



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE, OKWENGU & KIAGE, JJ.A)

CIVIL APPLICATION NO. NAI. 126 OF 2014

BETWEEN

JOHN MUTAI MWANGI & 26 OTHERS.....APPLICANTS

VERSUS

MWENJA NGURE & 4 OTHERS.....RESPONDENTS

(An application to deem the Notice of Appeal dated 27th September 2010 as having been withdrawn in an intended appeal against the Judgment of the High Court of Kenya at Nakuru (Ouko, J.) dated 22nd September 2010

in

H.C.C.C. NO. 155 OF 2003 CONSOLIDATED WITH H.C.C.C. NO. 94 OF 2005)

RULING OF THE COURT

By their motion on notice dated 22nd May 2014, which cites Rules 42, 82(1) and 83 of the Court of Appeal Rules 2010, the applicants pray that the [1st] respondent's notice of appeal dated 27th September 2010 be ***deemed as having been*** withdrawn. They also seek costs.

The grounds on which the motion is premised appear on its face as follows;

“(a) The Notice of Appeal was filed on 27th September 2010 but no record of appeal has since been instituted hitherto.

(b) The appeal has not been filed within the prescribed time.

(c) Certified typed copies of proceedings have been ready since 13/05/2013.

(d) That the respondent has lost interest in this appeal.

(e) It is over 270 days since the proceedings were ready.

(f) The applicant has done a myriad of reminders to the respondent with a view to jolting him to no avail.

(g) In the premises, the said Notice of Appeal ought to be deemed as withdrawn with its costs.”

It is supported by the affidavit of Gordon Ogola Advocate sworn on 22nd May 2014. In it he states that Ouko, J (as he then was) delivered a judgment on 22nd September 2010 finding in favour of the applicants herein. Aggrieved, the 1st respondent filed and served a notice of appeal dated 27th September 2010 but never took any steps thereafter to institute the appeal by filing memorandum and record of appeal as mandatorily required by the Rules. The deponent specifically swore at paragraphs 8 to 11 as follows;

“8. THAT the law requires an Appeal to be filed within sixty days of the date when the Notice of Appeal was lodged and it is well over Three years since the Notice of Appeal was lodged.

9. THAT it is over 270 days since the proceedings were ready and the respondent has been lethargic and full of inertia despite several attempts to jolt him. Annexed and marked GO 4 a, b and are reminders to the respondent’s advocates to put the appeal on its feet.

10. THAT the Notice of Appeal should be deemed to have been withdrawn as the respondent has failed and/or neglected to institute an appeal within the appointed time.

11. THAT the respondent has been more than lethargic and full of inertia so much such that it has been awaiting the registry to deliver the proceedings on its doorstep. Annexed and marked GO 5 (a) and (b) is a copy of letters dated 04/12/2013 and 20/06/2013.”

The deponent swore further that the delay of 270 days could not be explained otherwise than by the lethargy and inertia of the 1st respondent who inequitably continues to enjoy a stay of execution pending appeal granted by the High Court, thereby keeping the applicants out of their titled properties. He charged that the 1st respondent’s actions (or inactions) erode the pillars of transformative justice based on fairness, expeditious and efficient use of the justice system.

The 1st respondent **Ezekiel Mwenja Ngure** filed and served a replying affidavit sworn on 8th December in opposition to the application. He swore that he had been advised by his advocates;

“THAT there is no provision of the law or the rules of this Court that provides for a validly filed and served notice of appeal to be marked as deemed as withdrawn.”

He went on to attack the motion before us as “incompetent and unavailable” to the applicants on that score, and should therefore be struck out. The 1st respondent exhibited a single letter dated 28th September 2010 by which his then advocates wrote to the Deputy Registrar bespeaking the proceedings to enable him to file a record of appeal. He also swore as follows;

“9. THAT there has never been any communication from the Deputy Registrar of the High Court to my Advocates on the readiness of the proceedings to enable me to file a record of appeal unless the applicants have been having direct and selected communication with the said office such that once the proceedings were ready, they were promptly handed over to the applicants without recourse to my advocates.

10. THAT I am blameless for the delay but the applicants should have communicated to my advocates on readiness or availability of the proceedings instead of retaining them in their custody only to emerge with them 9 days to the

hearing of this motion.”

(Our emphasis)

At the hearing of the motion, the learned counsel who appeared for the main disputants before us were Mr. Kipkoech for the applicant and Mr. Karanja Mbugua for the 1st respondent. The other named respondents played a peripheral role and did not file any affidavits. Their learned counsel were Mr. Ochieng Gai for the 2nd respondent and Mr. Nguyo for the 3rd and 4th respondents. Mr. Kipkoech held brief for Mr. Kisilah for the 5th respondent.

Arguing the application, Mr. Kipkoech reiterated the contents of the supporting affidavit. He emphasized that the applicants’ counsel did write no less than three letters to their counterparts for the 1st respondent “in a bid to jolt them to serve us with a record of appeal”. The last such letter, dated 23rd November 2013, in fact threatened to bring an application such as the one before us but that did not move the 1st respondent. Instead, his advocates scoffed at the threat to bring the application threatened. Mr. Kipkoech urged us to find that the respondent had lost interest in the appeal and the same should not be allowed to hang over the applicants’ head like the Sword of Damocle, that famed figure of Greek mythology. He concluded that the application should be granted as Court business cannot be conducted in a casual manner. He cited the case of ***PRIME BANK LTD vs D.J. LOWE & CO. LTD*** [2014] eKLR appearing in his bundle of authorities.

Opposing the application, Mr. Karanja Mbugua relied on the 1st respondent’s replying affidavit and asserted that his client had not been indolent. He stated that he was never informed by the High Court that the proceedings were ready, becoming aware of it only when served with the application before Court. He conceded however, that in the intervening period between his requesting for the proceedings and receiving the application, he never wrote any follow up letter or reminder to the High Court. He concluded that under **Rule 83** this Court acts on its own motion and that the application before us was therefore incompetent.

Mr. Gai simply stated that he supported the application while Mr. Nguyo stated that he was in opposition to it.

The filing of a record of appeal is required to be done within 60 days of the lodgment of the notice of appeal by dint of **Rule 82** of the Court of Appeal Rules. That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The **proviso** to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.

Where an appellant who is desirous of pursuing his appeal nonetheless fails to institute it in accordance with the rule within time as computed, the only recourse he has in order to keep his notice of appeal and any record he may have filed out of time valid and efficacious, is to apply for extension of time under **Rule 4** before a single Judge who may, at his discretion exercised on settled principles, so extend time. Without such extension being sought and granted by the Judge or the Court upon reference under **Rule 47**, both the notice of appeal and any appeal that may have been filed is amenable for striking out upon application by the respondent under **Rule 84**, on the basis that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The application to strike out must however, be brought within 30 days of service of the impugned notice of appeal or record of appeal.

Up to that point, the defaults and the consequences of default ar, as it wer, in the hands of the parties who may move the Court as necessary. The Court acts under **Rule 84** only upon the instance of the

respondent in an appeal, and within a prescribed time.

There is, however, **Rule 83** which, provides as follows;

“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 motion or on application by any party, make such order.”

(Our emphasis.)

This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour.

Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under **Rule 81**. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice.

In the application before us, the record is quite clear that after lodging his notice of appeal on 27th September 2010, the 1st respondent did not file a record of appeal within the 60 days prescribed. Whereas his advocates did request for a copy of proceedings timeously on 29th September 2010, he never took any other action to try and follow up on the proceedings. Indeed, even at the hearing of the motion, **five and a half years** after the notice of appeal was filed, there was no indication given by the 1st respondent that he made any effort to obtain the proceedings. He did even have a certificate of delay prepared notwithstanding the ample evidence from the record of the motion that the said proceedings were ready from at least as early as 22nd May 2014 when the motion was filed.

What is even more puzzling, if not astonishing, is the cavalier manner in which the 1st respondent’s advocates treated correspondence from their counterparts for the applicant threatening to apply to dismiss or strike out the notice of appeal. This was their response;

(a) On 20th June 2013: “... There is no provision for an application for dismissal of an appeal for want of prosecution in the Court of Appeal Rules. Just be patient.”

(b) On 4th December 2013: “... Once we are supplied with the said proceedings, a record of appeal shall be served on you. The Court of Appeal Rules are very clear on this aspect.

That same attitude was carried over to the replying affidavit in opposition to this application which we have already adverted to. It is an attitude that smacks of unacceptable cynicism, a form of impunity.

What is plain to see in this matter is that the 1st respondent who, despite losing the suit at the High Court, nevertheless obtained from the learned Judge on 7th June 2011 an order of stay of execution that enjoined the applicants from entering upon or dealing with certain properties titled to them, has never had any intention of having the appeal progressed by relevant filing towards its determination on merit.

We have not seen in the replying affidavit of the respondent or in the submissions by his learned counsel, anything that would withstand the application by the applicant that the notice of appeal is deemed to have been withdrawn. A notice that has been alive this long without the appeal itself having been filed is blight upon our processes and is wholly untenable. It in fact amounts to an abuse of process and we cannot countenance it.

In the result, we allow the application with costs to the applicant. All the parties served with the notice of appeal shall be paid the costs thereof by the 1st respondent. The same shall be taxed if not agreed.

Dated and delivered at Nakuru this 14th day of April, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR