



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, MARAGA & KANTAI J.J.A)

CIVIL APPEAL NO. 45 OF 2014

BETWEEN

FRED BEN OKOTH APPELLANT

AND

EQUATOR BOTTLERS LTD RESPONDENT

(An appeal from the judgment- decree of the high court of Kenya at

Kisumu (Chemitei, J.) dated 25th March, 2014 **In H.C.C.A. NO. 28 OF 2011)**

RULING OF THE COURT

1. We have before us a Notice of Motion dated 3rd September, 2014, brought by the respondent under **Sections 3 and 3A** of the Appellate Jurisdiction Act and **Rule 84** of the Court of Appeal Rules. It seeks the striking out of this appeal on the ground that it is fatally defective.
2. Relying on his affidavit sworn on 3rd September, 2014 In support of that application, Mr. Okero, learned counsel for the respondent submitted that the record of appeal was filed out of time. This is because, although in its ruling of 10th June, 2014 the High Court granted the appellant leave to file the Notice of Appeal out of time under **Section 7** of the Appellate Jurisdiction Act, that order stated that the Notice of Appeal that the appellant had earlier on filed was deemed to have been filed with leave. In counsel's view, the High Court had no jurisdiction to grant an order whose operation was to have retroactive effect. That being his view, counsel urged us to find that the Notice of Appeal filed herein is fatally defective. As a consequence, he urged us to find that the record of appeal filed pursuant to that Notice of Appeal is equally defective and the same should be struck out.
3. Opposing the application, Mr. Nyawiri , learned counsel for the respondent submitted that the application is totally misconceived and urged as to dismiss it with costs.
4. We agree with Mr. Nyawiri that the respondent having not appealed against the said High Court order of 10th June 2014 granting the appellant leave to file the Notice of Appeal out of time, it cannot be allowed to challenge that decision in this application. At any rate, in their inherent jurisdiction, courts have jurisdiction to deem pleadings already filed as having been filed with leave as the High Court did in this case. Consequently we find no merit in this application and we accordingly dismiss it with costs.

DATED and delivered at Kisumu this 5th day of March 2015

W.KARANJA

JUDGE OF APPEAL

D.K.MARAGA

JUDGE OF APPEAL

S. Ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR