



IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: WAKI, NAMBUYE, KIAGE JJA)

CIVIL APPEAL APPLICATION NO 239 OF 2014

BETWEEN

SOFITRA LIMITED1ST APPELLANT

SAMUEL MBURU GICHANGA.....2ND APPELLANT

AND

ALICE O. ALUKWE (suing on behalf of

MAUREEN ALUKWE DECEASED).....1ST RESPONDENT

AKAMBA PUBLIC ROAD SERVICES LTD.....2ND RESPONDENT

DIXON ODHIAMBO OGUOKO.....3RD RESPONDENT

(An application to strike out the Notice of Appeal from the judgment of the High Court of Kenya at Nakuru (Emukule, J.) Dated 7th November, 2013

In

HCCC. NO. 26 OF 2005

RULING OF THE COURT

Before court is a Notice of Motion dated the 19th day of August 2014 and lodged in this court's Sub-Registry at Nakuru on the 4th day of September 2014. It is brought under **Rules 42, 75(b), 82 and 84** of the Rules of this Court 2010, and all other enabling procedures of the law. It substantively seeks an order of this Court to strike out the Notice of Appeal dated the 7th day of November 2013 filed by the applicant herein and lodged with the Registrar of the High Court of Kenya at Nakuru on the 18th day of November 2013. It is supported by the grounds on its body and the supporting Affidavit. It has been opposed by a Replying Affidavit deposed by Gachanja Gathoni on the 16th day of February 2016 and filed in this Courts Sub Registry at Nakuru on the 17th day of February 2016.

On the hearing date, learned Counsel Mr. Ndolo appeared for the applicant, while M/S Gachanja Gathoni appeared for the 1st and 2nd respondents.

In his submissions before Court Mr. Ndolo has urged us to allow the application on one major ground that the respondents have transgressed the rules of this Court for their failure to timeously lodge the record of appeal within the time lines stipulated in rule 82 of the Rules of this Court as they have taken no further steps in progressing the appeal process initiated by the filing of the Notice of Appeal that the applicant has invited us to strike out. Other attendant grievances are that the respondents never copied to them (applicants) copies of proceedings for purposes of expediting the appeal process if at all they took this procedural step. There is also no demonstration as to when the Registrar of the High Court informed the respondents that the said proceedings were ready for their collection, when collected if ever they collected them, and what steps they have taken to progress their appeal process.

Mr. Ndolo continued to urge further that any blame placed on the former advocate in the respondents' advocates firm then on record for them for any inadvertence in the failure to progress the appeal process does not hold as there is no demonstration as to when the said advocate left the respondents' advocates firm. In Mr. Ndolo's view these assertions are nothing but mere allegations which should be dismissed on account of the above. Mr. Ndolo submits that no reasonable explanation has been given as to why the record of appeal was not timeously lodged within the stipulated time. In this regard Section 3A & 3B of the Appellate Jurisdiction Act as well as Article 159(2) (d) of the Kenya Constitution 2010 should not be invoked to aid the respondent's hopeless appeal process.

In a very brief response to the applicants submission, M/s Gachanja conceded that the Notice of Appeal sought to be struck out does not comply with the specifications set in form D, but in her view the error is both excusable and curable. It is also conceded that the application under review was served on them way back in 2014 and as at now she has nothing to show as to what steps they have taken to regularize their appeal process. She however promised to exhibit evidence as to what steps they have taken towards this process when they next seek leave to regularize their appeal process. She did not however give time indication as to when this could be undertaken although she accepted that this was a mistake on their part and promised to make efforts to regularize the position.

In reply to those brief submissions Mr. Ndolo reiterated his earlier stand that their application is properly premised on Rule 84 which is available for the striking out of both the Notice of Appeal as well as the record of appeal; that no reasonable excuse has been given by the respondents for their failure to take remedial action to redeem their appeal process in view of their admission that the proceedings have already been typed and supplied.

Our invitation to intervene has been invoked under Rules 42, 75(b) 82 and 84 of the Rules of this Court. Rule 42 donates general power for making applications to the Court. Rule 75(b) obligates any intending appellant to format his/her Notice of Appeal in form D. Rule 82 on the other hand stipulates time lines within which an appeal should be lodged, that is, sixty (60) days from the date of the service of the Notice of Appeal on the opposite party. Rule 84 on the other hand donates power to strike out a Notice of Appeal for the reason that "no appeal lies or that some essential step in the appeal process has not been taken or such a step has not been taken within the prescribed time." Rule 84 is not absolute. It has an attendant caveat which requires any party wishing to avail itself of the procedure stipulated in it to take such action if deemed fit within a period of thirty (30) days from the date of service upon them of the Notice of Appeal.

The Notice of Appeal subject of this application is dated the 7th day of November 2013. It was lodged at the High Court Registry on the 18th day of November 2013 and served on the applicants on the 21st day of November 2013. Thirty (30) days within which to move and have it struck out lapsed on or about the 11th day of December 2013. The application seeking to fault the said Notice was hopelessly filed more than eight (8) months and twenty three (23) days later. It definitely does not lie in view of the wording in the proviso to rule 84.

The above findings notwithstanding we are rather not amused at the clandestine and casual approach the respondents have taken towards their intended appeal process. They do not give an impression of their being seriously aggrieved litigants. We wish to remind them that the exercise of the appellate jurisdiction as donated by the relevant applicable provisions of law is readily available for serious seekers of this Court's interventions. We doubt if the current respondents are one such serious litigants. It is therefore our duty to relieve both ourselves and them as well as the applicants of the burden of the pendency of the intended appellate process in our view the respondents seem to be unsure as to whether they wish to to pursue or not to pursue the intended appeal process.

We have no hesitation in making matters easier for them by invoking Rule 83 of the Rules of this Court for an appropriate remedial action. It provides:

“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 own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom if any persons on whom the notice of appeal was served”.

In obedience to the above mandate we deem the incompetent Notice of Appeal to have been withdrawn. Each party shall bear its own costs.

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

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR