



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KOOME & M'INOTI, J.J.A.

CIVIL APPLICATION NO. NAI 43 OF 2014

BETWEEN

PAN AFRICA LIFE ASSUARANCE LTD.....APPLICANT

AND

CAROLYNE CHEGERO VERESO.....RESPONDENT

(An application to strike out Notice of Appeal from the judgment and decree of the Industrial Court of Kenya at Nairobi (Mbaru, J.) dated 17th December 2013

in

I.C.C. NO. 2170 OF 2012)

RULING OF THE COURT

The applicant, *Pan Africa Life Assurance Ltd*, has moved the Court to strike out the Notice of Appeal lodged on 14th January 2014 by the respondent, *Carolyn Chegero Vereso*. By its Notice of Motion dated 4th March 2014 and taken out under *rules 77* and *84* of the *Court of Appeal Rules*, the applicant contends that the respondent has failed, or failed to take within the prescribed time, an essential step in the proceedings.

The short background to the application is that on 26th October 2012, the respondent filed a claim for unlawful termination against the applicant in the *Industrial Court* at Nairobi. She sought award of service pay for seven years worked, twelve months compensation, severance pay, general damages for breach of contract of employment, costs of the suit and interest.

The applicant defended the claim, contending that the respondent's employment was summarily and lawfully terminated for gross misconduct involving absconding duty, persistent poor work performance, chronic late reporting to work and breach of her contract of employment.

Mbaru, J. heard the claim and dismissed the same on 17th December 2013, with no orders on costs. Aggrieved by the judgment, the respondent lodged the Notice of Appeal as aforesaid, on 14th January 2014.

Mr. Leshan, learned counsel for the applicant urged us to strike out the Notice of Appeal on the grounds that it was not served upon the applicant within 7 days of its lodgment as required by **rule 77** of the Court of Appeal Rules. Instead, it was submitted that the Notice of Appeal was served on 4th February 2014, which was 21 days after the lodging of the Notice of Appeal. It was further contended that although **rule 4** of the Court of Appeal Rules afforded the respondent an opportunity to apply for extension of time so as to cure the defect in service of the Notice of Appeal, the respondent had failed to invoke the remedy.

The record before us indicates that the application to strike out the Notice of Appeal was served upon the respondent's advocates, **Messrs. Mang'erere Bosire & Associates** on 5th March 2014. The respondent has not filed any replying affidavit or grounds of opposition to the application. On the date scheduled for the hearing of the application, there was no appearance for the respondent, although her said advocates had been served on 19th March 2015 with the Notice of Hearing. In the circumstances we allowed the applicant to prosecute its application in the absence of the respondent or her advocates.

We have anxiously considered the application. The record bears the applicant out that the Notice of Appeal was lodged on 14th January 2014. In addition, **Miriam Gathura**, the applicant's Human Resources Manager swore an affidavit on 4th March 2014 in support of the application in which she deposed that the Notice of Appeal was served upon the applicant's advocates on 4th February 2014. That service is confirmed by the advocates' stamp confirming receipt of the Notice of Appeal on that date.

The respondent has not attempted to justify or explain the reason why **rule 77** was not complied with. The noncompliance with the rule was brought to the notice of her advocates when they were served with the application to strike out the Notice of Appeal on 5th March 2014, more than one year ago. To date no attempt has been made to cure the defect in the service of the Notice of Appeal, even though the rules of the Court afford the respondent that option.

Sections 3A and 3B of the Appellate Jurisdiction Act provide the overriding objective of the Act and the Court of Appeal Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of appeals. Those provisions oblige us, in the exercise of the powers under the Act or in the interpretation of any of its provisions or of the rules made thereunder, to give effect to the overriding objective. In the instant application, the respondent, who has had the opportunity to do so for more than one year, has placed absolutely nothing before us to enable us, consistent with the overriding principle, exercise our discretion in her favour.

In **WESTMONT POWER (K) LTD V. COMMISSIONER OF INCOME TAX, CA NO. 128 of 2006** this Court, in an application to strike out a notice of appeal, explained the limits of the overriding objective as follows:

"It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away well known and established principles of law hitherto in place before the said amendment...This to our understanding means sections 3A and 3B of Cap. 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this Court."

And in **KENYA COMMERCIAL FINANCE CO. LTD V. RICHARD AKWESERA ONDITI, CA NO. NAI. 329 OF 2009**, the Court reiterated:

"In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act."

Lastly, in **MRADURA SURESH KANTARIA V. SURESH NANALAL KANTARIA, CA NO. 277 OF 2005**, regarding resort to the overriding principles the Court stated:

“The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judiciary ascertained.”

It is not lost to us too, that expeditious disposal of appeals is a core value of the overriding objective. On the face of it, the respondent’s conduct and approach in this matter is not consistent with a party that is mindful of expeditious determination of the dispute. We are therefore satisfied that the applicant’s Motion is well founded and merited. Accordingly, we allow the same and strike out the Notice of Appeal dated 13th January 2014 and lodged on 14th January 2014. The applicant shall have costs of the application.

Dated and delivered at Nairobi this 27th day of March, 2015.

R. N. NAMBUYE

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

K. M’INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR