



IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI, & MWILU, J.J.A.)

Civil Application No. Nai 85 Of 2014

BETWEEN

PICKWELL PROPERTIES LIMITED.....APPLICANT

AND

KENYA COMMERCIAL BANK.....RESPONDENT

(An application to strike out a Notice of Appeal in an intended appeal from the decision of the High Court of Kenya at Nairobi (Ogolla, J.) delivered on

20th March 2013

in

H.C.C.C 544 OF 2011)

RULING OF THE COURT

1. Pickwell Properties Limited, (hereinafter referred to as **“the applicant”**) lodged in this court on 17th April 2014 an application by notice of motion dated 9th April 2014 seeking orders that –

“the Notice of Appeal herein dated 21 March 2013 be struck out AND the costs of and incidental to this application be paid by the Respondent to the Applicant.”

2. The background to the application is not complicated. The applicant was the respondent’s landlord in the business premises known and styled **“Shankdardass House”** in the City of Nairobi standing on Land Reference No.209/4283 (hereinafter referred to as **“the suit premises”**). The respondent carried on banking business on the ground and Mezzanine floors of the suit premises from November 1993. The terms of the tenancy were agreed on in writing and they included payment by the respondent of rent to the applicant and its mode of payment as well as the obligations of each party to the other.

3. In the year 2005, the respondent gave notice that it would not renew the lease upon its expiry on 14th December 2005. However, the respondent did not vacate the suit premises on 14th December 2005. Instead, it continued in possession until October 2006 when it removed the remaining fixtures and equipment and then gave vacant possession of the suit premises to the applicant.

4. A dispute ensued regarding rent. The applicant alleged that in breach of the terms of the tenancy, the respondent failed to pay rent for the period from December to 31st October 2006.
5. The dispute resulted in the applicant filing against the respondent suit No.544 of 2011 in the High Court in the Commercial and Admiralty Division at Milimani, Nairobi. The dispute was determined by the court on 20th March 2013 in a judgment in which the respondent was ordered to pay unpaid rent amounting to Shs.32,113,291/= and interest on delayed rent and interest.
6. Aggrieved by the said decision, the respondent gave notice of appeal on March 2013 of its intention to appeal against the whole of the said decision.
7. It is the said notice of appeal that the applicant seeks in its notice of motion dated 9th April 2014 to have struck out.
8. In the notice of motion, the applicant averred in an affidavit sworn by Sheetal Kapila on 9th April 2014 in support of the application that the record of appeal was not filed within 60 days from the date of the filing of the notice of appeal and that it has not been filed even though more than one year has elapsed.
9. In paragraphs 7, 9 and 10 the deponent of the affidavit in support of the application states:-

“7. Judgment was delivered in favour of the Applicant on 20th March 2013, and the Respondent filed a Notice of Appeal on 21 March 2013. The respondent also applied for a copy of the proceedings on the same date. I annex hereto copies of the said judgment, the said Notice and the said letter and mark them „SK2?, „SK3? and „SK4?.

9. It is apparent that the Respondent is relying on the proviso to rule 82 to justify its dilatory conduct, but as all the material proceedings were in writing and are in the court?s file, it is evident that the proviso is not available to the respondent.

10. I wrote to the Respondent?s advocates on 22nd January 2014 to alert them that they were out of time in filing their Record of Appeal; I informed those advocates that I would make an application to strike out their Notice of Appeal if the Record had not been filed within 60 days of my letter. They did not reply, and that period has now expired. I annex hereto a copy of the said letter and mark it „SK5?.

10. The respondent filed on 20th August 2015 an affidavit sworn by Peter Munge Murage in reply to the application in which the deponent averred that the respondent had duly given a notice of appeal and applied on 20th March 2013 for a typed copy of the proceedings but the court Registrar gave information that the court file had gone missing and consequently the respondent applied for reconstruction of the court file on 15th October 2014 which was not opposed.

11. The application for reconstruction of the file was scheduled to be heard on 5th November 2015 when the Court informed the parties that the file had been traced.

12. The respondent stated in its paragraphs 7,8, and 9 thus –

“7. The Notice of Appeal seeking to be struck out was filed on the 21st March 2013, within the requisite set time of 14 days. Even though the matter was disposed of by way of written submissions at the High Court, parties highlighted their proceedings on the 30th January 2013. The highlighting of the proceedings was taken down by the Honourable Judge and it created the need to prepare proceedings.

8. The respondents who were represented by a different firm of advocates at the High Court were then served with the letter dated 9th April 2014, informing them that the proceedings were ready

for collection. The said letter was received by the Respondent?s on the 23rd April 2014; six (6) days after this Application had been filed.

9. There was then a change of Advocates on the 10th June 2014 at the Superior Court. The Court file went missing and it is until the 5th November 2014 when the Application for reconstruction was coming up for hearing that the Court file was traced. This is demonstrated in the Certificate of Delay. The 5th of November 2014 is the exact date that the proceedings ought to have been collected.”

13. The respondent further averred that it made an application for review and setting (aside) of the stay orders “on the basis that the intended appeal was yet to be filed” which was argued and a ruling reserved for delivery on 30th April 2015.

14. A certificate of delay furnished on the respondent was exhibited showing (i) that an application letter bespeaking the copies of the proceedings was made on 25th March 2013 (ii) that in a letter dated 9th April 2014 received by the respondent on 23rd August 2013 the Court communicated to the respondent’s previous advocates, Messrs Mutimu Kangata & Company, that the proceedings were ready for collection; (iii) that the proceedings were never collected because the court file went missing; (iv) that the respondent applied for reconstruction of the file which was retrieved when the application was coming up for hearing rendering the application unnecessary; (v) that the time required for preparation and delivery of the certified copies of proceedings and impugned ruling was from 25th March 2013 to 5th November 2014 (i.e 613 days) as shown in the Certificate of Delay.

15. The respondent averred that it is “*in the interest of justice that the application for extension of time for filing and serving the record of appeal out of time be heard and determined before the hearing and determination*” of the application to strike out the notice of appeal.

16. The application for striking out the notice of appeal came up for hearing on 24th March 2015, when learned counsel **Mr. A. Wandabwa** appeared for the applicant and learned counsel **Mr. P. Munge** appeared for the respondent. Both counsel consented to have the applicant’s application seeking to strike out the notice of appeal determined on the basis of written submissions to be filed by the parties. The submissions by the applicant were filed on 31st March 2015 and the submissions by the respondent were filed on 13th April 2015.

17. Regrettably, the replying affidavit by the respondent was not in the court file and on 12th October 2015 the Registrar was requested to ensure that it was obtained and placed in the file to facilitate preparation of the ruling. The delay in the delivery of this ruling is attributable to this mishap.

18. The issue we are called upon to decide is whether the application for striking out the notice of appeal is merited and whether the orders sought should be granted.

19. The applicant in its submission contends that as the entire case in the High Court was “conducted solely in writing” as the impugned decision was based on pleadings and written submissions, there were no proceedings in the High Court requiring typing and the “purpose of the proviso to rule 84 of the Court of Appeal Rules is to ensure that an intending appellant “is not rendered out of time” by the delay occasioned to him in the preparation of proceedings for inclusion in the Record of Appeal; that the proviso cannot be relied on if proceedings were already in the respondent’s pleadings and submissions served upon it; that there is no reason why the respondent could not have lodged its record of appeal by 19th May 2013, sixty (60) days from the date of delivery of the impugned judgment.

20. Counsel for the applicant contended that the respondent, if entitled to avail itself of the relief in the proviso to rule 84, ought to have filed the Record of Appeal not later than 9th June 2014 because the Registrar wrote to the respondent on 9th April 2014 informing the respondent that the proceedings were ready for collection.

21. It was the applicant's counsel's further submission that even going by the time set in the certificate of delay, as proceedings were ready for collection on 5th November 2014, regard being had to the proviso to rule 84, the Record of Appeal ought to have been lodged not later than 4th January 2015. It has not been filed. Without the application of the proviso to rule 84, the respondent is out of time by a period close to two years, contended counsel.

22. Counsel for the applicant referred to the decision of this court in **Odera v. Muchira** [2013] e KLR as well as to the decision in **City Chemist (Nbi) and Another V. Oriental Bank Limited** [Civil Application No. Nai 302 of 2008 (UR 199/2008)] on the main aim and application of overriding objective principle in Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution. Counsel pointed out that the Court of Appeal Rules should be construed in a manner that facilitates fast, expeditious, proportionate or affordable resolution of appeals. Counsel also drew the attention of Court to the application by the respondent filed on 20th March 2015 seeking extension of time to file record of appeal. It seems that because there is no record filed yet which can be struck out, the applicant has sought to have the notice of appeal struck out instead but the application to strike out is hinged on the fact that the record of appeal was not filed within 60 days as required by the Rules. But the respondent has applied for extension of time to do so. Perhaps the applicant should have focused its attention on that, not that success would be guaranteed if it did so.

23. **Messrs Muriu, Mungai & co.**, counsel on record for the respondent, in opposition to the application, submitted that this is not a clear case for striking out the respondent's Notice of Appeal. To buttress this proposition, counsel cited the decision of this court in **Nicholas Kiptoo Arap Korir Salat versus IEBC & 6 Others**, Civil Appeal No (Application) 228 of 2013 [2013] eKLR where the court (Ouko JA) held:

“the power to strike out pleadings and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases...”

24. The respondents counsel further referred to the decision in **Joseph Kiangoi versus Waruru Wachira & 2 Others** [Civil Appeal (Application) No.130 of 2008 wherein this court held –

“...courts should in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair... the substantive aspect of sustaining the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record ...”

25. Counsel for the respondent contended that the application to strike out was misplaced because it was not brought within 30 days of service of notice of appeal. Counsel also referred us to the decision of this court in **William Mwangi Nguruki Versus Barclays Bank of Kenya Ltd** [2014] eKLR where the court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time.

26. The decision in the case of **Michael Mwalo V. Board of Trustees of National Social Security Fund** [2014] eKLR was also referred to us in support of the proposition that the application to strike out a notice of appeal must be brought within 30 days of service of the notice of appeal.

27. In conclusion, counsel for the respondent submitted that the applicant's application to strike out the notice of appeal was brought outside the time limit and the applicant has not shown the prejudice it will suffer if the notice is not struck out. Moreover, counsel submitted, the delay has been explained and the respondent has even applied for extension of time to file the notice of appeal out of time in Civil application No.78 of 2015 (UR 66/2015).

28. We have carefully perused the notice of motion dated 9th April 2014, and the supporting as well as the replying affidavits and we have duly considered the written submissions by the parties. The issue for our determination is whether (1) the application to strike out the notice of appeal was brought within the time frame set by the proviso to rule 84 of this Court's Rules and (2) if so, whether it has merit, regard being

had to the evidence in the affidavits and the circumstances of this case.

29. The facts are not in dispute. What is in dispute is the manner in which they are understood by the parties in relation to the notice of motion and the application of the law to them. It is not in dispute that the impugned decision was premised on the pleadings and written submissions. No oral arguments were advanced. For this reason, the applicant's counsel contends that the proceedings sought by the respondent's counsel were already in his possession. According to the applicant's counsel, the proviso to rule 82 of this Court's Rules was intended to obviate any prejudice that an intending appellant may suffer as a result of delay on the part of the court registry in preparing and delivering the proceedings and decision appealed from. In counsel's view, the parties had all the pleadings and the filed submissions and it was therefore possible for the respondent to compile the record of appeal without having to wait for the Deputy Registrar to supply further copies.

30. When the judgment of the court was delivered on 20th March 2013, counsel for both parties were represented in court. There is no evidence that the copies of the judgment were furnished on counsel. The notice of appeal was lodged on 21st March 2013 and the letter bespeaking the judgment was lodged on 25th March 2013. In April 2013, the respondent moved the High Court for an order of stay of execution under Order 42 Rule 6(1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. On 5th December 2013, the High Court determined the application by ordering payment by the respondent to the applicant of half of the money ascertained and found to be due by the respondent to the applicant in the judgment delivered on 20th March 2013 and the delivery by the respondent to the applicant of a bank guarantee for the balance of the money due by the respondent to the applicant pursuant to the judgment. Both the payment and the furnishing of the Bank Guarantee were to be within 7 days of ascertainment of the money due under the judgment of the High Court.

31. Thereafter parties haggled over the costs in a taxation of Party and Party Bill of costs before the Taxing Master in the High Court.

32. By a Certificate of Delay dated 18th February 2015, the Deputy Registrar certified that the time required (by him) for preparation and delivery of the certified copies of the proceedings and ruling was from 25th March 2013 to 5th November 2014, a whopping 613 days. If we understood counsel for the applicant's submission correctly, it is that the respondent was not seeking the exclusion of time fairly under the proviso to rule 84 of this Court's Rules. And the applicant's counsel may be quite correct in so far as the issue of written submissions is concerned. What this in effect meant is that the burden on the Deputy Registrar in providing proceedings was lessened as the submissions were already in the hands of both counsel. However, the Deputy Registrar still had the obligation to prepare and deliver a copy of the judgment of the court to the respondent. The latter cannot be blamed for tardiness. The certificate of delay speaks for itself. It has not been challenged as not being factual. As we understand it, in practice, it is normally drawn by counsel for the intending appellant and is supposed to be approved by counsel for the intended respondent. It is then submitted to the Deputy Registrar for endorsement.

33. The certificate of delay in this case shows that the respondent is entitled to have excluded in the computation of the period for lodging appeal, by dint of the proviso to rule 84 of this Court's Rules, the period shown in the certificate of delay as having been necessary for the preparation and delivery of the judgment and the proceedings, the time for lodging the appeal by the respondent having started to run from 8th November 2014. Therefore, the appeal should have been lodged within 60 days from 8th November 2014. That period expired on 8th January 2015. It is not in dispute that there is pending in this court an application (No.78 of 2015 – (UR 66/2015) lodged on 20th March 2015) seeking extension of time to lodge the record of appeal. The reasons why the appeal was not lodged after the time excluded in the certificate of delay were not assigned in this application. The application for extension of time is underway and we refrain from making any comment on the matter save that the respondent is not barred by any law from invoking the proviso to rule 84 but whether or not he satisfies the court that extension of time is merited to file the record after 60 days is a matter for the court that shall hear the application.

34. It is not disputed that the applicant was duly served with the Notice of Appeal after it was lodged on

21st March 2013. The proviso to rule 84 of this

Court's Rules prohibits the bringing of an application to strike out a notice of appeal (or a record of appeal) 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). Rules 84 stipulates:

“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 of 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.

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.”

35. In the instant application, the applicant does not contest the fact that it was served way back in March 2013 with the Notice of Appeal which it now seeks to have struck out. The time within which the application should have been brought elapsed a long time ago in March 2013. The application to strike out was brought way out of time after the expiry of the period stipulated by the proviso to rule 84. The application is therefore not competent as it does not lie in light of the proviso to rule 84. Its purported basis is absent.

36. In the circumstances, we have no alternative but to strike out the notice of motion dated 9th March 2014 which we hereby do. We order that each party shall bear its own costs.

Dated and delivered at Nairobi this 12th day of February 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR