



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 50 OF 2016

BETWEEN

MARIO ROSSI.....APPLICANT

AND

SALAMA BEACH HOTEL LIMITED..... RESPONDENT

(An application to strike out the reference to the full Court against the ruling of Ouko, J.A dated 1st July, 2016

in

Civil Application No. 58 of 2015)

RULING OF THE COURT

[1] The application before us is anchored on **Rule 55** of the **Court of Appeal Rules** (the Rules) wherein **Mario Rossi** (the applicant) entreats us to strike out the reference to the full Court by **Salama Beach Hotel Limited** (the respondent) against the ruling of a single Judge of this Court (Ouko, J.A) dated 1st July, 2016. He also seeks an order of stay of all further proceedings in **H.C.C.C No. 84 of 2010** issued by the High Court on 20th November, 2015 to be vacated. This is for the sole reason that the said reference had not been made within the requisite time frame under the said Rule.

[2] Apparently, following the delivery of the judgment of the trial court (Angote, J.) dated 9th May, 2014 in **H.C.C.C No. 84 of 2010**, the respondent filed an appeal in this Court being **Civil Appeal No. 10 of 2015** challenging the said decision. Nonetheless, the appeal was struck out on the grounds that it had been filed out of time and for the omission of a primary document from the Record of Appeal. Subsequently, the respondent filed an application, being **Civil Application No. 58 of 2015** under **Rule 4** of the Rules seeking an extension of time within which to file a fresh Notice of Appeal and Record of Appeal. The application landed on Ouko, J.A's docket, who by a ruling dated 1st July, 2016 found that the respondent was undeserving of the exercise of the Court's discretion in its favour and dismissed the same with costs.

[3] It is also instructive to note that an order of stay of execution of all further proceedings in the High court was issued by the said court on 20th November, 2015 pending the hearing and determination of **Civil Application No. 58 of 2015**. Notwithstanding the dismissal of **Civil Application No. 58 of 2015**, the learned Judge of the High court declined to vacate the stay orders when the matter came before him on 5th September, 2016 simply because, as per the applicant, the respondent's advocate informed the court that the reference in issue had been lodged. According to the applicant, that was the first time he had heard about the said reference since neither he nor his advocate were served with the letter seeking the same.

[4] Consequently, upon making enquiries from this Court's registry, the applicant's advocate learnt that the respondent had requested for the reference on 13th July, 2016 vide a letter dated 8th July, 2016 which was never copied to them. It followed that the said reference had been made out of the stipulated seven days period from the single Judge's decision hence the Court was divested of jurisdiction to entertain the same. In addition, the applicant's position was that the pendency of the said reference barred him from enjoying the fruits of the judgment of the High court without any reasonable cause.

[5] In response, the respondent, through its Managing Director, Mr. Hans Juergen Langer, attributed the delay of filing the replying affidavit to the fact that both he and his wife, who is also a director, are resident in Germany. He went on to state that following the ruling by Ouko, J.A the respondent's advocate on record made an oral application for reference to the full Court as contemplated under **Rule 55** of the Rules.

Out of abundance of caution, the said advocate vide a letter dated 8th July, 2016 to the Registrar followed up on the oral application.

[6] The Registrar wrote back on 27th February, 2017 requesting for two more copies of the application to enable the matter to be placed before the full Court which copies were availed. As the respondent was waiting for further instructions from the Court, the applicant served its advocates with the current application. In conclusion, Mr. Langer implored the Court to dismiss the application on the ground that the intended appeal had very good prospects of succeeding.

[7] At the plenary hearing, **Mr. Mkombi** learned counsel for the applicant and **Mr. Ndegwa** learned counsel for the respondent respectively relied entirely on the written submissions on record and opted not to make any oral highlights. It was submitted on behalf of the applicant that no oral application for reference was made after the delivery of the ruling dated 1st July, 2016. Going by the provisions of **Rule 55**, a letter requesting for reference to the full Court should have been lodged on or before 8th July, 2016. As a result, the letter requesting for reference which was received by the Court on 13th July, 2016 was without doubt out of time.

[8] Submitting on the effect of non-compliance with **Rule 55** reference was made to the case of **Charles Onyinge Abuso vs. Kenya Ports Authority & Another [2018] eKLR** wherein the Court held:

“Rule 55 is clear and needs no amplification. Even if we were to deem the route followed to get the application before us proper, the application was filed outside the 7 days prescribed under Rule 55 of the Rules. This was not a simple infraction or oversight which can be overlooked. Nor was it a simple case of non-compliance with Rules of the procedure. It flouted substantive law because as stated, the application itself was filed outside the 7 days within which the letter seeking reference should be sent to the Registrar of the Court. The procedure was improper and even if the Court was to close its eyes and assume that the procedure could be countenanced, the court would still not have jurisdiction because the application was out of time and no extension of time was sought.

That being the case we are not persuaded that we should go into the substantive merits of the application itself. Our finding is that this application is irredeemably incompetent and the only option open to the court is to dismiss it. We order that it be and is hereby dismissed with costs to the 1st respondent.”

Consequently, the reference in question was futile and susceptible to instant dismissal. The applicant went further to suggest that the reference was aimed at frustrating him from realizing the fruits of his judgment. Taking us through the background of the application before us, the applicant contended that the substratum of the stay orders in the High court was lost after the dismissal of **Civil Application No. 58 of 2015**. The applicant went on to submit on the demerits of the reference in a bid to convince us to vacate the stay orders.

[9] On its part, the respondent argued that the application before us is premised on the erroneous contention that the reference was filed out of time. It was clear from the replying affidavit sworn on behalf of the respondent that immediately after delivery of the ruling dated 1st July, 2016 the respondent’s counsel made an oral application for reference of the ruling in issue to the full Court which was in line with **Rule 55(1) (b)**. The letter dated 8th July, 2016 to the Registrar of this Court which the applicant relies on was lodged out of abundance of caution and as a follow up to the oral application. In any event, there was no indication by the Registrar of the Court that the application was lodged out of time as envisioned under **Rule 12** of the Rules. On the stay orders, the respondent’s response was that this Court lacks jurisdiction to entertain the prayer to vacate the orders because the High court was still seized of the matter and as such, only the High court could grant the order in question.

[10] We have considered the application, submissions by counsel and the law. The issue before us relates to the competency as opposed to the merits of the reference by the respondent. The applicant believes that the reference was filed out of time. It is common ground that time lines fixed by Statute or subsidiary legislation made thereunder are of essence since they are designed to achieve an intended purpose and outcome, that is, not only do they ensure procedural order and certainty within the judicial system, but also advance a just, uniform and efficient dispensation of justice. It is for that reason that courts advocate for strict compliance with such time lines. This much was appreciated by this Court in **Municipal Council of Mavoko vs. Aristocrats Concrete Company Limited [2015] eKLR**.

[11] Was the reference filed out of time, and if so was it a nullity? The answer to that question lies within the provisions of **Rule 55 (1)(b)** of the Rules which stipulates:

“55

(1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—

a) ...

b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.” [Emphasis added]

It is clear that a party can make an application for reference against the decision of a single Judge either orally at the time the decision in issue is given or thereafter by a letter to the Registrar within seven days of the decision.

[12] In this case, the respondent claims that its advocate made such an oral application on 1st July, 2016 when the ruling by Ouko, J.A was delivered and that he later lodged a letter in Court on 13th July, 2016 which was a follow up to the oral application. On the other hand, the

applicant is adamant that the respondent did not make an oral application but requested for reference through a letter. The letter in issue reads in part as follows:

“ ...

The ruling in the above matter was delivered on 1st July, 2016 by the Honourable Ouko, J.A.

The Applicant being dissatisfied with the decision of the Honourable Ouko, J.A hereby applies to have the decision of the single Judge, varied, discharged or reversed by the Court.

We made an application informally at the time of delivery of the ruling which was delivered by the Honourable M’noti, J.A and this letter serves as a follow up to that application.

You quick action will be appreciated.”

[13] In our view, apart from the said letter more was needed to establish that indeed such an oral application was made taking into account that the same is disputed by the applicant. Additionally, our own perusal of the Court proceedings of 1st July, 2016 in **Civil Application No. 58 of 2015** does not reveal that such an oral application was made because it was not recorded. Consequently, we agree with the applicant that there was no oral application as alluded to by the respondent.

[14] This means that the letter requesting a reference before a full Bench of this Court should have been filed within seven days of the single Judge’s ruling, that is, on or before 8th July, 2016. It follows therefore that a letter which was lodged in this Court on 13th July, 2016 by the respondent’s advocate was filed out of time without leave of the Court hence the only option available to us is to strike it out having been filed out of time without leave.

[15] On the issue of vacating the stay orders, we find that allowing such orders, let alone entertain the said prayer would be tantamount to groping in the dark. This is because in as much as it is not in dispute that **Civil Application No. 58 of 2015** was dismissed, we have no way of verifying this save for the applicant’s allegation, that the High court refused to vacate the orders, in the face of the reference. If that be the case, the best recourse for the applicant is to seek for its vacation now that there is no reference.

[16] Accordingly, for the reasons outlined herein above the application partially succeeds. We hereby strike out the reference made by the respondent vide the letter dated 8th July, 2018 and lodged in this Court on 13th July, 2016. We direct each party to bear its own costs.

Dated and delivered at Mombasa this 15th day of November, 2018

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR