



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, JA – IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 153 OF 2016**

**WILFRED SAMSON MUTUA .....APPLICANT**

**AND**

**KENYA WILDLIFE SERVICE.....RESPONDENT**

*(Being an application for extension of time to file the record of appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Maureen Onyango, J.) dated 22<sup>nd</sup> September, 2014*

in

**ELC. No. 890 of 2012)**

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**RULING**

The applicant, “**Wilfred Samson Mutua**” took out the motion on notice dated 28<sup>th</sup> June 2016 now before this Court seeking to extend time within which to file and serve the record of appeal upon the respondent, “**Kenya Wildlife Service**”. The Employment and Labour Relations Court delivered its determination on a claim filed by the applicant seeking damages on alleged wrongful termination of employment on 22<sup>nd</sup> September, 2014. Unsatisfied by the court’s determination and being desirous of appealing the same, the applicant filed a Notice of Appeal on 5<sup>th</sup> November 2014 in the same court. The motion before me is hinged on rule 4 of the Court of Appeal Rules together with sections 3, 3A and 3B of the Appellate Jurisdiction Act.

The gist of the applicant’s case as interred from the supporting affidavit sworn by **Albert Simiyu Kuloba**, his learned counsel, is that after the judgment was delivered, he orally applied to be supplied with the certified copies of the proceedings and judgment for purposes of lodging an appeal on 22<sup>nd</sup> September 2014. Subsequently, on 5<sup>th</sup> November 2014 he formally applied for the certified copies of the proceedings and judgment through a letter to the Court’s deputy registrar and forwarded a deposit of requisite fees. That he received a communication from the court’s registrar on 2<sup>nd</sup> March 2016 informing him that the typed copies were ready for collection. He deposes that when his court clerk visited the court’s registry subsequent to the letter, he was informed that the court file was missing and was therefore unable to pay and collect the copies of the proceedings and judgment. Counsel then wrote to the registry on 16<sup>th</sup> March 2016 lamenting and inquiring on the fate of the missing court file. The registry replied to

the advocate's letter on 22<sup>nd</sup> March 2016 informing him that the missing file had been traced. It is then that the remaining balance of the fees was paid and the certified copies of proceedings and judgment collected. On 29<sup>th</sup> March 2016, the applicant's advocate applied for a certificate of delay which the deputy registrar issued on 20<sup>th</sup> April 2016.

According to the applicant, the delay occasioned was about 30 days from receipt of proceedings and which he submits is not inordinate. He also submits that no prejudice would be occasioned to the respondent if the application was allowed and that none has been alleged by the respondent through its reply to the application.

According to the applicant, the overriding objectives invoked required that parties in a suit be given an opportunity to ventilate their issues and not to be locked out of the seat of justice due to technicalities related to procedure. He argued that the practice of courts is to breathe life into pleadings as Article 159 of the Constitution advocated for fair hearings. It was also counsel's submission that he had attached a draft memorandum of appeal to his application which raises serious questions of law that needed to be ventilated on appeal and the application ought to be allowed in the interests of justice.

The respondent in opposition to the application filed a replying affidavit as well as written submissions. The respondent pointed out that it had already paid Kshs. 569, 523/- in settlement of the courts decree on 29<sup>th</sup> October 2014. It further deposed that the applicant's letter bespeaking proceedings dated 5<sup>th</sup> November 2014 was not copied to it as required by rule 82 (2) of the Court of Appeal Rules. It pointed out further that the notice of appeal was filed and served out of time, without leave of court and was therefore not properly on record. In fact, it was incompetent. It prayed that the same be struck out. It deposed further that it stood to be prejudiced if the application was allowed on the ground that it had already settled the decretal sum which the applicant had enjoyed. In any event and according to the respondent, the delay was inordinate. It termed the application as premature and an abuse of the Court process.

During the oral hearing of the application, the respondent's counsel denied the allegations that the court file went missing and accused the applicant of deposing to lies. Counsel further reiterated that the Notice of Appeal had been filed, served out of time and without leave of Court and was therefore incompetent.

It has been stated that every court has the duty to first determine whether or not it has jurisdiction in a particular matter. See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR; Owners of the Motor Vehicle M.V. Lillian "S" v Caltex Oil (Kenya) Limited (1989) KLR1**. This Court in satisfaction of that duty has to establish whether it has jurisdiction to entertain the application in the circumstances of this case, bearing in mind that the notice of appeal is actually incompetent. It is trite law that the notice of appeal is a crucial document, the foundation of an appeal and clothes this Court with the requisite jurisdiction to carry out its appellate jurisdiction such as to entertain the instant application. The Court of Appeal in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, quoted with approval the case of **Pepco Construction Company Limited versus Carter & Sons Limited Nairobi, CA No. 80 of 1979 (UR)** wherein the Court of Appeal observed as follows;

***"A notice of appeal is what gives this court jurisdiction in any appeal. It is a primary document in terms of rule 85(1) of the Rules. A record of Appeal must contain a valid copy of the notice of appeal. The omission to include a valid copy renders the appeal incompetent...."***

The procedure for filing a notice of appeal is provided for under rule 59 (1) of this Court's rules in these terms;

***"(1) Any person who decides to appeal to the Court shall give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal."***

The judgment, the subject of the applicant's intended appeal was delivered on 22<sup>nd</sup> September, 2014. The notice of appeal ought to have been filed within 14 days, which according to the respondent should have been on or before 6<sup>th</sup> October 2014. The notice of appeal on record shows it was filed on 5<sup>th</sup> November, 2014. In its application, the applicant avers as follows;

***“(1) THAT the Applicant filed its Notice of Appeal timely in the Superior court registry on the 5<sup>th</sup> November 2014 in the Court of Appeal on the 22<sup>nd</sup> September 2014.” (Emphasis added)***

In my view that averment is false and is an attempt by the applicant to mislead this Court. The notice of appeal on record was filed on 5<sup>th</sup> November 2014, 40 days out of time. No leave of court was sought prior to the filing of the notice. Despite the respondent's assertion that the notice was filed out of time and without leave of court, in canvassing his application, the applicant failed in *toto* to controvert or respond to the assertion. An attempt was made by the applicant's advocate during the plenary hearing of the application by submitting that, having invoked section 3A of the Appellate Jurisdiction Act, then this Court had jurisdiction to even admit the notice of appeal as filed. It did not matter that it was filed out of time. I do not think that this Court should allow the notice filed out of time casually as suggested by the respondent's counsel.

In **Patrick Kiruja Kithinji v Victor Mugira Marete [2015] eKLR**, this Court held that whether or not an appeal is filed on time goes to the jurisdiction of this Court. Further, that 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 that have served us well this far. Consequently, Court found an appeal filed out of time is not curable under Article 159 of the Constitution. Furthermore, in **Nick Salat Vs IEBC & Others (2013) eKLR**, the Court of Appeal stated;

***“I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow of rules and procedures and create an anarchical free-for-all in the administration of Justice.***

***This court, indeed all courts must never provide succor and cover to parties who exhibit scant respect for the rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the ever-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcome can be anticipated with a measure of confidence, certainty and clarity where powers of rules and their application are concerned.*** (Emphasis put)

Consequently, section 3A of the Appellate Jurisdiction Act invoked by the applicant cannot similarly come to his aid. The notice of appeal as filed is simply incompetent and incapable of being saved, or some life being breathed into it by the invocation of Article 159 of the Constitution or section 3, 3A and 3B of the Appellate Jurisdiction Act.

To compound matters further, the letter bespeaking proceedings dated 5<sup>th</sup> November 2014 was not copied to the respondent in accordance with rule 82 (2) of the Court of Appeal Rules showing further the applicant's cavalier disregard of laid down rules. Rather than seek to regularize the notice of appeal clearly filed out time by seeking leave of court first, the applicant has chosen to sweep it under the carpet and attempted further to mislead the court. He has put the cart before the horse! Effectively, there is no proper notice of appeal on record upon which the instant application can be anchored. Accordingly, the jurisdiction of this Court has not been properly invoked. The upshot is that the applicant is undeserving of this Court's discretion to extend time and the application ought to be dismissed.

It is so ordered.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of May, 2018.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**