



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & M'INOTI, J.J.A)

CIVIL APPEAL (APPLICATION) NO.279 OF 2009

BETWEEN

SIMON KIMUTAL.....1ST APPLICANT

BENARD NJOROGE GATHUA.....2ND APPLICANT

AND

SAMMY MAKOVE

(COMMISSIONER OF INSURANCE).....1ST RESPONDENT

STATUTORY MANAGER UNITED INSURANCE...2ND RESPONDENT

(An application to strike out the Record of Appeal in Civil Appeal No. 279 of 2009 being an appeal from the Ruling/Order of the High Court at Nairobi (L. Kimaru, J.) dated 2nd October 2009

In

Winding up Cause No.22 of 2006)

RULING OF THE COURT

The main appeal to which this application relates, was filed on 27th November 2007, being an interlocutory appeal from the ruling and order of the High Court (L. Kimaru, J.) dated 2nd October 2009. Being aggrieved by the said ruling the 1st respondent herein filed a notice of appeal on 12th October 2009 and subsequently filed the record of appeal. The matter was set down for hearing and parties appeared before Court on numerous occasions, when the matter was unfortunately adjourned severally for various reasons.

On 9th July 2018 this matter came up for hearing. Parties were represented by counsel. Ms. Lucy Kambuni, SC appeared for the appellant, Mr. Kinyanjui appeared for the 4th to 134th respondents and Mr. Kasamani for the 10th respondent. Mr. Kinyanjui brought to our attention that he was not served with the record of appeal. He went into a litany of lamentations all culminating to the fact that due to this non-service, he was not ready to proceed with the hearing of the appeal. Ms. Kambuni on her part informed us that the record of appeal was served on the firm of J. Harrison Kinyanjui & Co. Advocates on 25th August 2016 and pointed out an affidavit of service to that effect. Counsel however, did not show a stamped copy of the record as proof of such service and that the affidavit was not explicit that the record of appeal was indeed served.

After considering the rival positions of the parties, in order to put to rest the issue of service, this Court ordered the appellant's counsel to effect service of the record of appeal and submissions upon the firm of J. Harrison Kinyanjui & Co. Advocates within 7 days of the order. We also directed that the firm of J. Harrison Kinyanjui & Co. Advocates be at liberty to file any application that it may be minded to file within 14 days of such service. Additionally we directed Mr. Kinyanjui and all the other respondents to file and serve their written submissions in response to the appellant's written submissions and any list and bundles of authorities

within 21 days of being served. The matter was then listed for hearing on 20th September 2018.

On 23rd July 2018, the firm of J. Harrison Kinyanjui & Co. Advocates filed a notice of motion pursuant to **section 3** of the Appellate Jurisdiction Act and **Rule 84** of the Court of Appeal Rules seeking two main orders that; the record of appeal be struck out and dismissed with costs to the applicant in consequence of the 1st respondent's lack of service of the record of appeal on the applicants; and that costs of the motion and the appeal be awarded to the applicants.

On 20th September 2018 when the matter was set down for hearing, Mr. Kinyanjui informed us that he had filed an application to strike out the appeal. The appellant in opposition filed three affidavits in response to the application. We proceeded to hear both the appeal and application together in order to expedite this long outstanding matter. Inevitably the outcome of the application will determine the directions and determination we shall make in the appeal. It is therefore reasonable and diligent to deal with the application first.

The main grounds upon which Mr. Kinyanjui relies in support of his application are that: by the order made by this Court on 9th July 2018, the appellant was accorded 7 days within which to serve the record of appeal on the applicants herein but 14 days thereafter, no record of appeal has been served. On this basis the applicant invokes **Rule 84** of the Court of Appeal Rules to strike out the record of appeal; that the appellant has never lodged an application for his service of the record of appeal vide substituted service and there is no proof that all affected parties have been served with the record of appeal pursuant to **Rule 90(1)** of the Court of Appeal Rules; and that the appeal constitutes a gross abuse of the court process and on those grounds alone should be struck out.

In response to the application Ms. Kambuni, SC relied on her replying affidavit sworn on 23rd August 2018, and attributed the delay in service to the voluminous record of appeal, submissions and list of authorities that had to be copied. Counsel stated that this was a huge task that was difficult to execute within the period directed by the Court. It was also contended that her firm could not undertake the copying of the record due to delays occasioned by the public finance laws that govern the appellant. In the circumstances, immediate refund of the costs incurred by her firm in making the copies would be difficult. Learned counsel indicated that it was only possible to serve the record, submissions and authorities on 27th July 2018. For these reasons, counsel urged the Court in making its determination to consider all the circumstances of service of the record of appeal and submissions with regard to both the first and second occasions of service.

Mr. Kasamani for the 10th respondent supported the application and opposed the appeal. On the appeal, counsel submitted that incompetent pleadings cannot form the basis of a competent decision by the court. Having filed incompetent pleadings in circumstances where a statute makes mandatory provisions as to content and procedure, the appellant's attempt to cure an incompetent suit must fail. On these grounds counsel urged the Court to dismiss the appeal with costs.

We have considered the application before us, the grounds in support of the application, submissions by learned counsel and the law. The application was brought pursuant to **Rule 84** of the Rules which provides:-

“A person affected by an appeal may at any time either before or after institution of the appeal apply to the Court to strike out the Notice of Appeal or the appeal, as the case may be on the ground that no appeal lies or that some essential step in proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a Notice of Appeal or appeal shall not be brought after the expiry of 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be.”

For us the issue for determination is whether the non-service of the record of appeal is fatal and whether there are grounds to excuse the defect or default of non-service. In determining this issue it is paramount to consider **Rule 90** of this Court's Rules which provides:

“(1)The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79.

(2)The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint.” (Emphasis Supplied)

It is clear that the record of appeal was filed on 27th November, 2009. It is also clear that the law required the said record of appeal to be served upon the respondents within 7 days of the date of filing. That is the mandatory requirement placed upon the shoulders of an appellant as per the provisions of **Rule 90**. The appellant did not serve the record of appeal as required by that Rule.

On 9th July 2018, this Court indulged the appellant and directed that the record be served upon the respondents within 7 days. This order was meant to give the appellant a second opportunity to comply with its obligations towards the respondent. Similarly, the order of service was meant to ensure that all documents were made available to the parties to avoid any further adjournments and delays. The appellant did not serve the respondent as directed by the Court. As a consequence of the failure to comply with the orders of this Court, Mr. Kinyanjui filed the application dated 23rd July, 2018 in compliance with the Court order.

To the extent that the respondent clearly and categorically did not comply with the orders and directions given on 9th July, 2018 for service, it means that the applicants are justified in filing their application. To our mind, this was an outright non-compliance which was not satisfactorily explained.

The explanation and justification offered by the respondent does not meet the threshold for excusing the delay and disruption of the appeal.

We are satisfied that the application for striking out the appeal is well merited and that the reasons and explanation offered by the respondents are below this Court's expectation. Consequently, the application succeeds and there is no further or other step that needs our attention. Having so found, there is no basis for us to entertain the appeal and we accordingly strike it out. The respondents shall have the costs of the application and appeal too.

Dated and delivered at Nairobi this 12th day of October, 2018.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR