IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: WAKI, NAMBUYE, KIAGE JJA)

CIVIL APPLICATION NO. NAI. 12 OF 2016

BETWEEN

SIMON GASHWE MUKUHA.....APPELLANT

AND

NEWTON KAGIRA MUKUHA.....RESPONDENT

(An application to strike out the Notice of Appeal dated 12th November, 2014

from the Ruling of the High Court of Kenya at Nakuru

(Emukule, J.) dated 31st October, 2014

In

Succession Cause No. 92 OF 2011

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RULING OF THE COURT

The matter before us is a notice of motion dated 18th June 2015 filed by ***Simon Gashwe Mukuha*** (Simon) seeking an order for striking out a notice of appeal dated 12th November 2014, which was filed by ***Newton Kagira Mukuha*** (Newton). Simon and Newton are brothers and sons of the late ***Peter Mukuha Kago*** (deceased) who had other sons and daughters. The two are involved in a tussle over the distribution of the estate of the deceased which is still pending before the High Court. The current bone of contention is the shareholding of **Naivas Ltd**, the well known chain of stores in Kenya ('the company'). Newton contends that the deceased was a founding shareholder of the company and the shares he held are subject to distribution as part of the estate. Simon on the other hand refutes that contention maintaining that the deceased has no shares in the company and the company has nothing to do with the estate.

A Summons taken out by Newton before the High Court in November 2012 seeking an injunction to restrain Simon from intermeddling with the estate by selling or disposing of the shares of the deceased in the company was heard and disposed of by Emukule J. The learned Judge framed the issue*: "Who owns the company known as Naivas Ltd"* and heard oral evidence before making the following decision on 31st

October 2014;

- **Newton had no interest, legal or equitable in the company.**
- **The deceased was a member of the company, holding 10,000 shares.**
- **The deceased died <u>testate</u> and bequeathed his shares to four of his children who were shareholders of the company, and the shares will be transmitted in the normal manner once the issue of the executor of the Will of the deceased was determined.**

Newton was not satisfied with that decision and filed a notice of appeal on 12 November 2014. It was intended to be served on the Advocates on record for Simon, ***M/S Ikua Mwangi & Company Advocates***, of Nakuru. In the motion before us, however, Simon swears that the notice of appeal was never served on his advocates within 7 days in accordance with ***Rule 77*** of the ***Court of Appeal Rules*** (CAR) and it was therefore ripe for striking out under ***Rule 84***. It is not clear when Simon or his lawyers discovered that the notice of appeal had been filed, but he swears that he was informed by his advocates who had perused the court file. There is no affidavit from his advocates to support that contention.

It would appear that Newton, who is acting in person, was not served with the motion before us as soon as it was filed in November 2015. According to him, he was served on 23rd April 2016 - four days before the hearing date – and that fact does not appear to be contested. He attended the hearing to register that fact and stated that he would have filed an affidavit in reply to confirm that he did in fact serve the notice of appeal on the advocates although he did not file a return of service. He would also have confirmed in the affidavit that he had applied for copies of the proceedings and ruling from the High Court but they were delayed since there were some proceedings before that court for rectification of the record. He confirmed he was still interested in the appeal.

Learned counsel for Simon, Mr. Mwangi denied in oral submissions that he was personally served with the notice of appeal as asserted by Newton. However, he did not confirm when and how the discovery that a notice of appeal had been filed was made, only stating from the bar that he went to the court file to check after complaints made by his client. He conceded that there were some rectification proceedings before the High Court as alluded to by Newton.

We have considered the application and the submissions made on both sides. The motion is premised under ***Rule 84*** of CAR which requires an application of this nature be filed within 30 days of the alleged default. On the face of it, this motion was filed way out of time and would have been summarily rejected. *A fortiori*, the contention by the Newton that he personally served the notice of appeal on the advocate on record is not sufficiently rebutted and it is not enough for Simon to speak on behalf of his advocate who was capable of swearing his own affidavit but did not.

There is an unqualified discretion conferred on the court to strike out documents, proceedings, intended appeals or appeals which do not comply with the rules of the court. As always, however, the discretion must be exercised judicially and is guided by the **Constitution** and ***sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act.*** The court has previously observed in many decisions that there is a duty imposed on it under ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** to ensure that the manner of interpretation of the law or exercise of discretion is consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. As explained in the case of ***<u>City Chemist (Nbi) & Ano. vs Oriental Commercial Bank Ltd Civil Application No. NAI 302 of 2008 (</u>***UR 199/2008):

> ***"The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective."***

In this matter, we think the applicant has not complied with the proviso to ***Rule 84*** and the motion is for striking out. We also think the applicant has not furnished cogent evidence to establish any deliberate flouting of the rules of this court by the respondent. The applicant has all along known that the respondent intended to appeal the decision of the High Court and there was no order barring any further proceedings

before that court. There seems to be no reason, therefore, why the matter before the High Court cannot proceed, the intended appeal notwithstanding. No prejudice would thus be suffered by the applicant if the notice of appeal is not struck out.

It is plain, however, that despite compliance with the filing of the notice of appeal timeously, and even accepting the respondent's contention that the notice of appeal was served, he has not filed any appeal more than seven months after the filing of the notice of appeal. There has not even been an application for extension of time to do so, which would have made known the reasons for the delay. The notice of appeal is indeed a good candidate for the exercise of this court's powers under ***Rule 83*** of ***CAR ,*** *suo motu*.

However, instead of applying the coercive powers provided by the rules and striking out the motion as we think we should; and instead of giving the impression to the respondent that he has been successful in this application, we think this is an appropriate case for invoking the 'overriding objective' principles to facilitate the just, expeditions, proportionate and affordable resolution of the intended appeal. This court chose to do so when an application was made to strike out the main appeal in ***Deepak Chamanlal Kamani & another v Kenya Anti-Corruption Commission & 3 others [2010] eKLR*** where it reasoned as follows:

> "***What will happen, for example, if we were to strike out the appeal? The common experience of the Court is and has always been that whenever an appeal is struck out, the losing party invariably invokes the jurisdiction of the Court under rule 4 of the rules under which the Court can enlarge time within which to file a fresh notice of appeal and a fresh record of appeal. That invariably increases the costs of the litigation. In addition to increasing the costs, since the parties are starting all over again, the time within which an appeal would take to be eventually determined on merit is unnecessarily lengthened. In a case where the party whose appeal has been struck out does not start afresh his appeal would not have been determined on merit at all, and, therefore, it cannot really be said that a just determination has been made in the case. These are the situations which Parliament must have intended to remedy by incorporating the overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act. Similar provisions have been incorporated in the Civil Procedure Act to cover litigation in the High Court and in the subordinate courts."***

In the circumstances, we make the following orders:

i). The respondent, ***Newton Kagira Mukuha***, shall file and serve the memorandum and record of appeal within 45 days of this order.

ii). The record of appeal shall be served on the advocates on record for the applicant, ***Simon Gashwe Mukuha*** within 14 days of filing.

iii). In default of compliance with order (i) above, the notice of appeal dated and lodged on 12th November 2014 shall be deemed to have been withdrawn under ***Rule 83*** of the Court of Appeal Rules, without any further application, and the respondent herein shall bear the costs thereof.

iv). After compliance with order (i) and in default of compliance with order (ii) above the notice of appeal and the record of appeal shall be struck out without further application, and the respondent herein shall bear the costs thereof.

v) If the orders (i) and (ii) are complied with, the appeal shall be heard and disposed off expeditiously.

vi). Each party shall bear its own costs of this application.

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

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR