



IN THE COURT OF APPEAL

AT NYERI

CIVIL APPLICATION NO. NYR. 9 OF 2016

(CORAM: WAKI, NAMBUYE, KIAGE, JJA)

BETWEEN

CHARLES WANJOHI WATHUKU.....APPLICANT

AND

GITHINJI NGURE.....1<sup>ST</sup> RESPONDENT

CHARLES MWANGI GITUNDU.....2<sup>ND</sup> RESPONDENT

*(Being an application for stay of execution from the Ruling of the High Court*

*of Kenya at Nyeri (Makhandia, J.) dated on 3<sup>rd</sup> day of June, 2009*

in

Succession Cause No. 60 of 1997

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**RULING OF THE COURT**

1. This Succession Cause on the estate of the late Wathuku Ngure has had a chequered history since its debut in court some 19 years ago. But the matter before us is rather narrow and we have no intention therefore of relating that long history . It is a notice of motion dated 3<sup>rd</sup> March 2016 which was taken out by **Charles Wanjohi Wathuku (the applicant)**, the court-appointed administrator of the estate, seeking the following substantive orders:

***“1. That the notice of appeal dated 4<sup>th</sup> June 2009 and lodged in the record of High Court Succession Cause No. 60 of 1997 on the 4<sup>th</sup> June 2009 is deemed to have been withdrawn following the failure to institute the requisite appeal under Rule 82 of the Court of Appeal Rules, 2010 or under Rule 81 of the former Court of Appeal Rules revoked on 17<sup>th</sup> December, 2010, after notice dated “17.11.2010” to collect proceedings and ruling was sent to he advocates on record for the respondents by the Deputy Registrar of the High Court at Nyeri.***

***2. That the order of stay of execution in the Ruling of the Court of Appeal at Nyeri (P. K. Tunoi, E. M. Githinji and J. W. Onyango-Otieno, JJA) in the ruling dated 11<sup>th</sup> December, 2009 in Civil***

***Application No. NAI. 178 of 2009 (UR. 120/2009) to wit, “That there be issued a stay of execution of the Order issued by the Superior Court on 3<sup>rd</sup> June 2009 in that the respondent be restrained from executing the said order till determination of the intended appeal” is set aside and vacated, the substratum for the order of stay of execution having been extinguished by operation of Rule 83 of the Court of Appeal Rules, 2010.***

***3. That the applicant is at liberty to execute the orders of the High Court made on the 3<sup>rd</sup> June 2009, to wit, “the respondents are still expected to pay to the estate of the deceased Kshs 4,074,899/= being the value of the earth mover and a further Kshs 4,983,356/=. This amount should be paid forthwith by the respondents jointly and severally failing which their known properties shall be sequestered and sold to recover the said amount”.***

The applicant has invoked **Rule 83** of the **Court of Appeal Rules (CAR)** on the “effect of default in instituting an appeal;” **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** on the overriding objective of civil litigation; and **Rule 1(2)** of **CAR** which preserves the inherent powers of the Court.

2. On the 3<sup>rd</sup> of June 2009, **Makhandia J** (as he then was), determined an application for contempt of court made against **Githinji Ngure** and **Charles Mwangi Gitundu (the respondents)** for failure to comply with various orders of the court relating to the estate. Apart from imposing a fine of Sh 20,000 or in default service of 3 months in prison, the court made orders for the two of them to pay jointly and severally a sum of Sh. 8,983,356 to the estate failing which their properties would be sequestered and sold to recover that sum.

3. The respondents were dissatisfied with the whole decision and timeously filed a Notice of Appeal on 4<sup>th</sup> June 2009 and timeously served it. They also applied for “*uncertified copies of the proceedings and certified copy of the Ruling*” on 3<sup>rd</sup> June 2009 and copied the letter bespeaking the copies to the applicant’s advocates. Subsequently, the respondents sought an order for stay of execution of the decree relating to Sh. 8,983,356 after paying the fines of Sh 20,000 each. This Court acceded to that application on 11<sup>th</sup> December 2009 on the basis that the intended appeal was arguable and the decretal sum was substantial taking into account the respondents’ station in life.

4. It is the applicant’s contention that the respondents went to sleep after obtaining the orders for stay and have not filed the intended appeal for the last six years. That is because the proceedings applied for were ready for collection from the court registry on 17<sup>th</sup> November 2010 and notification for collection was sent to counsel on record for the respondents. This, in their view, was inordinate delay and continued contempt of court which called for the court’s own action *suo motu* under **Rule 83** of CAR, but since the court has not acted, the applicant has applied to have the notice of appeal deemed to have been withdrawn.

5. In his affidavit in support of the motion, the applicant deposes that his advocates on record applied for the same copies in December 2010 and confirmed from the court file that a letter had been dispatched to the respondents’ counsel in November, 2010 to pay and collect their copies. The applicant’s counsel collected their copies, even when they did not have to since they were not appealing, and which are now the basis of the motion before us.

6. In response to the factual averments, the second respondent, Charles Mwangi Gitundu, swore an affidavit asserting that the court registry has never responded to their Advocates’ letter bespeaking copies of the proceedings and Ruling and they were still waiting for the court to supply the copies. He blamed the delay on “*unnecessary multiple activities on the file since 16<sup>th</sup> June 2009*” and the possibility that after the applicant collected his copies, none were left to be supplied to the respondents. He contended that the applicant was merely intent on harassing the respondents despite his knowledge that they were paying the decretal amount by monthly installments of Sh. 100,000 and the prayer for payment of the entire sum in excess of sh. 8 million was thus untenable. Finally the deponent drew the attention of the court to the death of the first respondent, Githinji Ngure, on 2<sup>nd</sup> July 2015 and the efforts made by the deceased’s son to be substituted in other proceedings relating to the estate since November 2015.

7. In written submissions filed by the applicant's counsel, **Mr. Stephen Mwenesi**, he stressed that the respondents were in a position to file their appeal within 60 days of receipt of the copies of proceedings applied for and they can only blame their lethargy for the delay. Furthermore, the respondents could have, but have not made any application for extension of time to file the record of appeal, and the inordinate delay of 5 years would be difficult to explain. In the meantime, the estate of the deceased continues to suffer prejudice when it cannot enjoy the fruits of the orders made in its favour for more than six years. **Rule 83**, in counsel's view, was tailor-made for such situations and **Rule 1(2)** was also meant for stopping the blatant abuse of court process. As for the death of the first respondent, counsel submitted that it was long after the notice of appeal was deemed to have been withdrawn. In any event, any application by the son of the deceased would be incompetent without production of letters of administration of the estate, with or without a Will. The assertion was only made as a red herring to this application. He cited the cases of **John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others [2016] eKLR** and **Amos Wamunyua & another v Nehemiah Ndumo Gitahi & another [2012]eKLR** in support of those submissions.

8. Responding to those submissions, counsel for the respondents, **M/s Bali Sharma & Bali Sharma** in written submissions contended that the application was a waste of time and was only intended by the applicant to enrich himself before the appeal is heard. According to them, the appeal has taken 20 years in court and nine Judges have disqualified themselves from dealing with the appeal which is why it was transferred to Nairobi. In passing, we do not understand to which appeal reference is made. Be that as it may, they pointed out that there was a pending application dated 3<sup>rd</sup> November 2015 for substitution of the first respondent who is deceased and no orders can be granted against him before the application is determined. It was improper therefore for the applicant to make submissions on the competence of that application before it is heard. Counsel further reiterated that the court had not supplied the copies applied for and therefore no appeal or application for extension of time could be made. He added that the application itself was incompetent as it was filed out side the time limits set under **Rule 84** of CAR. The cases of **Sarah Achieng Salasia v Fred M.O. & 2 others [2005] eKLR** and **Litha Peter Muia & Another v. Zuena Ngando Kababu Civil Appl. No. 125 of 2011** were relied on.

9. We have considered the application, the affidavits on record, the authorities cited and the submissions of counsel. In our view, the application stands or falls on whether prayer 1 is granted or not. If it is, and the notice of appeal is deemed to have been withdrawn, there would be no substratum upon which an order for stay under prayer 2 can survive and even less for an order for execution of decree before the High Court can be made as sought in prayer 3. If prayer 1 is not successful, then there would be no basis for granting prayers 2 and 3. In short, prayers 2 and 3 are consequential to the outcome of prayer 1. We must therefore consider the principles which apply in considering applications made under **Rule 83**. In passing, we underscore that the application is not made under **Rule 84** CAR which has specific timelines and which may well have rendered the application incompetent if that Rule was invoked.

10. But any party is at liberty to invoke **Rule 83**. The Rule states as follows:-

***"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served"***  
(Emphasis added.)

11. In the case of **John Mutai Mwangi & 26 others (supra)**, this Court had this to say on the rationale behind the rule:

***"This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely***

***park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice”.***

12. We are in no doubt that the respondents were intent on challenging the order for payment of over Sh. 8 million and there was a notice of appeal to show for it. This court indeed agreed with them that the appeal was not frivolous when it granted a stay of execution. But the stay was only a stop gap measure to facilitate the appeal process as allowed by the rules. The rules require that the appeal be lodged within 60 days of the filing of the notice of appeal by dint of **Rule 82** of CAR. As this court stated in the same authority(supra):

***“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days”.***

13. The respondents concede that they have not filed the intended appeal since the notice of appeal was filed and served about six years ago. They have not filed any application for extension of time and we do not know the reasons they would have raised in such application. The only explanation laid before us is that the respondents have been waiting to be supplied with copies of the proceedings and Ruling to lodge the record of appeal. Faced with the assertion that the copies were available for collection way back in November 2010, they retort that their letter was not responded to by the court and that the applicants must have collected all the copies leaving none for the respondents.

14. With respect, such attitude is not helpful to the respondents. They have all along been represented by able counsel who have their offices within the vicinity of the courts in Nyeri. The advocates themselves have not sworn any affidavit to affirm that the court was to blame for not responding to their letter bespeaking copies. The relevant court registry itself has not been asked to supply support for the assertion that it was to blame. Indeed, we have had no difficulty dealing with this application which contains all the proceedings and ruling made before Makhandia J. At any rate, a diligent and conscientious party or counsel will not sit back and wait for a response to a crucial letter when they can send reminders or personal follow ups. There was no single reminder written since June 2009! What is apparent in this case was pure inaction or neglect.

15. This Court has stated before as follows:-

***“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.*** See Rajesh Rughani –Vs- Fifty Investment Ltd. & Another (2005) eKLR .

Also in the Case of Bains Construction Co. Ltd. -Vs- John Mzare Ogowe 2011 eKLR the Court observed:-

***“It is to some extent true to say mistakes of Counsel as is the present case should not be visited***

***upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences”.***

16. We do not condone the conduct of the respondents and their counsel in this matter. Timelines are not technicalities of procedure which may be accommodated under **Article 159** of the **Constitution** or **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**. We have that on the authority of the Supreme Court which **reiterated**:

***“...that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis”. See Raila Odinga and 5 Others v. IEBC and 3 Others [2013] e KLR.***

17. The Supreme Court also agreed with the dicta of Kiage JA in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** stating:

***“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”***

See **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR (SC).**

18. We have considered the submission that the first respondent is deceased. But he died in July 2015, more than five years since the filing of the notice of appeal. There is nothing to show what was done to advance the filing of the appeal before his demise. We note that the liability for discharge of the order of Makhandia J. was joint and several. The motion before us is therefore competent as against the second respondent. We have also seen an averment to the effect that *“the order of substitution was given by the court on 26<sup>th</sup> September 2015.”* If that be so, no reason is shown why the substituted party has not taken any action since then to protect his interests.

19. It sees to us that the court process is in danger of abuse in this case if it has not already been abused. It is our duty to discourage such abuse. In the event we find merit in prayer 1 of the application. We grant it with the result that the notice of appeal filed on 4<sup>th</sup> June 2009 shall be and is hereby deemed to have been withdrawn. The costs of the application shall be borne by the 2<sup>nd</sup> respondent.

***Dated and delivered at Nyeri this 6<sup>th</sup> day of July, 2016***

**P. N. WAKI**

.....

***JUDGE OF APPEAL***

***R. N. NAMBUYE***

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***JUDGE OF APPEAL***

***P. O. KIAGE***

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***JUDGE OF APPEAL***

I certify that this is a true copy of the original

***DEPUTY REGISTRAR***