**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, MWILU & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 357 OF 2014**

**BETWEEN**

**SETH PANYAKO.....APPELLANT / RESPONDENT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL BOARD.....RESPONDENT / APPLICANT**

*(An application for striking out of the Record of Appeal dated 1st December 2014 and filed in court on 15th December 2014 being an Appeal from the Judgment and Award of the Industrial Court at Milimani (Hon. Lady Justice Monica Mbaru (Mrs.)*

in

**Industrial Court Case No.1589 of 2010)**

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**RULING OF THE COURT**

1. This is an application under **rules 42, 84 and 90(1)** of this Court's rules seeking orders to strike out the record of appeal dated 1st December 2014 and filed in this court's registry on 15th December 2014. The application is brought by the respondent to the main appeal, **KENYATTA NATIONAL HOSPITAL BOARD**, hereafter referred to as the applicant. The application is premised on the ground that the record was filed on 15th December 2014 and served on the applicant/Respondent's counsel on the 25th February 2015, out of time. The application is also supported by the affidavit of **SUSAN WANGUI NDIRANGU** the applicant's advocate. The application is opposed by way of replying affidavit sworn by the respondent **SETH PANYAKO**.

2. Both parties filed their written submissions and list of authorities. The application was also argued before us by counsel. **Susan Ndirangu** appeared and argued for the applicant while **Jaoko Alexander** appeared and responded to the application on behalf of the respondent.

3. At the hearing, Ms. Ndirangu adopted and relied on the applicant's written submissions in prosecuting the application. The applicant's argument is that the record of appeal having been filed on 15th December 2014, the respondent ought to have served the same within 7 days that is to say, on or before 22nd December 2014 in line with **rule 90(1)** of this court's rules. By effecting service on 25th February 2015 that was way out of time and was a whole 72 days from the date of filing. In the submissions, the

applicant argues that **rule 90(1)** of the Court's rules is couched in mandatory terms and the respondent had not given any explanation for such late action. The respondent's explanation referring to the delay occasioned by typing of proceedings did not relate to the issue of delayed service.

4. The applicant thus invokes **rule 84** of this Court's rules to strike out the notice or record of appeal for failing to follow some essential step in the proceedings within a prescribed time. The applicant referred us to the case of **Ransa Company Limited & 2 others v Manca Francesco [2015]eKLR** in which the court considered the extent and applicability of its inherent powers and the overriding objective of the court under **sections 3A** and **3B** of the **Appellate Jurisdiction Act** and **Article 159** of the **Constitution**. The applicant is categorical that the respondent has not made any effort to explain his default on service or seek indulgence of the court on the issues raised.

5. Mr. Jaoko on his part arguing the case for the respondent in opposition to the application adopted the written submissions and list of authorities filed. He urged us to consider that the applicant stands not to suffer any prejudice if the appeal is heard. He referred us to the case of **Joseph Kiangoi v Wachira Waruru & 2 others [2010] eKLR** and **DT Dobie & Company (Kenya) Ltd v Muchina [1982]KLR** where the court invoked the overriding objective of justice to sustain rather than strike out the suit. From our perusal of the replying affidavit and the submissions, it is apparent that the factual position relating to the application is not disputed.

6. **Rule 84** of this Court's rules 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 service of the notice of appeal or record of appeal as the case may be."***

Our jurisdiction under this power is discretionary which discretion must be exercised judiciously. **Rule 90(1)** is instructive that the memorandum and record of appeal should be served upon the respondent within seven days.

7. Our perusal of the pleadings reveals that indeed the record of appeal was lodged on 15th December 2014 and served upon the applicant on 25th February 2015. The respondent's argument in the replying affidavit relates to the explanation leading to the delay between July 2014 when the respondent filed its notice of appeal and 1st December 2014 when the record of appeal was prepared. This delay was occasioned by the delay in obtaining the typed proceedings and it is not contested by the applicant.

8. The crux of the application relates to the delay to serve the record of appeal upon the applicant. The respondent has not explained this delay and instead invokes the overriding objective of justice and inherent powers of the court to sustain the suit. This may well be so but we need to point out that these powers under **sections 3A and 3B** of the **Civil Procedure Act** and **Article 159** of the **Constitution** do not operate in a vacuum. The question of delay is a question of fact that ought to have been addressed by the respondent in the replying affidavit. The respondent knew the applicant's advocates on record upon whom to effect service as he eventually did, *albeit* out of time. It did not also escape our mind that the respondent was represented by counsel at all times and was thus privy to proper legal counsel on the existence of and importance of adherence to such timelines as set by the rules of the court.

9. Moreover, as rightly pointed out in **Ransa Company Limited case (supra) & 2 others v Manca Francesco [2015]eKLR, sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Article 159** of the **Constitution** are not a substitute to existing specific rules of law and procedure and should only be invoked where there are no specific alternative provisions of the law. That notwithstanding, we are mindful that each case is to be considered on its own peculiar circumstances and that no case is exactly

the same as another one and it is for that reason and for the greater interest of justice that we state that in this case the record of appeal was actually timeously filed and the attendant delay was in the service of the same. We consider that in a matter, such as this one, where a litigant has taken necessary steps to ready the appeal and has unfortunately made a misstep in one aspect, greater justice will be served in facilitating the determination of that appeal on its merits and the court should be slow to lock out a litigant from accessing justice on account of what appears to be a clear technicality. That is what is sought to be cured by **Article 159 (2)(d)** of the **Constitution of Kenya, 2010**. Furthermore in a case such as this one, where the respondent does not suffer prejudice, or such prejudice as may not be adequately compensated by costs, we think that it is the valid duty of the court to facilitate a hearing on merits. In the circumstances of this matter we disallow the application under consideration and order that the respondent shall pay to the applicant costs which we hereby assess at Kshs.15,000/= before the hearing of the appeal. In default of payment of those costs the applicant be at liberty to execute.

It is so ordered.

**Dated and delivered at Nairobi this 5th day of August, 2016.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

**……..…**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**