



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ONYANGO OTIENO, VISRAM & KOOME, JJ.A.)**

**CIVIL APPLICATION NO. NAI 105 OF 2010**

**BETWEEN**

**KUGURU FOOD COMPLEX LIMITED.....APPLICANT**

**AND**

**MASHREQ BANK P.S.C.....RESPONDENT**

*(An application to strike out the notice of appeal from the Ruling and Order of the*

*High Court at Nairobi (Hatari Waweru, J.) dated 18<sup>th</sup> November, 2005*

*in*

*H. C. C. C. No. 1287 of 1999)*

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**RULING OF THE COURT**

1. This is an application by way of a notice of motion brought under **Rules 80, 81 (1) & (2), 82 (a) & 42 (1)** of the Court of Appeal Rules (the Rules) in which the applicant seeks an order striking out the notice of appeal dated 24<sup>th</sup> November, 2005 filed by the respondent.
2. The genesis of this application is the High Court's (Waweru, J.) ruling dated 18<sup>th</sup> November, 2005, in which the Learned Judge set aside an order that directed the trial therein to start *de novo*. However, since the appeal against the said ruling is not before us, we shall say no more.
3. The grounds upon which the applicant relies on in support of the application are firstly, that the respondent filed a notice of appeal against the above mentioned ruling on the 24<sup>th</sup> November, 2005 and applied to the Registrar of the High Court (Registrar) for certified proceedings (proceedings) vide a letter dated 23<sup>rd</sup> November, 2005. Secondly, that the only attempts made by the respondent herein to procure the proceedings are through two letters to the registrar dated 16<sup>th</sup> February, 2006 and 22<sup>nd</sup> February, 2007; it has been three years and two months since any action was taken by the respondent. Fourthly, that the respondent has taken advantage of the fact that an appeal could not commence without the proceedings and has conscientiously delayed and/or ignored procuring the same. Fifthly, that the respondent is not keen in procuring the said proceedings and is enjoying an order of stay of the proceedings in the High court to the detriment of the applicant.

4. The respondent in opposition to the current application filed a replying affidavit sworn by Salah El-din Amin on 22<sup>nd</sup> June, 2010. Mr. Salah El-din Amin, on behalf of the respondent deponed that the current application is misconceived, speculative and made without any basis or justification. This is because firstly, that the applicant was not candid and had failed to disclose the respondent's recent efforts to follow up on the proceedings vide a letter dated 25<sup>th</sup> November, 2008. Secondly, the respondent maintains that it promptly applied for the proceedings and has been diligently following up on the same; any delay in lodging the appeal is as a result of the failure of the High Court registry to supply the proceedings. Further, that the respondent has no influence/control over the workings of the High Court registry and is therefore not responsible for the delay. Thirdly, that the appeal has merit and ought to be heard.

5. At the hearing of the application, Mr. M. Waihiga, learned counsel for the applicant, reiterated the grounds set out above in support of the application. He submitted that the respondent's delay in instituting the appeal offended **Rule 82** of the Rules. Mr. Waihiga urged the court to strike out the notice of appeal.

6. Mr. S. Amin, learned counsel for the respondent, in opposition to the application relied entirely on the replying affidavit on record. He submitted that the appeal being Civil Appeal 71 of 2011, in respect of the notice of appeal, which is the subject of this current application, had already been filed on 19<sup>th</sup> April, 2011. He further submitted that the Registrar had issued a certificate of delay and the same had been filed in the said appeal.

7. Mr. Waihiga confirmed that indeed the said appeal had been filed and served upon him. He urged this Court to also strike out the appeal on the grounds it was filed out of the requisite time.

8. We have considered the application, the grounds in support of the application, the affidavits, the submissions by the learned counsel and the law. We would like to first deal with the issue of Civil Appeal No. 71 of 2011 filed by the respondent which Mr. Waihiga, in his oral submission urged us to strike out. The current application herein only seeks an order to strike out the notice of appeal and as such we cannot entertain any application or submission in relation to the appeal that is not currently before us. Therefore, this brings the issue of striking out the appeal to an end.

9. We are of the view that the respondent has been diligently following up on the proceedings. Further it is quite clear that the duty to prepare proceedings is placed on the court and not a litigant. The respondent in this case could not have done anything else to fast track the preparation of the proceedings.

10. The applicant further submitted that the delay by the respondent to obtain the proceedings breached **Rule 82** of the Rules. Under **Rule 82** of the Rules, an appeal should be instituted within sixty days of the date of filing the notice of appeal. The Rule further provides that in computing the said time any period certified by the Registrar as having been required to prepare the proceedings should be excluded. In **Mariam Abubakar Ileri & Another -vs- National Cereals & Produce Board - Civil Application No. 92 of 2008**, this Court held,

***“..in view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant's counsel, time prescribed for filing an appeal stopped running. The running of the time resumed on or about 3<sup>rd</sup> September when copies of proceedings were delivered to the respondent.”***

11. In this case the respondent applied for the certified proceedings on the 24<sup>th</sup> November, 2005 vide a letter dated 23<sup>rd</sup> November, 2005 and filed the notice of appeal on the 24<sup>th</sup> of November 2005. By dint of **Rule 82** of the Rules, the time prescribed for filing an appeal stopped running when the respondent applied for the proceedings and resumed when the registrar informed the respondent that proceedings were ready for collection.

12. Further there was no allegation by the applicant that it was the respondent who delayed in retrieving the proceedings despite the same being prepared by the court. We find that there was no delay in the

respondent filing the appeal as the applicant conceded that at the time of filing this current application the proceedings had not been prepared by the court.

13. The upshot of the foregoing is that the current application has no merit and is hereby dismissed with costs to the respondent.

14. In the absence of Onyago Otieno, J.A who has since retired, this ruling is delivered under **Rule (32) (3)** of the Court of Appeal Rules.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of May, 2016.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**