IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KOOME & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 297 OF 2014 (UR 221/2014)

BETWEEN

ELIZABETH WANJIKU MUCHAI …….... APPLICANT

AND

THE STANDARD LIMITED ……..…… RESPONDENT

(An application to strike out the Notice of Appeal dated 27th January, 2011 against the judgment of the High Court of Kenya at Nairobi (Rawal, J.) dated 17th January, 2011

in

H. C. C. C. No. 2148 of 1997)

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RULING OF THE COURT

1. ***Elizabeth Wanjiku Muchai (the applicant)*** has brought the notice of motion before us seeking *inter alia,* that the notice of appeal dated 27th January, 2011 and filed in this Court on 4th February, 2011 by the respondent be struck out. The application is anchored on the grounds that since the respondent filed the notice of appeal against the decision of the High Court, it had not taken any reasonable step to file the record of appeal. The delay was inordinate and prejudicial to the applicant.

2. The genesis of the application is that the applicant filed suit against the respondent being H.C.C.C. No. 2148 of 1997 seeking damages for defamation. The trial court entered judgment in favour of the applicant and awarded her damages to the tune of Kshs.5,500,000/=. Aggrieved with the entire judgment, the respondent filed the Notice of Appeal in question. Stay of execution of the decree arising therefrom was issued pending the filing and determination of the intended appeal. The stay was on the condition that the respondent paid part of the decretal amount being Kshs.2,047,890 and deposited the balance in a joint earning interest account held by the parties' advocates. Apart from compliance with the said conditions it seems that no other action was taken with regard to the intended appeal.

3. It is those circumstances that provoked the applicant to file the current application. In response, M/s Caroline Cheruiyot, a Senior Legal Officer of the respondent, deposed that the delay in filing the record was not attributable to the respondent. The respondent had requested for certified proceedings from the High Court within the requisite time frame, but the proceedings were not ready. She stated that the

respondent was keen in prosecuting the intended appeal. Moreover, the applicant's application was incompetent having been brought contrary to the proviso under ***Rule 84*** of the Court of Appeal Rules (the Rules).

4. When the application first came up for hearing on 28th May, 2015 it was adjourned with the consent of the parties. A consent order was entered in the following terms: -

> ***"By consent of the parties represented here by learned counsel Mugisha for the applicant and Werimo for the respondent, the application dated 17th November, 2014 is hereby adjourned for 45 days to enable the respondent's counsel take essential steps to procure the typed proceedings from the High Court, and to file a supplementary affidavit within 45 days outlining the steps taken to procure the said proceedings. Today's costs to the applicant."***

Be that as it may, it is apparent that when the application came up again for hearing before us on 6th February, 2017 the respondent's counsel had not filed the supplementary affidavit.

5. Mr. B. Mugisha, learned counsel for the appellant, submitted that the notice of appeal ought to be struck out because no substantive steps were taken to file the record of appeal. Pointing out that the respondent failed to comply with the above mentioned consent order, he argued that was an indication that the respondent was not keen to prosecute the intended appeal.

6. On his part, Mr. Limo, learned counsel for the respondent, urged that the respondent had written severally to the Deputy Registrar of the High Court requesting for the proceedings without any success.

7. We have considered the application, the grounds in support thereof, submissions and the law. In our view, the best starting point would be to address the competency or the lack thereof of the application. It is not in dispute that the application was brought pursuant to ***Rule 84*** of the Rules which stipulates that-

> ***"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.***
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> ***Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be. Emphasis added.***

8. It is on the basis of the said proviso that the respondent claims the applicant ought to have filed the application within three months of service of the notice of appeal. The Notice of Appeal was served on 16th February, 2011. Failure to do so rendered the application incompetent. This Court was faced with a similar situation in ***Lither Peter Muia & Another -vs- Zuena Ngando Kababu [2015] eKLR.*** It observed thus,

> ***"Mr. Mulwa relied on the decision of this Court in in C.Y.O.O. V R.O.O (supra) where the following passage appears:***
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> ***"The proviso to that rule [rule 84] sets a time limit for invoking it. It would be apparent, therefore, that on the face of it the motion itself was filed out of time and is liable to striking out."***
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> ***The notice of appeal in this case was lodged on 14th May 2009 and served on the advocates for the applicants on the same date. If the proviso to rule 84 is applicable in this case, it would mean that at the very latest the applicants should have filed the present application to strike out the notice of appeal on 14th June 2009, being 30 days from 14th May 2009.***

The ground on which the applicants have applied for the notice of appeal to be struck out is that the respondent has not instituted the appeal within the period prescribed under rule 82 of the rules of the Court. Given that the respondent has at least 60 days from the date of lodging the notice of appeal to institute the appeal by filing the record of appeal, an application to strike out a notice of appeal on the ground that the appeal has not been instituted cannot possibly be presented before the expiry of the permitted 60 days. Having served the notice of appeal on 14th May 2009, the applicant had up to 14th June 2009, without taking into account such time as may be excluded as having been required for preparation and delivery of a copy of the proceedings, to institute the appeal.

In other words, the 30 days restriction under the proviso to rule 84 cannot apply in the present circumstances. To hold otherwise would be tantamount to reducing the time permitted for filing the appeal under rule 82 of the rules of the Court. In our view, rule 84 cannot

apply to the circumstances of this case as it is intended to apply to situations where, for instance, it is contended that the notice of appeal has been lodged or served out of time or, where leave to appeal is required and has not been sought and obtained or where no appeal lies or where a step precedent to lodging the notice of appeal or appeal has not been taken. To that extent, the authority cited in support of striking out the motion, the C. Y. O. O. case (supra) is distinguishable.

Here, the applicants are seeking to strike out the notice of appeal on the grounds that the record of appeal has not been filed. A party cannot be penalized for failing to do something in 30 days when that party has at least 60 days within which to perform such act *(sic).*

Consequently there is no merit in the respondent's contention that the application is incompetent for having been filed outside the 30 days window permitted under the proviso to rule 84 of the rules of the Court." Emphasis added.

The above is on all fours with the situation before us. Consequently, the respondent's contention that the application is incompetent fails.

9. By virtue of ***Rule 82*** of the Rules, the record of appeal ought to be filed within 60 days from the date the Notice of Appeal is lodged. The rule also provides that in computation of the said period, the time which is taken to prepare proceedings ought to be taken into account. Our understanding is that the said provision does not in any way advocate that once a party writes a letter requesting for the court proceedings, he/she should sit down and relax. In as much as it is the court's duty to avail proceedings, a party ought to be diligent in following up the same. Follow up, in our opinion, amounts to reasonable steps being taken by a party. Perhaps, that is why the parties in the consent order agreed for the respondent's counsel should file a supplementary affidavit setting out the steps he had taken to obtain the proceedings.

To us, failure to file such an affidavit almost two years after the consent was recorded is not indicative that the respondent had taken reasonable steps or at all to obtain the proceedings. We therefore find the respondent has not taken any reasonable steps to file the record of appeal within the requisite time frame.

10. The upshot of the foregoing is that we allow the application with costs to the applicant. The Notice of Appeal dated 27th January, 2011 and filed before this Court on 4th February, 2011 is hereby struck out.

Dated and delivered at Nairobi this 3rd day of March, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

……..…..…..…

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR