



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MURGOR, SICHALE & KANTAL, J.J.A.)

CIVIL APPLICATION NO. NYR. 36 OF 2017 (UR 25/2017)

BETWEEN

POLICE CONSTANBLE HENRY NYAKOE OBUBA.....APPLICANT

AND

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

THE INSPECTOR GENERAL,

NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE DEPUTY INSPECTOR,

GENERAL KENYA POLICE SERVICE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

(An Application to strike out a Notice of Appeal from the Judgment of the Employment and Labour Relations Court at Nyeri (Ongaya, J.) dated 13th May, 2015 in Petition No. 14 of 2015 and setting aside of the Ruling and Order of the Honourable Court of Appeal (Waki, Nambuye & Azangalala, J.J.A.)

dated 9th November, 2016

in

Civil Application No. 36 of 2016 (UR 23 OF 2016))

RULING OF THE COURT

We are in the main asked in the Notice of Motion said to be brought under **Rule 42, 75 (2), 82, 84 and 90 (1)** of the **Court of Appeal Rules 2010** and **Sections 3A and 3B** of the **Appellate Jurisdiction Act** to strike out the notice of appeal dated 13th May, 2016 and lodged in court on the same day and also to set aside the ruling delivered by this Court on 9th November, 2016.

In the grounds in support of the motion it is stated that the respondents filed a Notice of Appeal as stated but that, since filing, had not filed an appeal and that it was 314 days as at the date of the motion since Notice of Appeal was filed. It is further stated that the respondents were granted by this Court a stay of execution of the judgment and decree of the Employment and Labour Relations Court in Nyeri Petition No. 14 of 2015 delivered on 13th May 2016 pending hearing and determination of an intended appeal. In so far as is material, it is further stated that the applicant continues to suffer because of failure by the respondents to file a substantive appeal; that the applicant's case in the lower court was a constitutional petition based on constitutional violations in that a disciplinary appeal had not been concluded for a period of 12 years; that failure to file an appeal by the respondents is a continuation of violations against the applicant which has led to him suffering loss which cannot be compensated by way of damages; that the applicant is a family man and the only bread winner of his family who has not earned a salary for a period of 13 years and been unable to meet his financial obligations and finally, that it is fair that the notice of appeal be struck out.

The supporting affidavit of the applicant reproduces the same grounds that we have set out and it is not necessary to repeat those depositions here. When the application came up for hearing before us on 7th February, 2018, Mr. Bitange Mageto, learned counsel, appeared for the applicant, but there was no appearance for the respondents. We observed that the office of the Attorney General was served with a hearing notice on 29th January, 2018 on behalf of himself and on behalf of the 1st, 2nd and 3rd respondents but there was no appearance at the hearing. In view of the evidence of service we allowed the application to proceed.

Learned counsel for the applicant submitted that the Notice of Appeal should be struck out as the respondents had not filed an appeal since filing a Notice of Appeal on 13th May, 2016. Learned counsel reminded us of the provisions of **Rule 82** of this Court's rules where an appeal should be filed within 60 days unless there is leave to file it out of time. Learned counsel cited various authorities in support of the motion and urged us to allow the application.

We have considered the application and the submissions made in support of the same. We note that as already stated, a Notice of Appeal was filed on 13th May, 2016 to challenge a judgment of the Employment and Labour Relations Court delivered on 13th May, 2016. There is no evidence that the respondents have taken any other step to pursue the intended appeal. It was stated by this Court in **Mae Properties Ltd vs Joseph Kibe & Another [2017]** eKLR:

“It is safe to say, therefore, that a notice of appeal dies a natural death after 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 an 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”.

In the same case – **Mae Properties Ltd** (supra), the following passage appears citing the case of **Martin Kabaya v 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, and 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 summoned by complaints, petitions, applications or appeals are vexed when those who summoned them 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”.

It is clear that the appeal that is yet to be filed will be out of time. No explanation has been offered why no action has been taken by the respondents since 13th May, 2016 when a Notice of Appeal was lodged at the High Court. We agree with learned counsel for the applicant that the Notice of Appeal should be struck out and we now order the Notice of Appeal lodged on 13th May, 2016 be and is hereby struck out.

We grant costs of the motion to the applicant.

Dated and delivered at Nyeri this 21st of February, 2018.

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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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