



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPLICATION NO. 29 OF 2014

BETWEEN

PETER KIBE WANGAI APPLICANT

AND

PAUL TEMU NDEREMO 1ST RESPONDENT

CAMP GARNATULA CATHOLIC 2ND RESPONDENT

(An application to strike out the Notice of Appeal dated 1st October, 2010 from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 17th September, 2010

in

H.C.C.A No. 18B of 2009)

RULING OF THE COURT

1. Before us is a Notice of Motion application brought pursuant to **Rule 83** of the **Court of Appeal Rules** (the Rules). The applicant seeks *inter alia* an order striking out the Notice of Appeal dated 1st October, 2010 which was filed against the High Court’s judgment dated 17th September, 2010.
2. The grounds in support of the application are that the respondents filed the Notice of Appeal on 1st October, 2010 against the aforementioned decision of the High Court and served the same upon the applicant’s advocate on 4th October, 2010. Since then the respondents have failed to take any action in filing the appeal. It is in the interest of justice for the orders sought to be granted.
3. At this juncture it is imperative to set out the background facts of this application. Following a road traffic accident the applicant herein filed a suit in the subordinate court against the respondents seeking damages. At the conclusion of the trial, the trial court dismissed the applicant’s suit; consequently, the applicant filed an appeal in the High Court which was allowed vide a judgment dated 17th September, 2010. The High Court reinstated the applicant’s suit and directed the same to be heard afresh. Aggrieved with that decision the respondents filed a Notice

- of Appeal dated 1st October, 2010 on even date. Subsequently, the High Court granted stay of execution of its judgment dated 17th September, 2010 pending the hearing and determination of the intended appeal.
4. Mr. Mwangi, learned counsel for the applicant, in his affidavit in support of the application reiterated the aforementioned grounds. He deposed that the respondents had lost interest in filing and prosecuting the appeal; the order of stay of execution was prejudicial to the applicant who is keen in prosecuting his suit in the subordinate court. The suit in the subordinate court involves a minor who had sustained injuries and lost his mother in the aforementioned road accident. He further deposed that the respondents were guilty of inordinate and unexplained delay in filing the appeal.
 5. At the hearing of the application, Mr. Mwangi relied on the aforementioned application and his affidavit. In opposing the application Mr. Cheruiyot, learned counsel for the respondents, submitted that the respondents had an arguable appeal.
 6. We have considered the application, submissions by counsel and the law. **Rule 82** of the Rules requires an appellant to file an appeal within sixty days of lodging the Notice of Appeal. The proviso to **Rule 82** stipulates that where an appellant requests in writing for proceedings the period certified by the Deputy Registrar as having been required to prepare and deliver the proceedings is excluded in the computation of time. In this case there is no evidence that the respondents had requested for proceedings therefore time begun running after the Notice of Appeal was lodged. The Notice of Appeal was lodged on 1st October, 2010 hence the respondents were required to file the appeal on or before 3rd December, 2010.
 7. We cannot help but note that the respondents have neither filed the appeal nor offered any explanation for the delay. We find that the contention by the respondents' that they have an arguable appeal does not suffice as a reasonable explanation. We also note that the respondents have been unfairly benefitting from the orders of stay of execution which are in place pending the hearing and determination of the intended appeal for a period of three years. We are of the considered view that this is an appropriate case to invoke the provisions **Rule 83** of the Rules which stipulates:-

“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 of any persons on whom the notice of appeal was served.”

In *Mohammed Sheikh Abubakar –vs- Zacharius Mweri Baya- Civil Application No. Nai. 184 of 2005*, this Court expressed itself as herein under:-

“In this matter, there was a notice of appeal filed on 10/9/2004 and, as we have found, served within time. We have not been shown any appeal instituted within 60 days of filing the notice of appeal. Nor have we been shown there was compliance with the provisions of rule 81 or that an application has been made and granted for extension of time....

In the end, we are satisfied that the applicant was justified in seeking the order for deeming the notice of appeal to have been withdrawn by the time the application was filed in Court on 26/5/2005. We grant the application and give the declaration and consequential order that the notice was withdrawn upon the failure to institute the appeal in accordance with the rules.”

8. The upshot of the foregoing is that we find that the respondents' Notice of Appeal dated 1st October, 2010 has been withdrawn due to failure to institute the appeal in accordance with the Rules of this Court. Consequently, the application is allowed with costs to the applicant.

Dated and delivered at Nyeri this 20th day of January, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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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