



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL (APPLICATION) NO. 49 OF 2018

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

VERSUS

MAUR ABDALLA BWANAMAKA.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court at Malindi (Hon. Chitembwe, J.) delivered on 17th July, 2017

in

Malindi H.C. Constitutional Petition No. 17 of 2015.)

JUDGMENT OF THE COURT

[1] By an application dated 21st June, 2018, the respondent's key prayer *inter alia* is that 'the Notice of appeal and appeal filed herein is withdrawn under **Rule 82 (1) (a) of the Court of Appeal Rules** (the Rules).' The reasons advanced in support of this prayer are that the appellant failed to comply with the timelines set out under the Rules regarding the filing of the appeal, and as a result, the appeal that was filed out of time is thus incompetent. In an affidavit sworn by the respondent in support of the application, he deposes that on 19th July, 2017, the appellant applied for typed proceedings, which were duly prepared and ready for collection on 31st January, 2018.

[2] According to the respondent, the appeal should have been lodged by 31st March, 2018, or at the very latest, by 8th April, 2018. He pointed out that by a letter dated 7th February, 2018, he even informed the appellant that the proceedings were ready for collection, but the appellant still neglected to file the appeal in time. Consequently, the respondent claims that the Notice of Appeal should be deemed and indeed stood withdrawn by operation of law on 8th April, 2018.

[3] The respondent further posited that the appeal filed by the appellant on 3rd May, 2018, was lodged out of time and without leave of the court. He also added that the appellant had failed to include the last page of the typed proceedings; which bore the date when the proceedings were completed which was a blatant attempt to hoodwink the court regarding the date when the proceedings were ready. On this premise, the respondent argued that the appellant had failed to demonstrate candour before this Court and was thus undeserving of the exercise of this Court's discretion even if it were inclined to so grant it in any event.

[4] The application was opposed vide a replying affidavit sworn by the appellant's counsel, **Mr. Ahmed Jelle** on 6th September, 2018. The appellant's counsel was categorical that the impugned decision was delivered on 17th July, 2017, and a request for proceedings was made on 19th July, 2017. As to when the proceedings became ready, the appellant indicated that an application for stay of execution was made before the court below and it was while attending court to take the ruling on that application on 28th February, 2018 that counsel learnt from the court registry that the proceedings were ready. Upon getting that information, it was at that point in time that he paid and collected the same. He deposed that the appeal was subsequently filed on 3rd May, 2018 and that by law, the appellant had 60 days from the date, the Notice of Appeal was lodged to file the Record of appeal. In this case, the appellant said, it took 215 days for it to obtain the typed proceedings as evidenced by the certificate of delay issued by the Deputy Registrar.

[5] In addition to the statutory 60 days, period provided, the appellant argued that it had a total of 275 days from the date of the impugned ruling, to prepare and lodge the appeal. Further, the appellant urged the Court to take note of the fact that the computation of the 275 days should exclude the Court vacation which ran from 21st December 2017 to 13th January, 2018. Consequently, that since the appellant had 275 days within which to file appeal and excluding the vacation period, this brought the filing deadline to 18th May, 2018. The appellant contended that having filed the appeal on 3rd May, 2018, the appeal was well within time, as it was lodged 15 days prior to the statutory deadline. Regarding the allegation that the proceedings were ready for collection as early as 31st January, 2018, and that the respondent had duly communicated this fact to the appellant; the appellant argued that the duty to inform litigants that the typed proceedings are ready lies with the court and not the litigants themselves. Furthermore the only way time can be ascertained is by the certificate of delay which is issued by the court. Counsel urged the dismissal of the application, stating that the appellant was ready to prosecute the appeal which will bring the issues in controversy to a final conclusion and advance the cause of justice.

[6] The application was ventilated through written submissions, with oral highlights at the hearing. In his oral address as well as written submissions, **Mr. Muchiri** learned counsel for the respondent reiterated the respondent's position as stated above, adding that under **Rule 82 (1)**, the appellant was required to file the memorandum and record of appeal within 60 days of lodging the Notice of Appeal. Instead the Notice of Appeal was lodged on 25th July, 2017, and it was not until 3rd May, 2018 that the record of appeal was filed. Consequently, that the appeal herein was filed out of time and without leave of Court and should be deemed withdrawn. Citing the decision in the case of **Patrick Kiruja Kithinji v. Victor Mugira Marete; Meru CACA No. 48 of 2014**, counsel contended that an appeal filed out of time goes to the jurisdiction of the Court and deprives it of jurisdiction to entertain an appeal filed out of time without leave. He thus urged that the Notice of Appeal be deemed as withdrawn with costs to the respondent.

[7] For the appellant, learned counsel **Ms Malik** reiterated the contents of the replying affidavit, the written submissions and dismissed the instant motion as incompetent, because it was instituted against the provisions of **Rule 82 (1) of the Court Rules**. Counsel argued that the aforesaid Rule only sets out the timelines for filing of an appeal and has nothing to do with withdrawal of the Notice of Appeal. In addition, **under Rule 83**, the only time that a Notice of Appeal may be deemed withdrawn, is when an appellant has defaulted in instituting the appeal within the appointed time, which was not the case herein. According to counsel, the two Rules make no mention of striking out or withdrawal of an appeal; the only Rule which provides for withdrawal of an appeal being Rule 84 which requires such an application must be made within 30 days of service. This Rule was equally unavailable to the respondent given that the appeal was served upon him on 3rd May, 2018 and they were way beyond the time limit. Counsel concluded that the appeal herein was timeously filed and that the application is unmerited and should be dismissed with costs.

[8] **Rule 82 (1)**, upon which the respondent solely relied on, provides for institution of appeals and states as follows:

“Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

a) a memorandum of appeal, in quadruplicate

b) the record of appeal, in quadruplicate;

c) the prescribed fee; and

d) security for the costs of the appeal

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy. (Emphasis added)

[9] The import of this provision is that where no application for typed proceedings is made, the appeal must be instituted strictly within 60 days of lodging the Notice of appeal. However, where an application for typed proceedings is made, the time taken to compile the proceedings is exempted in the computation of the 60 days. This means that at the time the proceedings are being prepared, time ceases to run; to enable the parties and the court ascertain when this period was, the deputy registrar of the court below issues what is known as a certificate of delay, detailing the period of exemption.

[10] That said, the respondent herein contends that the appeal was filed outside the 60 day window and that the same should be deemed withdrawn under Rule 82 aforesaid. It is however notable that the said Rule does not provide for withdrawal of the Notice of Appeal or the Record of Appeal. As a matter of fact the Rule that provides for withdrawal of a Notice of Appeal is **Rule 83** which states as follows:

“Effect of default in instituting appeal:

If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served. (Emphasis added)

[11] It would thus appear that only a Notice of Appeal may be deemed withdrawn; and even then, it has to be apparent that appellant failed to institute the appeal within the appointed time set under Rule 82. In our view however, Rule 83 only provides for withdrawal of the Notice of Appeal, where the appellant has failed to lodge the appeal within the appointed time. This is distinct from the present scenario, which we opine would have best been catered for by Rule 84, as the record of appeal herein was duly filed. If at all the appeal was filed out of time as

contended by the respondent, Rule 84 avails the striking out of the appeal in its entirety. Therefore, the respondent ought to have moved this Court under Rule 84, citing the appellant's failure to take essential steps within the prescribed time. The failure to invoke the proper provision renders this application incompetent because as stated earlier, under Rule 82, this Court has no mandate to withdraw an otherwise competent Notice of Appeal.

[12] Having failed to move the Court under Rule 84, it is not open for us to address the question of whether the respondent would have succeeded under the said Rule or not, needless to state that the proviso to the said Rule requires such an application be made within 30 days from the date of the service of the notice of appeal or record of appeal as the case may be. This application was not made within 30 days and that explains why the applicant may have deliberately avoided to invoke Rule 84 altogether to circumvent that requirement.

[13] The above is one way of looking at the matter, we also need to address the issue of computation of time. In doing so, we appreciate that on 8th February, 2018 Mr. Muchiri wrote to counsel for the respondents informing them that the proceedings were ready for collection. This was a positive move by counsel for the applicant which we commend; however this was countered by a deposition by counsel for the respondent that he was informed by the court staff on 28th February, 2018 that the proceedings were ready when he paid for them and obtained a payment receipt bearing the said date, a certificate of delay that confirmed it took the court registry 275 days from 25th July, 2017 to 28th February 2018 to prepare and deliver the proceedings, which he annexed to the replying affidavit. We find the date certified and authenticated by court is the correct one from which the date of filing the appeal should be computed. If the position of Mr. Muchiri were to carry the day, he needed to authenticate it with a letter from the registry or a copy of the said proceedings. Otherwise this position can be taken advantage of by some unscrupulous parties to write to their opponents informing them the proceedings were ready while knowing they were not, just to use that letter to strike the appeal.

[14] Counsel for the respondent argued that the 60 days should be counted by adding the same to the number of days certified in the certificate of delay as having been taken to prepare and certify the record. By their calculation the respondent had a total of 275 days to file the appeal. They even faulted the Deputy Registrar of the High court for failing to take into account the December court recess which days are expressly excluded from computation of time under **Rule 3(e)** of the **Court of Appeal Rules**. Under the same Rule, Sundays and public holidays are referred to as excluded days in computation of time. Counsel maintained that that the record of appeal was filed within time. In this case if the excluded days were factored in, we find this appeal was filed within time and for this reason also the application to strike it out falls flat on its face.

[15] Accordingly, we are not persuaded that the notice of motion dated 11th February 2013 has any merit and in the circumstances we order it dismissed with costs to the respondent.

Dated and delivered at Mombasa this 6th day of December, 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