IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU, KANTAI, JJ.A.)

CIVIL APPEAL (APPLICATION) NO.85 OF 2011

BETWEEN

OCEANFREIGHT TRANSPORT CO. LTD.....APPLICANT/RESPONDENT

AND

PURITY GATHONI GITHAE…….....1ST RESPONDENT/APPELLANT

SAMUEL KAMAU MACHARIA.....2ND RESPONDENT/APPELLANT

(Application to strike out the Record of Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Rawal, J.), dated 23rd October, 2001 in **H.C.C.C. No. 3958 of 1991**

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RULING OF THE COURT

1. On 23rd October, 2001, the High Court (Rawal, J.), delivered a judgment in High Court Civil Case No.3958 of 1991 in which the court allowed an application filed by **Oceanfreight Transport Company Limited** (hereinafter referred to as the "applicant"), for summary judgment against **Purity Gathoni Githae** and **Samuel Kamau Macharia** (hereinafter referred to as "the 1st and 2nd respondent" respectively)

2. Being dissatisfied the respondents filed a notice of appeal on 29th October, 2001, expressing their intention to appeal the whole judgment of the High Court. On 6th May, 2011, the respondents filed a record of appeal and the appeal was numbered Civil Appeal No. 85 of 2011.

3. On 13th June, 2011, the applicant, upon being served with the record of appeal, filed a notice of motion dated 9th June, 2011. The motion sought orders under **Rule 84** of the Court of Appeal Rules, 2010, and **Sections 3A** and **3B** of the Appellate Jurisdiction Act that:

> a. the memorandum of appeal and record of appeal lodged by the appellants in this Court on the 6th day of May 2011 be struck out.
>
> b. the costs of this application and costs of the appeal be awarded to the applicant.

4. The applicant's motion was anchored on grounds stated on the motion and an affidavit sworn by **Livingstone Ndung'u Waithaka**. In a nutshell, the applicant contended that the respondents had filed their appeal after an inordinate and inexplicable delay of more than nine years. Under **Rule 82** of the

Court of Appeal Rules an appellant is required to file his appeal by lodging the memorandum and record of appeal within 60 days, but the respondents had lodged their memorandum and record of appeal after several years, and the applicant maintained that the delay was not excusable even taking into account the maximum period of 211 days that was certified by the Registrar of the Court, as necessary for the preparation of the court proceedings. The applicant maintained that the typed record of proceedings was ready and available for collection on 23rd May, 2002, and that the respondents have no excuse for their indolence in filing the appeal.

5. The respondents objected to the motion through a replying affidavit sworn by the 2nd respondent on 5th July, 2011. The grounds upon which the motion was opposed includes: that it offends the rule of law doctrine and the principle of law that states that a party who has no right has no remedy; that the application is founded on wrongs committed by the applicant in extracting an illegal decree and usurping the court's function of supplying proceedings to parties; and that the application is inimical to the overriding objective, and the principle under **Article 159(2)(d)** of the Constitution that requires the court to apply substantive justice, and to hear appeals undeterred by technicalities.

6. During the hearing of this appeal, the applicant was represented by Mr. Raiji instructed by the firm of Maina Murage & Company Advocates, while the respondents were represented by Dr. Kamau Kuria instructed by the firm of Kamau Kuria & Kiraitu Advocates. Pursuant to directions given by the Court, and in concurrence with the parties' counsel, hearing of the appeal proceeded by way of written submissions that were duly filed and exchanged by the parties and highlighted in Court.

7. The application before us has a somewhat convoluted history. Pursuant to the judgment delivered on 23rd October, 2001, a decree was issued by the High Court on 29th November, 2001. The decree was in favour of the applicant for Kshs.500,000/= together with interest at 19% per annum, compounded monthly from the 6th day of December, 1986 until payment in full.

8. By a notice of motion dated 28th February, 2002, filed in the High Court, the applicant sought interpretation of the judgment of the High Court dated 23rd October, 2001, in regard to the order for payment of interest. This was because the learned judge had entered judgment for the applicant "as prayed in the plaint", and the applicant wanted confirmation that it was entitled to interest a**t** the rate of ***"19% per annum compounded monthly from the 6th day of December, 1986 until payment in full"***, as had been prayed for in the plaint. That application was opposed by the respondents who maintained that the ruling was silent on the payment of interest and this implied that the specific prayer for interest was refused and/or denied.

9. Our perusal of the record has not revealed the outcome of the notice of motion dated 28th February, 2002. Nonetheless, the decree dated 29th November, 2001 is certified by the Deputy Registrar of the High Court and confirms that judgment was issued together with interest at 19% per annum compounded monthly as prayed for in the plaint.

10. The respondents did not satisfy the decree, and the applicant initiated execution proceedings under **Order 21 Rule 7** and **32** of the Civil Procedure Rules, by applying for a notice against the respondents to show cause as to why they should not be committed to civil jail. This was resisted by the respondents through a notice of motion dated 11th December, 2002, in which the respondents applied for declaration under **Sections 72, 73, 74, 77** and **84(1)** & 2 of the former edition of the Constitution, contending that the intended arrest and committal to civil jail would be a violation of their constitutional rights. The respondents' application was however rendered moot when the applicant withdrew its application seeking to have the respondents committed to civil jail.

11. In 2008, as the judgment debt remained unsatisfied, the applicant issued bankruptcy notices against the respondents in Bankruptcy Notices Nos. 3 and 4 of 2008 in the High Court at Nairobi Commercial and Tax Division Milimani, demanding payment of the decretal sum in HCCC 3958 of 1991 which then stood at Kshs.29,334,170/= together with interest. The respondents filed an affidavit seeking to have the bankruptcy notices set aside.

12. On 27th May, 2008, the respondents' application to set aside the bankruptcy notices was dismissed, and the applicant was granted leave to proceed with the bankruptcy proceedings. The respondents filed an appeal in this Court and sought orders for stay of further proceedings with regard to the bankruptcy notices. On 16th October, 2009, this Court dismissed the respondents' application for stay of proceedings.

13. By a notice of motion dated 1st March, 2010, the respondents moved the High Court in Civil Application No.3958 of 1991, for orders to have a different firm of advocates come on record to represent them, with a view to pursuing a notice of motion for setting aside the decree issued on 29th November, 2001, or in the alternative, review of the decree. Rawal, J. (as she then was), who heard the application dismissed it on 19th April, 2010, noting that the decree had already been recognized as valid by several courts.

14. In the meantime the applicants had filed bankruptcy causes against the two respondents in Bankruptcy Cause No.25 and 26 of 2009 that were consolidated. The applicant sought to have orders of receivership issued against the respondents for their inability or refusal to pay the decretal sum in HCCC No.3958 of 1991. The Bankruptcy Cause was heard by Koome, J. (as she then was). In a judgment delivered on 28th January, 2011, Koome, J. found that the respondents had not appealed the judgment of the High Court delivered on 23rd October, 2001 in HCCC No.3958 of 1991, and that the judgment remained unsatisfied as efforts by the applicant to execute the judgment had not been successful. The learned judge therefore, issued a Receiving Order against the respondents, directing that the estates of the respondents be placed under receivership.

15. It is instructive to note that the respondents filed their record of appeal against the judgment of the High Court delivered on 23rd October, 2001, on 6th May, 2011, that is, after the judgment of Koome, J. In its submissions, the applicant maintains that the appeal ought to be struck out as it was filed way out of time and in contravention of **Rule 84** of the Court Rules; that the Certificate of Delay that purports to show that it took 9½ years to prepare and deliver proceedings to the respondents, was a falsified document; that the true position was that the proceedings were ready for collection and could with due diligence have been obtained by the respondents on 23rd May, 2002; that the respondents have been in possession of the court proceedings since 23rd May, 2002 when the applicant delivered a copy of the proceedings to their lawyer; that the respondents had in fact used copies of these proceedings in the bankruptcy cases; and that the respondents have no good reason for their inordinate delay in filing the record of appeal.

16. In addition, it was argued that the respondents' appeal cannot be saved under the oxygen principle or the obligation of the court to give weight to substantive justice as provided under **Article 159(2)(d)** of the Constitution, given the manner in which the respondents have conducted themselves, to wit: their indolence and failure to lodge their appeal for over nine (9) years; their dishonesty in coming to court with a falsified Certificate of Delay; their failure to follow up on the court proceedings; their failure to pay for and obtain court proceedings; and their temerity and affront in maintaining that the court could not use the proceedings that the applicant had magnanimously given to the respondents' lawyer. The Court was urged to bring this matter to closure by striking out the respondents' record of appeal.

17. In opposing the applicant's motion, the respondents contended that the applications were an abuse of the process of the court, for the reason that **Rule 82** of the Court Rules requires that an appeal be filed within 60 days, but provides that where proceedings are not supplied in time, the period taken by the court to prepare the proceedings must be deducted; that the record of appeal is always accompanied by a certificate of delay that explains why the appeal was not filed within 60 days; that although the respondents applied for proceedings on 24th October, 2001, the proceedings were supplied by the court on 7th March, 2011; that the applicant's motion merely seeks to avoid the overriding objective of the Court Rules which is to facilitate a just, expeditious, proportionate and affordable resolution of the dispute.

18. The respondents criticized the applicant for using the motion in order to avoid having the illegal decree that it extracted in November, 2001, challenged; and indirectly attacking the respondents' Civil Appeal No.62 of 2011; they maintained that the applicant obtained an illegal decree and ought not to

benefit from it by basing its application on its own wrongdoing; that **Rule 4** of the Court of Appeal Rules provides a window for the respondents to be heard; and that the decree extracted by the applicant was a nullity as the Deputy Registrar of the High Court has no powers under **Order 20** of the former Civil Procedure Rules to approve a decree which does not agree with the judgment delivered by the superior court.

19. The respondents summarized their submissions as anchored on the principles that the applicant's motion offends the rule of law doctrine and the principle of law which states that a party who has no right has no remedy; that it is settled law that the certificate of delay issued by the High Court provides the time within which an appeal should be filed and there is no basis for the court not acting on the certificate of delay relied upon by the respondents; that the applicant has not only founded its application on its own wrongs by relying on an illegal decree but has also usurped the court's function of supplying proceedings to parties; that the focus of the court should be to do substantive justice undeterred by technicalities in accordance with the overriding objective principle.

20. Referring to the ruling delivered on 23rd October, 2001, the respondents maintained that the ruling is significant because no interests in respect of the period before the suit filed by the applicant could be granted as there was no substantive agreement between the parties. The Court was urged to exercise its inherent jurisdiction in setting aside the decree that was signed by the Deputy Registrar. In this regard, the respondent relied on ***Nyeri Civil Appeal No.52 of 2005 Highway Furniture Mart Limited v Permanent Secretary, Office of the President***.

21. The respondents maintained that the decree signed by the Deputy Registrar contained a mistake as the court did not award interest at 19% per annum compounded monthly. The respondents drew the Court's attention to its Civil Appeal No.62 of 2011 in which the illegal decree had been challenged. ***Nabro Properties v Sky Structures [2002] KLR 299*** was relied upon for the proposition that no party is allowed to base its claim on its own wrongdoing.

22. The respondents also relied on: ***Court of Appeal Civil Application No.177 & 178 of 2009 Ratemo Oira v Blueshield Insurance Company Ltd***, wherein it was held that when it comes to computation of the time within which an appeal should have been filed, the court will always rely on a certificate of delay unless salient and cogent reasons are given to challenge that certificate of delay.

23. In regard to the overriding objective principle, ***African Safari Club v Safe Rentals Court of Appeal at Nairobi Civil Application No.53 of 2010***, was cited in support of the contention that the court's approach to substantive justice has changed as it is concerned as much about procedure as it is about substantive justice. The Court's attention was drawn to the fact that the principal sum that was only Kshs.500,000/= in 2001 has skyrocketed to Kshs.34 million because of an illegal decree on which the bankruptcy proceedings were based. ***Civil Appeal No. (Application) 228 of 2013 Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and Others***, was cited and emphasis given to the following statement by Ouko, J.A.

> **"In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Section 3A and 3B of the Appellate Jurisdiction Act Cap 9 Laws of Kenya and later Article 159 (2)(d) of the Constitution of Kenya 2010 changed the position. The former provision introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the costs and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interest of justice before coming to a decision one way or the other. Article 159(2)(d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities or procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents."**

24. Finally, the respondents dismissed the submissions made by the applicant arguing that they were anchored on Court of Appeal Rules which ought to be in place and not the Rules that are actually in place.

25. Rule 82 of the Court Rules provides that an appeal is instituted by the lodging in the appropriate registry of a memorandum of appeal; a record of appeal; the prescribed fee; and security for the costs of the appeal, within 60 days from the date of lodging the notice of appeal. There is a proviso to this Rule, that where an appellant has applied for copies of the proceedings within 30 days of the decision sought to be appealed from, and has served a copy of the letter bespeaking the proceedings on the respondents, the court in computing the 60 days will exclude the period that is certified by the Registrar of the Court as required for the preparation and delivery of a copy of the proceedings.

26. Under **Rule 83** of the Court Rules, where a party has filed a notice of appeal but has failed to institute an appeal by filing the appropriate documents within the required period, he is deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party make an order that the appeal has been withdrawn. Of importance here is **Rule 84** of the Court Rules under which a person affected by an appeal or intended appeal may apply to the Court to strike out the notice of appeal, on the ground that no appeal lies if some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Such an application must however be made within 30 days from the date of service of the notice of appeal or record of appeal.

27. We have considered the application before us in light of the above Rules and the contending submissions made by the respective parties. It is not disputed that although the notice of appeal was filed four days after the judgment subject of the appeal, the respondents filed the record of appeal and memorandum of appeal more than nine years after the filing of the notice of appeal. The applicant has invoked **Rule 84** of the Court Rules, contending that the record of appeal has been filed after inordinate and inexplicable delay.

28. On their part, the respondents rely on a certificate of delay dated 5th May, 2011, that was allegedly issued by the Deputy Registrar of the High Court confirming that the respondents applied for copies of proceedings on 24th October, 2001, but was only supplied with the proceedings on 7th March, 2011, and that the period between 24th October, 2001 and 4th March, 2011 ought to be excluded from the computation of time, as the period was required for the preparation and supply of the certified copies of the proceedings. This is countered by the applicant who maintains that contrary to what is stated in the certificate of delay, the typed copies of proceedings were available to the parties by 23rd May, 2002, and that the applicant through his lawyers not only informed the respondents' advocate of the availability of the court proceedings, but also forwarded an uncertified copy of the said proceedings to the respondents' lawyers on the same day.

29. The issue that arises is whether the respondents' appeal was filed within the required period, as provided under **Rule 82.** In particular, whether the period from 24th October, 2001 to 4th March, 2011 ought to be excluded from the computation of time, or whether the respondents' appeal ought to be struck out as having failed to comply with **Rule 82** of the Court Rules.

30. In support of its arguments that the certificate of delay dated 5th May, 2011, is fallacious and ought not to be relied upon in the computation of time, the applicant annexed a copy of a receipt dated 23rd May, 2002, for Kshs.540, issued to the applicant's advocate by the trial court for payment for certified copies of the proceedings. The applicant also availed a copy of a letter from his advocate dated 23rd May, 2002 addressed to the respondents' advocate, advising of the availability of the copies of the proceedings and forwarding uncertified copies of proceedings to the respondents' advocate.

31. The respondents do not deny having received the uncertified copies of proceedings, but maintains that the typing and supply of proceedings are duties of the court, and that the applicant could not usurp the court's duty and purport to supply the respondents with copies of proceedings. We find this contention untenable. If the respondents were indeed concerned about pursuing their appeal, it mattered not that the typed proceedings did not come to them directly from the court. What was important was the information that the proceedings had already been typed and were available in court. Acting on that information, the

respondents could have obtained immediately from the court certified copies of the proceedings and not waited for 9 years.

32. In ***Ratemo Oira T/A Ratemo Oira and Company Advocate v Blueshield Insurance Company Limited [2010] eKLR***, this Court considered the issue of computation of time within which an appeal should be filed and reliance on the certificate of delay. We reiterate that a certificate of delay provides evidence to the court that a delay in a particular period was necessitated by the typing and supply of proceedings. Like any other evidence before the Court such evidence can be challenged if in fact the period of delay was not necessary for the typing of proceedings. In this case, the applicant has produced clear evidence that by 23rd May, 2002, the proceedings had in fact already been typed. Therefore, there is no way that the period 24th October, 2001 to 4th march, 2011, could have been necessary for the preparation and typing of proceedings that were already typed by 23rd May, 2002.

33. While we appreciate that the respondents were under no obligation to use the uncertified proceedings forwarded to them by the applicant's advocate, we fail to understand why the respondents were unable to obtain proceedings from the court when the same were in fact available. The period of nine years that it took for the respondents to obtain the proceedings is not excusable, as it is clear that the respondents could with due diligence have obtained the proceedings shortly after 23rd May, 2002, when they learnt of the availability of the proceedings. It is inconceivable, unfair and unjust that a party who had information that typed proceedings were available in the court but failed to act on that information, should use a certificate issued under **Rule 84** of the Court Rules to delay the filing and disposal of an appeal by simply failing to pursue the proceedings. Clearly, this Court cannot be blind to the fact that the certificate of delay dated 5th May, 2011, did not reflect the true position as the proceedings had already been typed by 23rd May, 2002, and could have been collected by the respondents. Definitely, the period 23rd May, 2002 to 5th May, 2011, almost nine years before the filing of the record of appeal was not necessary for the preparation and supply of certified copies of the proceedings and to this extent the certificate of delay is fallacious and cannot be relied upon.

34. The respondents sought to rely on **Article 159(2)(d)** of the Constitution and the overriding objective in civil litigation as provided under **Section 3A** and **3B** of the Appellate Jurisdiction Act. These provisions focus on the achievement of substantial justice in civil litigation. We reiterate what Ouko, J.A. stated in ***Civil Appeal (Application) 228 of 2013 Nicholas Kiptoo arap Korir Salat v IEBC & others*** (Supra), that neither the Constitution nor the Appellate Jurisdiction Act advocates for countenance of procedural impropriety, but:

> ***"The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents."***

35. The delay of more than nine years has not been explained by the respondents. The laxity of the respondents in pursuing this appeal coupled with the respondents' failure to seek extension of time for the filing of the record of appeal, until the applicant filed its motion, does not justify the Court ignoring clear rules of the Court. The prejudice that has been suffered by the applicant in waiting to realize a decree for almost sixteen years is evident from the escalation of the decretal sum. In the circumstances, it would neither be just nor fair to exercise our discretion in the respondents' favour.

36. The respondents took issue with the decree signed by the Deputy Registrar maintaining that the same was illegal as it did not correctly reflect the judgment delivered by the Court. This is not an issue for determination in this application. The respondents had the opportunity to raise the issue in the High Court. Indeed, the applicant provided the opportunity by not only filing a motion dated 28th February, 2002 for interpretation of the judgment of the court, but also forwarded drafts of the decree to the respondents for approval. We do not therefore find it appropriate to delve into the issue.

37. It is clear that there has been a lot of litigation between the parties anchored on the judgment of 23rd October, 2001. While we appreciate that the respondents had the right to pursue whatever remedy they deemed appropriate, the respondents had the obligation to take appropriate action to protect their

interests. Much as the respondents have challenged the decree arising from the judgment of 23rd October, 2001, claiming that it has skyrocketed to an unreasonable level, the respondents did not take any action to avert the escalation of the interest by depositing the principal amount in court, or in an interest earning account.

38. We come to the conclusion that the certificate of delay dated 5th May, 2011, relied upon by the respondents does not give a true reflection of the time taken in the preparation and supply of proceedings of the trial court, and therefore, the respondents have not complied with **Rule 84** of the Court Rules in filing their record of appeal. The respondents have also shown by their conduct that they have no reasonable excuse for the inordinate delay except to prolong litigation in this matter and delay the course of justice. There is no reason why this Court should stand in the way of justice for a party who has been holding an unsatisfied decree for almost sixteen (16) years.

39. Accordingly, we allow the applicant's motion dated 9th June, 2011, and strike out the memorandum and record of appeal lodged by the appellant on 6th May, 2011. We award the costs of this application and costs of the appeal to the applicant.

Those shall be the orders of this Court.

Dated and delivered at Nairobi this 29th day of September, 2017

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR