



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & OKWENGU, JJ.A)**

**CIVIL APPLICATION NO. 188 OF 2015**

**BETWEEN**

**KERICHO TECHNICAL INSTITUTE.....APPLICANT**

**AND**

**FINMAX COMMUNITY BASED GROUP.....1<sup>ST</sup> RESPONDENT**

**CHAIRMAN.....2<sup>ND</sup> RESPONDENT**

**TREASURER.....3<sup>RD</sup> RESPONDENT**

**SECRETARY.....4<sup>TH</sup> RESPONDENT**

*(Being an Application to strike out the Notice of Appeal lodged on 28<sup>th</sup> April 2015 in an appeal from a Judgment of Honourable Justice J.K. Sergon delivered on 24<sup>th</sup> March 2015 and Amended on 22<sup>nd</sup> April 2015 in Kericho High Court Civil Suit No. 20 of 2013*

*in*

***H.C.C.C. No. 20 of 2013***

**\*\*\*\*\***

**RULING OF THE COURT**

[1] By a notice of motion dated 8<sup>th</sup> July, 2015, the applicant **Kericho Technical Institute**, seeks orders *inter alia* that: ***“this honourable court be pleased to declare that the respondents be and are hereby deemed to have withdrawn their notice of appeal herein dated 15<sup>th</sup> April 2015 and lodged in Court on 28<sup>th</sup> April 2015”***. In the alternative the applicants seek to have the notice of appeal struck out.

The notice of Appeal was lodged by Finmax Community Based Group, Chairman, Treasurer and Secretary respectively who were the defendants in a suit filed in the High Court by the applicant. The respondents were aggrieved by the judgment of the High Court (**Sergon, J**) delivered on 24<sup>th</sup> March, 2015 in which the High Court gave judgment for the applicant for Kshs. 11,261,501.28 together with costs and interest; and dismissed a counterclaim that had been lodged by the respondents.

[2] The applicant's motion is brought under **Rules 82, 83 and 84** of the **Court of Appeal Rules** and is supported by an affidavit sworn by the applicant's advocate **Johnson Mitey**.

[3] In brief, the applicant contends that although the respondents had lodged a notice of appeal against the judgment of the High Court on the 28<sup>th</sup> April 2015, the applicants had not been served with a notice as required under **Rule 77(1)** of the **Court of Appeal Rules**; that 60 days had lapsed since the lodging of the notice of appeal; that the respondents had failed to institute an appeal as prescribed under **Rule 82(1)** of the **Court of Appeal Rules**; that the Deputy Registrar of the High Court at Kericho had confirmed that the respondents have not applied for copies of the proceedings and judgment for the purposes of the appeal; and that the respondents should therefore be deemed to have withdrawn the notice of appeal as provided under **Rule 83** of the **Court Rules**. In the alternative the notice of appeal filed by the respondents should be struck out with costs.

[4] In response to the applicant's motion the respondents filed a replying affidavit sworn by **Evalyne Ngeno-Koko** who described herself as the Assistant Manager Legal Services of the 1<sup>st</sup> respondent. In the affidavit the deponent swore that the High Court judgment was delivered on 24<sup>th</sup> March 2015 without Notice to the respondent; that the applicant filed a motion dated 1<sup>st</sup> April 2015 seeking amendment of the High Court judgment and that the application was served upon the respondents on 8<sup>th</sup> April 2015; that the ruling on the motion was delivered on 22<sup>nd</sup> April 2015 without notice to the respondents; further that the respondents filed an application for stay of the judgment and conditional orders were granted for the filing of a bank guarantee; and that a further application was made for extension of time within which to file the bank guarantee.

[5] It was explained that although a notice of appeal was filed, typed proceedings could not be availed while further proceedings were ongoing. It was explained that the respondents had to change advocates when they realized that there was some laxity on the part of their previous advocate. The court was urged not to visit the error of the previous advocates on the respondents who were desirous and willing to pursue their appeal and that the applicants had not suffered any prejudice.

[6] A supplementary affidavit sworn by one **Rachel Nderu** on behalf of the respondents explained that on the 21<sup>st</sup> October, 2015, the record of appeal was rejected by the Nakuru High Court registry for having been filed more than 60 days from the date of the delivery of judgment; that the respondents applied for a certificate of delay on 4<sup>th</sup> November, 2015 to explain the delay in filing the record of appeal and the certificate was received on 17<sup>th</sup> November, 2015 and the record of appeal filed again on 19<sup>th</sup> November, 2015.

[7] During the hearing of the motion learned counsel **Mr. Rutto** appeared for the Applicant while learned counsel **Mr. Steve Kimathi** appeared for the Respondents. Mr. Rutto submitted that contrary to **Rule 75 and 77 (1)** of the **Court of Appeal Rules**, the Notice of Appeal was never served on the Applicant; that the appeal was yet to be instituted as **Rule 82 (1)** had not been complied with; that the respondents failed to apply for typed proceedings or send copies of letters bespeaking the proceedings to the applicant; and that the application should be allowed as the respondents are enjoying stay orders without any appeal.

[8] Mr. Kimathi submitted that the purpose of a notice of appeal was to inform the respondents of the appeal, and that this was achieved through the application for stay of execution wherein the said notice of appeal was exhibited; that the striking out of the appeal would be draconian given that the applicant had not suffered any prejudice; that the delay in filing the record of appeal had been adequately explained; that striking out the notice of appeal would be a waste of time as the respondents would need to go through the process of filing another appeal and that there would be no prejudice suffered by the applicant as its money was secured in court and a record of appeal has already been filed.

[9] Having considered the application and the supporting affidavit, the replying affidavit, supplementary affidavit and the respective submissions by learned counsel as well as the authorities cited we find that the only issue for determination is whether the respondent has failed to comply with **Rules 82,83 and 84** of the **Court of Appeal Rules** to justify the granting of the orders sought.

[10] **Rule 84** upon which this application is anchored provides as follows:-

*“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 or the 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. [Emphasis added]*

*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.”*

[11] Based on the foregoing provision, an applicant can seek an order striking out the notice of appeal on three grounds. Firstly, that no appeal lies; secondly that an essential step in the proceedings has not been taken; and thirdly that the essential step has not been taken within the prescribed time.

[12] In our present case the applicants are seeking to strike out the notice of appeal on the ground that an essential step in the proceedings has not been taken to wit no record of appeal has been filed within 60 days of lodging the notice of appeal as stipulated under **Rule 82 (1)** of the **Court of Appeal Rules**.

[13] **Rule 82** of the **Court Rules** provides in part as follows:-

*“82 (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged-*

.....

*Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant such copy.*

[14] The Judgment of the High Court subject of the intended appeal was delivered on 24<sup>th</sup> March 2015 and amended on 22<sup>nd</sup> April 2015. The respondents lodged a notice of appeal on 28<sup>th</sup> April 2015. Therefore the respondents ought to have filed the record of appeal by 28<sup>th</sup> June 2015. The proviso to **Rule 82 (1)** gives a party some leeway where that party has applied for the proceedings of the High Court within 30 days of the decision. However for a party to enjoy the benefits of the proviso the application bespeaking proceedings must not only have been made within 30 days but also a copy of the letter must have been served on the other party. Indeed **Rule 82 (2)** of the **Court of Appeal Rules** provides as follows:-

*“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”*

[15] It is clear that the respondents never applied for the typed proceedings until 15<sup>th</sup> July 2015. This was a week after the applicant had filed the present application on 8<sup>th</sup> July 2015. In the replying affidavit sworn by **Everlyn Ngeno-Koko** at paragraph 11 it is sworn that the proceedings could not be prepared while there were pending matters. The respondents however has not explained why they waited until 15<sup>th</sup> July 2015 whereas they complied with the orders of the court pursuant to the application for stay on 16<sup>th</sup> June 2015. In any event **Rule 82 (1)** of the **Court of Appeal Rules** provides that the application bespeaking proceedings has to be made within 30 days of the decision sought to be appealed against. This is regardless of any subsequent proceedings.

[16] The above notwithstanding, a certificate of delay issued by the Deputy Registrar of the High Court at

Kericho on 10<sup>th</sup> November, 2015, states in part as follows:

***“1. Application for copies of the proceedings and judgment and Notice of Appeal in this suit was made and filed by M/s Nyaundi Tuiyott & Advocates (sic) for the defendant was lodged in this court on 11<sup>th</sup> April 2015 which was within the 30 days of the Judgment desired to be appealed against.” (Emphasis added).***

[17] This certificate of delay contradicts the replying affidavit that was relied upon by the respondents. Whereas the replying affidavit states that the application for proceedings was made on 15<sup>th</sup> July 2015, the certificate of delay talks of 11<sup>th</sup> April 2015. No explanation has been given to explain this contradiction. Moreover, the letter dated 11<sup>th</sup> April 2015 applying for the proceedings was not exhibited. We come to the conclusion that the certificate of delay was irregularly issued as no application for the proceedings was made until 15<sup>th</sup> July 2015. This means that the application for proceedings was not made within 30 days.

[18] Further **Rule 77 (1)** of the **Court of Appeal Rules** provide that:-

***“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.....”***

[19] The respondents did not serve the notice of appeal within the required period. No satisfactory explanation has been given for this failure. Instead the respondents have trivialized the rule by contending that service of the notice was simply meant to inform the parties of the appeal, and that this intention was achieved when they annexed a copy of the notice of appeal to their application for stay of execution that was served on the applicant. While we are mindful of **Article 159 (1)(d)** of the **Constitution** that justice should be administered without undue regard to procedural technicalities, we reiterate this Court’s view that the requirement for service of a notice of appeal is not a mere technicality. We reiterate the position of this Court as stated in the following decisions: The case of **Prime Bank Limited v D.J.Lowe & Company Limited [2015] eKLR**, where this Court stated as follows:-

***“The importance of the last requirement has been explained by this Court in Sheikh v Sheikh (1985) KLR 649 as follows;***

***“The object of rule 76 (1) (today Rule 77 (1)) of the Court of Appeal Rules in obliging an appellant to serve copies of the notice of appeal on the parties directly affected by it is that the rights of a party likely to be directly affected by the result of the appeal should not be affected without the party being provided an opportunity of being heard.”***

[20] In **M.S vs N.K Civil Appeal No. 277/2005** (Unreported) decided on 12<sup>th</sup> February, 2010 the Court of Appeal made the following emphasis:

***“It follows that although Rule 76 (read 77) is a procedural rule based on the Appellate Jurisdiction Act, it has deeper roots in the Constitution so as to safeguard due process. Indeed, in the hierarchy of fundamental rights, the right of hearing ranks very high. For this reason we think that failure to serve the notice of appeal renders a notice of appeal incompetent including the record of appeal itself. This is because Rule 76 (1) is a mandatory requirement and provides that all persons directly affected by the appeal must be served with a notice of appeal ....”***

[21] From the foregoing, we find that the notice of appeal filed by the respondents was not served within the 7 days from the date of filing as required under **Rule 77** of the **Court of Appeal Rules** nor was the record of appeal filed within 60 days from the date when the notice of appeal was lodged as provided under **Rule 82(1)** and **(2)** of the **Court Rules**. We find that the respondents failed to take essential steps within the prescribed time and therefore in accordance with **Rule 84** of the **Court Rules**, we strike out the notice of appeal. We award the applicant costs of the motion.

**Dated at Nairobi this 24<sup>th</sup> day of June, 2016**

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***W. KARANJA***

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***JUDGE OF APPEAL***

***H.M OKWENGU***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**