



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA, & MURGOR, JJA.)

CIVIL APPLICATION NO. 64 OF 2015

BETWEEN

ERASTUS ONYANGO NYAMORI..... APPLICANT

AND

COUNTY GOVERNMENT OF MIGORI..... 1ST RESPONDENT

MIGORI GOVERNOR ZACHARY NYAMORI.....2ND RESPONDENT

(An Application for an order of striking out the Notice of Appeal, (under Rules 83 and 84 of the Court of Appeal Rules 2010) and subsequent lifting of the Orders of the Court of Appeal (Maraga, Ouko & Ole Kantai JJA dated 23rd April 2015 in Civil Application No. 80 OF 2014)

AND

In the Matter of Industrial Cause No. 308 of 2014

RULING OF THE COURT

The applicant's Notice of Motion dated 24th November 2015 seeks to strike out the Notice of Appeal dated 17th December 2014 and the subsequent lifting of the orders of this Honourable Court dated 23rd April 2015 staying the execution of the Industrial Court decision dated 3rd December 2014, and the order staying further proceedings in the ***Industrial Court Cause No. 308 of 2014***.

In the alternative, the applicant seeks orders compelling the respondents to resume payment of the applicant's withheld salaries as ordered by the Industrial Court.

The application is supported by an affidavit sworn by ***the applicant, Erastus Onyango Nyamori*** on the same date.

In the affidavit, the applicant averred that the intended appeal had been overtaken by events by reason of the failure of the respondents to file or institute an appeal within the required period of 60 days from 17th December 2014 when the Notice of Appeal was lodged. The applicant further deponed that through his own efforts, by 22nd October 2015 the registry had supplied him with the typed and certified copies of the proceedings of the Industrial Court.

It was further deponed that this Court, in **Civil Application No. 17 of 2015**, ruled that the respondents could not be faulted for failing to file the record of appeal within the stipulated period of 60 days as they had not received the typed and certified copies of the proceedings from the Industrial Court. That in this instance, 60 days have lapsed since the typed and certified copies of the proceedings were available to the parties, yet there is no demonstration that the proceedings have been paid for, or that an intended appeal has been filed. As a consequence, pursuant to **Rule 83** of the **Court of Appeal Rules**, the Notice of Appeal should be deemed to have been withdrawn.

In a replying affidavit sworn on 19th January 2016 by **Roger O. Sagana**, advocate for the respondents, it was deponed that subsequent to filing the Notice of Appeal the respondents wrote to the Registrar seeking typed and certified proceedings and the ruling of the Industrial Court. The applicant then filed **Civil Application 308 of 2014** seeking to strike out the Notice of Appeal which was dismissed by this Court on 25th September 2015.

Mr. Sagana further deponed that he has written letters of reminder to the Deputy Registrar on 2nd October 2015 and 12th January 2016 requesting for the certified proceedings, to which there has been no response. That he personally attended the registry in December 2015 and on 15th January 2016 where he was informed that the Deputy Registrar was out of the office, and that the proceedings had been typed but were yet to be proof read and certified.

Counsel questioned how the applicant had obtained the copies of the proceedings, despite there having been no communication from the Deputy Registrar to either party informing them that the proceedings were ready for collection upon payment of the costs. Furthermore, counsel was concerned that the applicant's letters to the Deputy Registrar seemed to have been able to solicit copies of the typed proceedings, while those of the respondents had gone unanswered.

It was further averred that **Rule 82 (1) and (2)** of this Court's Rules was yet to be complied with as the Deputy Registrar had not issued a certificate of delay specifying the period taken to prepare the copies of the proceedings, thus impeding the respondents' ability to file the record of appeal within the period specified.

In his submissions, **Mr. R. J. Ogwe**, learned counsel for the applicant, submitted that the Notice of Appeal ought to be struck out as it was evident that the respondents were not keen to prosecute their appeal. Counsel further submitted that the applicant had written to the Deputy Registrar requesting to be supplied with the proceedings and obtained the proceedings on the same day. Since 22nd October 2015, the respondents had not taken any steps to file the record of appeal out of time. Counsel further submitted that though the letters from the respondents to the Deputy Registrar have been copied to the applicants, there was no evidence to show that the court had received them and neither was there any acknowledgment by the Deputy Registrar.

Mr. Sagana, learned counsel for the respondents, opposed the application and for the larger part of his submissions reiterated the contents of his sworn affidavit. Counsel stated that it was not shown how the applicant came to be in possession of the typed proceedings.

In reply to, this Mr. Ogwe conceded that he did not have any communication from the Deputy Registrar forwarding the typed and certified proceedings.

We have considered the application and the parties' submissions. The application is brought under **Rules 83 and 84** of this Court's Rules and seeks to strike out the respondents' Notice of Appeal on the basis that despite the proceedings having been typed and certified by 22nd October 2015, the respondents had failed to file the record of appeal within the prescribed time.

It is not in dispute that the Notice of Appeal was filed on 17th December 2014. In a letter dated 11th December 2014, the respondents requested for copies of the proceedings. As these were not forthcoming, counsel for the respondents averred that various reminders and visits were made to the Registry to follow

up the request for the proceedings. These letters went unanswered. Instead, it was when the applicant filed this application attaching copies of the proceedings certified on 22nd October 2015 that it was realized that the certified proceedings and the ruling had been supplied to the applicant. There was no letter forwarding them to either party, and no certificate of delay was made available to show the period taken by the Registry to prepare the proceedings.

Once served with this application, by a letter dated 12th January 2016, the respondents complained to the Deputy Registrar that they had not received any communication showing that the proceedings were ready for collection, despite the fact that they were the intended appellants. They also requested to be furnished with a certificate of delay, and enclosed a draft for completion by the Registry.

Rule 82 states in the relevant part;

“.....Provided that in 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 of such copy.” (emphasis ours)

Our reading of the provision is that, having delivered the letter requesting for the proceedings, and following service upon the applicant of the copy of such request, not only were the respondents entitled to receive the certified proceedings from the Registry, they were also entitled to receive a certificate of delay specifying the period taken to prepare the proceedings, so as to enable them compute the time taken for filing the intended appeal.

It is apparent to us that at this point, since these steps are yet to be complied with by the Deputy Registrar, the respondents are in no position to file the intended appeal. It is not sufficient for the applicant to contend that since he has obtained the proceedings, the Notice of Appeal should be struck out, yet the Deputy Registrar has neither communicated with nor supplied the respondents with the certified copies of the proceedings and not least, the certificate of delay.

We take the view that until such time as **Rule 82** of this Court’s Rules have been complied with, this application is premature and unjustified. We find that it lacks in merit, and we dismiss it with costs to the respondents.

Orders accordingly.

Dated and delivered at Kisumu this 2nd day of June, 2016.

D. K. MARAGA

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

