that to be the attitude of a litigant desirous of pursuit of its rights by way of appeal to this Court. The times set by the Rules are meant to be obeyed and the non-reckoning of the time for preparation of proceedings ought to be the exception, and not the general rule. At any rate we find that the applicant's submissions that there has been inordinate delay in filing of the record of appeal, running to over three years, is simply unanswerable.

It cannot be the business of the courts and therefore responsibility should not casually be cast on registries, to drive the process of compliance with timeliness on the part of litigants. An intending appellant who has a desire to vindicate his position and secure his rights must be seen to be diligent. A cavalier and indifferent attitude towards timelines is to be frowned upon and this Court, when moved as we have been moved, will not hesitate to strike out a notices of appeal that have not been followed by the institution of appeals and have, moreover, no reasonable prospects of being so followed in the foreseeable future. This is what the Court at Nyeri had in mind when it stated in **PATRICK KIRUJA KITHINJI vs. VICTOR MIGURA MARETE** (supra);

***“12. In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.”***

So seriously do the Rules view defaults in institution of appeals that under **Rule 83**, the notice is deemed as withdrawn after the lapse of the appointed time and the Court may on its motion make an order to that effect.

We need only add what we recently stated in **MAE PROPERTIES LIMITED vs. JOSEPH KIBE & ANOR** Civil appeal (Application) No. 201 of 2016;

***“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 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.”*

Inevitably, therefore, the application before us succeeds and we grant it with costs.

**Dated and delivered at Nairobi this 19th day of January, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**