IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & ODEK, JJ.A)

CIVIL APPEAL NO. 171 OF 2013

BETWEEN

NELSON AGOYA……..... 1ST APPELLANT

ABSOLOM LUYAYI LUMASIA..... 2ND APPELLANT

ROHODA MUSIMBI.....3RD APPELLANT

WYCLIFF MUKANGULA LUMASIA.....4TH APPELLANT

TONY BARAZA SHIVAMBO.....5TH APPELLANT

ERNEST OKUTE.....…….....6TH APPELLANT

AND

KENYA UNION OF EMPLOYEES OF VOLUNTARY

AND CHARITABLE ORGANIZATIONS….....1ST RESPONDENT

DAYSTAR UNIVERSITY COLLEGE..... 2ND RESPONDENT

*(Being an application to strike out an appeal against the judgement (Isaac K. Mukunya J.), delivered on 3rd March 2009 in Industrial Court at Nairobi Cause No. 37 of 2008, pursuant to leave granted on the 7th May 2013 i**n CIVIL APPL. NO 17 OF 2013)***

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RULING OF THE COURT

[1] The main appeal in this matter came up for hearing on 26th January 2015. It could, however, not proceed as an issue of *locus standi* of the appellants was raised by counsel for the 2nd respondent and the Court ordered the issue be resolved before the appeal could be heard on merit. A brief background of the matter is that, the six (6) appellants were employees of Daystar University College, the 2nd appellant (hereinafter referred to as Daystar). A claim was filed on behalf of the appellants by the1st respondent, Kenya Union of Employees of Voluntary & Charitable organizations, before the then Industrial Court.

The appellants alleged that their services were unlawfully terminated by Daystar and they sought compensation and reliefs under various heads as per the memorandum of claim. Upon hearing the parties, the Industrial Court, (Mukunya J.), held as follows:

> **"In the premises, the employer/respondent is hereby ordered to compute and pay the terminal dues as enumerated in the report of the Labour Commissioner and pay them to the grievants within thirty (30) days. This will be on top of what the grievants have already been paid. Since declaration of redundancy was wrongful and the grievants lost their employment wrongfully, the respondent/employer shall pay to each of them four (4) month's salary as compensation for wrongful loss of employment also with thirty (30) days. In the event that the computation of the underpayments is disputed by the claimant, then the Nairobi Provincial Labour Officer at the request of the claimant to assist the parties to do so and the respondent to pay within thirty (30) days of such notification. All other demands and reliefs are hereby dismissed."**

[2] Being dissatisfied with the aforesaid judgment, the appellants filed the present appeal which seeks a determination whether the learned trial judge erred by failing to award the appellants certain heads of their claim and reliefs sought following their retrenchment from employment at Daystar. However when the appeal came up for hearing on 26th January 2015, Mr. Festus Terrer, learned counsel for Daystar, indicated that the appeal was filed by parties who lacked *locus standi* as the complainant before the Industrial court was the Union and the appellants were mere grievant. This turn of events caused the matter to taken out of the hearing list to enable counsel for Daystar to make the necessary application to regularize the position before the appeal could be heard. This is what the learned judges stated in a pertinent portion of the said order of the Court;-

> **"We have given due consideration to the above sentiments.**
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> **We feel it will be unsafe for us to call upon the parties to proceed with merit arguments on the appeal before the issue of *locus standi* of the purported appellants is sorted out. For this reason, we find it prudent to adjourn this matter and take it out of today's hearing list and direct learned counsel for the 2nd respondent to make a necessary application to regularize the position before the appeal can proceed to hearing if need be."**

[3] As a consequence to the aforesaid order, Daystar filed a Notice of Motion on 23rd June, 2015 seeking to strike out the appeal on the grounds that the appeal was filed by parties who were not claimants in the Industrial Court. The aforesaid motion was argued by Ms Olando, learned counsel for Daystar, who urged us to strike out the appeal on the grounds that it was not filed by the Trade Union which represented the appellants as claimants in the trial court. Counsel pointed out that, after the judgement, the Union, being the rightful claimant filed another Notice of Appeal in Civil Appeal No. 303 (A) of 2013. The appellants applied to be joined as interested parties but the application was dismissed. That is when the appellants sought extension of time and by a Ruling of Musinga JA., dated 31st May, 2013, the appellants were granted leave to file an appeal out of time. It is as a result of the said leave that the appellants filed the present appeal. Counsel further submitted that there was material non-disclosure when the appellants were granted leave to file the present appeal.

[4] Several authorities were cited by counsel for Daystar as per the list of authorities to buttress the point that jurisdiction of the court can only be invoked by proper parties. Among them is the persuasive decision by the Supreme Court of Nigeria in the case of **Goodwill & Trust Investment Ltd & Ano. vs Witt & Bush Ltd (2011) LPELR-1333 (SC)** in which the Court held, *inter alia,* that:

> **"It is a cardinal principal of law that jurisdiction is fundamental to the determination of a suit, as unless a court is competent, it cannot exercise jurisdiction over a suit to the extent of deciding on it… Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication**…"

The case of **Bahadurali Ebrahim Shamji vs Noor Jamal & Others [1998] e KLR** was cited to

underscore the principle of non-disclosure and the consequence a court should attach to any failure to comply with the duty to make full and frank disclosures. On this point, the appellants were faulted for failure to disclose that they were not claimants but grievant and that there was another Notice of Appeal that was filed by the Union on their behalf.

[5] The application was opposed by Mr. Oduour, learned counsel for the appellants, who relied on the replying affidavit sworn by the 1st appellant, Nelson Agoya, on the 14th October 2015. Counsel submitted that there was no material non-disclosure as Daystar was represented when the application seeking leave was heard and they had an opportunity to raise the issue of *locus standi.* After Musinga JA granted the orders, his Ruling has not been appealed against. Counsel contended that raising this matter in the appeal is tantamount to appealing through the back door. On the issue of the appellants' interest in the appeal, counsel contended that the claim is in regard to their grievances for unlawful termination and the various demands and reliefs that were dismissed by the trial court. The appellants are pursuing this appeal, said counsel, after realizing that the Union was not taking their interests into consideration as they are no longer members of the Union. Counsel urged us to dismiss the application.

[6] On its part, the Union was represented by Mr. Janitor Odin Otieno, its Secretary General, who supported the application to strike out the appellants' appeal. He submitted that he is the lawful representative of the Union that was the claimant before the Industrial Court. Pursuant to the authority by the appellants, he filed a Notice of Appeal in Civil Appeal No. 303 (A) of 2013 in the Court of Appeal in respect of the subject judgement. He stated that the Union never appointed an advocate to represent the grievant. He further stated that he was not served with the application for leave, and that therefore there was material non-disclosure when the appellants were granted leave. He urged us to strike out the appeal as it is the Union which is supposed to act for the appellants so that he can proceed with Civil Appeal No 303 (A) of 2013.

[7] This appeal was filed on 30th July 2013, while this Notice of Motion seeking to strike the appeal was filed on 23rd June 2016. For all intent and purposes, this motion is an application under **Rule 84** of the Court of Appeal Rules which 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.**
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> **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 the service of the notice of appeal or record of appeal as the case may be.**

[8] The applicant postulates that the above application was filed pursuant to leave granted by this Court on 26th January 2015. In our respectful view, directing the parties to file an application to sort out the issue of *locus standi,* does not amount to leave of the court to file an application for striking out the appeal outside the provisions of the Rules. If the applicants' intention when they raised the objection was to seek to strike out the appeal, they ought to have made a specific application seeking for leave to bring an application under Rule 84 out of time. The instant application was filed almost two years after service of the record of appeal and almost 5 months after the applicant was directed to regularize the issue. The proviso to **Rule 84** requires an application of this nature to be filed within 30 days of service of the notice of appeal or record of appeal, but the applicant has not given any cogent reasons why this application was filed outside that period. Incidentally, the applicant was represented throughout the proceedings and even when the appellants sought leave to file the appeal out of time, Mr. Wambugu, appeared for them and the issue of *locus standi* of the appellants was not raised. Ms Olando told us that her client participated in the hearing of that application by mistake because when Mr. Terer came on record, he raised the issue about the parties and he was accordingly given leave on the 26th January 2016 to file the present application to strike out the appeal.

[9] As stated above, the provisions of **Rule 84** are couched in mandatory terms. A party desiring to strike out an appeal must abide by them. Raising an objection at the threshold of the hearing, and being directed to resolve the issue did not amount to the applicant being granted leave to circumvent the provisions of the Rules. This Court has pronounced itself in many cases that an application must be filed within the time frame of 30 days and the court has no discretion to second guess what was intended by the framers of the Rules when they gave a time frame. See the case of **Gichuki King'ara & Co Advocates v AL Jalal Enterprises Ltd & Others** Civil Appl. No. NAI 211 of 2012(unreported) where this Court stated in reference to **Rule 84** as follows;

> **"The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought."**

This application was thus filed out of time, it was an afterthought, and as such it should itself be struck out.

[10] We think we must also address ourselves to the singular issue that was argued before us, namely, whether the appellants have the *local standi* being grievant as opposed to the claimants to bring an appeal. According to **Black's Law Dictionary**, grievant means;-

> "**An employee who files a grievance and submits it to the grievance procedure outlined in a collective - bargaining agreement.''**

A grievance in our own understanding is a wrong or hardship suffered, real or supposed which forms legitimate grounds of a complaint. The suit before the Industrial Court was filed on behalf of the appellants. It was acknowledged in the pleadings that there was neither recognition agreement nor a collective bargaining agreement between Daystar University and the Union. Nonetheless the Union represented the appellants before the court. The appellants stated that since their employment was terminated, they ceased to be members of the Union; the Union has not been pursuing their interests and that is why they sought leave to appeal their own case.

[11] We have considered this issue within the broad parameters of the overriding objectives that guide the administration of justice as derived from the Constitution and the Appellate Jurisdiction Act; the Court should aim at rendering substantive justice by disregarding procedural technicalities. We however wish to throw a word of caution that citing the right parties in court proceedings is not a mere technicality as it has implications on the orders made that may affect a wrong party profoundly. In this case it is the appellants who suffered the alleged injustices that they intend to appeal against, if there are any orders to be made, those orders will be for them or against them not so much to the Union who are merely representing the appellants as its members. In the circumstances of this matter the Union that has no recognition or collective agreement on behalf of the appellants, cannot force itself on the appellants, much the same way an advocate may not represent an unwilling client. We gather there is another appeal that was filed by the Union being Civil Appeal no 303 (A) of 2013, involving the same parties and issues, in our view that appeal can be heard together with Civil Appeal No. 171 of 2013 so as to save on judicial time.

[12] We think we have said enough to demonstrate this application lacks merit, and it was filed out of time without proper leave of the court and the appellants being the interested parties who will directly be affected by the orders made in this appeal have the requisite *locus standi* to pursue the appeal. The application is dismissed. We direct that both Civil Appeals Nos. 171 and 303 (A) of 2013 be heard together. The appellants shall have the costs of this application in any event.

Dated and delivered at Nairobi this 8th day of July, 2016.

M. K. KOOME

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR