



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: NAMBUYE, MUSINGA & OUKO, JJA)
CIVIL APPLICATION NO. 44 OF 2017 (UR 34 OF 2017)

BETWEEN

KENYA UNION COMMERCIAL, FOOD

AND ALLIED WORKERSAPPLICANT

AND

KEROCHE INDUSTRIES LIMITED.....1ST RESPONDENT

LAKE NAIVASHA BREWERY LTD.....2ND RESPONDENT

JOSEPH KARANJA.....3RD RESPONDENT

TABITHA MUIGA.....4TH RESPONDENT

(Application from the Ruling of the High Court of Kenya at Nairobi (Nzioki wa Makau, J.) Dated 11th November, 2012 in Industrial Cause No. 772 of 2010)

RULING OF THE COURT

Before the Court is a Notice of Motion dated the 21st day of February, 2017. It is brought under **Article 159 (2) (a) and (b)** of the Constitution, sections **3** and **3A** of the Appellate Jurisdiction Act Cap 9 Laws of Kenya and all the inherent powers of the Court. The substantive prayer seeks leave of this Court to strike out the notice of appeal dated and lodged on the 24th day of December, 2012 intending to appeal against the whole of the judgment of the Industrial Court (Now Employment and Labour Relations Court) (**Nzioki wa Makau, J.**) delivered on the 11th day of November, 2012. The rest of the prayers dealing with the release of sums deposited as security for the conditional order of stay of execution granted by the Court below as well as the attendant request for leave to execute fall outside the ambit of our mandate and will not therefore form part of the reasoning and the outcome of this ruling.

The application is supported by the grounds on its body and a supporting affidavit. It is unopposed.

On the hearing date, **Mr. John O. Owiyo** appeared for the applicant, while there was no appearance for the firm of **Mirugi Kariuki & Company Advocates** who are on record for the respondents. Although there was no evidence of service of the hearing notice on the said firm by the Court's registry, the Court accepted and was satisfied with a Return of Service filed on the 24th day of September, 2017, on behalf of the applicant by a process server, **Mr. Peter Mwangi Njoroge**, which indicates clearly that the said firm was served on the 12th day of September, 2017 with a hearing notice for the hearing of the application under review. Being satisfied that the respondents had due notice of the hearing date, we allowed **Mr. Opiyo** to prosecute the application exparte.

In his submissions, **Mr. Owiyo** reiterated the contents of the grounds in the body of the application and the supporting affidavit, that on the 11th day of November, 2012, the court below entered judgment in favour of the applicant as against the respondents in the sum of Kshs. 2,200,000; that the respondents were aggrieved and filed a notice of appeal dated and lodged on the 24th day of December, 2012 intending to appeal against the whole of the said judgment; that the respondents applied for typed copies of the proceedings on the 17th day of December, 2012 for purposes of pursuing the intended appeal; that the respondents were informed by the Deputy Registrar, the court below on the 15th day of December, 2015 that the proceedings were ready for collection subject to payment of the requisite copying charges; and that it was not until the 19th day of February, 2016 when the respondents collected the proceedings, while the certificate of delay was collected on the 23rd of May, 2016.

Mr. Owiyo continued to urge further that the respondents had sixty (60) days within which to lodge a record of appeal in accordance with the Rules of the Court, either from the date they collected the typed copy proceedings from the court, that is the 19th February, 2016 or alternatively from the date when they were issued with the certificate of delay, which was on the 23rd May, 2016; that sixty days from either of those dates lapsed long time ago; that the respondents were further put on notice of the need for them to expedite the progression of the intended appeal if they still so desired, when they were served with the application under review on the 3rd day of April, 2017 to which no response was filed. **Mr. Owiyo** therefore urged us to find that, from the respondents' conduct displayed above, they (respondents) appear to have lost interest in the pursuit of their intended appeal; that the continued pendency of the impugned notice of appeal is an impediment in the execution of the decree issued in the applicant's favour. On the totality of the above, **Mr. Owiyo** urged us to allow the application with costs.

We have considered the record before us in light of the sole submissions of **Mr. Owiyo** as well as the applicable Rules of the Court that guide the exercise of our mandate with regard to the application under review. We are alive to the fact that our invitation to intervene has been invoked under **Article 159 (2) (a)** and **(b)** of the Constitution, both of which enjoin us to render justice to all irrespective of status and without delay, **section 3** of the **Appellate Jurisdiction Act** (supra) which donates the jurisdiction of the Court, and **section 3A** of the same Act which enshrines the overriding objective principle of the court. Although the application is undefended, it is our duty to satisfy ourselves that it meets the threshold for the relief sought, which is to strike out the notice of appeal filed herein.

The judgment intended to be impugned was delivered on the 11th day of November, 2012. **Rule 75 (1) and (2)** of the **Rules** of the Court obligated the respondents to lodge a notice of appeal within 14 days of the delivery of the said judgment, which 14 days from the 11th November 2012 fell on the 25th day of November, 2012 or thereabout. From the face of the notice of appeal on record, it was not until the 24th day of December, 2012, almost one month after the expiry of the stipulated 14 days, that the said notice of Appeal was filed therefore out of time and without leave. **Rule 75 (1) and (2)** provides as follows:-

“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal”.

From the above provision, the notice of appeal sought to be struck out was hopelessly filed out of the time stipulated in **Rule 75 (1) and (2)** of the Rules of the Court and without leave and is therefore incompetent, null and void *ab initio*. See **MacFoy versus United African Co. Ltd [1961] 3 ALLER 1169**.

The above finding disposes of the application, but for purpose of the record only, we wish to add that rule 82 of the Rules of the Court required the respondents to apply for a copy of the typed proceedings for purposes of appeal within thirty 30 days from the date of the judgment, which fell on the 11th day of December, 2012. It was not until the 17th day of December, 2012 when the proceedings were applied for. This was six (6) days after the expiry of the stipulated period. Whereas the non compliance with rule 82 of the Rules of the court may be taken as a mere procedural technicality, curable under Article 159 of the Constitution or which the court itself in the exercise of its inherent power may excuse for ends of justice to be met to both parties, the failure to comply with rule 75 (1) & (2) (supra) is a core issue as it forms the foundation stone of the appellate process to this Court. The failure to comply with this rule was fatal to the respondent's appellate process which therefore stands vitiated.

May we also express our displeasure at the conduct displayed by the respondents in an apparent initiation of the purported appellate process solely for purposes of inconveniencing and causing hardship to the victorious party in the litigation between them. May we remind them that the appellate process of this Court exists solely for the vindication of the rights of serious litigants, of which the respondents do not appear to be such serious litigants by the show of their conduct. It is therefore our duty to relieve both ourselves and both parties on board of the pendency of this appellate process. (See **Sofitra Limited & Another versus Alice O. Alukwe & 2 Others [2016] eKLR**).

In the result, and for the reasons given above, we find merit in the application under review which is bound to succeed. The order that commends itself in the circumstances is an order striking out the said purported notice of appeal. We therefore order that, the purported notice of appeal dated and lodged on the 24th day of December, 2012 out of time and without leave of court, be and is hereby struck out. The applicant will have costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR