IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 45 OF 2014

BETWEEN

PRIME BANK LIMITED …….…….....
…….APPLICANT

AND

D.J.LOWE & COMPANY LIMITED ……..……
RESPONDENT

(Being an application for an order to deem as withdrawn and/or struck out the Notice of Appeal dated 1st December, 2011 from the ruling of the High Court of Kenya at Mombasa (Ibrahim, J.) and delivered by Okwengu, J. on 29th November 2011,

in

H. C. C. C. No.235 of 2010)

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RULING OF THE COURT

The applicant, Prime Bank Limited seeks to have the notice of appeal dated 1st December, 2011 deemed to have been withdrawn and/or be struck out pursuant to Rules **83** and **84** of the Court of Appeal Rules. Those two rules provide as follows;

> ***"83. 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who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party make such order….***
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> ***84. A person affected by an appeal may at any time, either***
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> ***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 taken within***

the prescribed time."

In a ruling delivered by **Okwengu. J.** (*as she then was*) on behalf of **Ibrahim, J.** (*as he then was*) on 29th November, 2011, the latter held that the respondent's suit, **HCCC No.235 of 2010** was an abuse of the court process, having been instituted when a suit involving the same parties on the same subject matter, being **HCCC No.35 of 1997** was still pending determination in that court. The learned Judge proceeded to strike out the plaint in **HCCC No.235 of 2010** with costs.

Aggrieved by this decision the respondent, D.J Lowe & Company Limited lodged a notice of appeal one day later on 1st December, 2011. Because by the time the instant application was brought on 25th November, 2014, some three years after the filing of the notice, no appeal had been filed while at the same time the applicant is contending that it has not been served with the notice of appeal, the applicant holds the view that the respondent has not done enough to actualize its intention to appeal the decision in question.

Mr. Ushwin Khanna, learned counsel for the applicant has sworn an affidavit that although the respondent's advocates had filed a notice of appeal, that notice was never served on the respondent; that the respondent applied for copies of the proceedings on 30th November 2011 but made no follow up prompting them (the advocates for the applicant) to offer on 20th February, 2014, three years later, to type the proceedings. The applicant's advocate having typed the proceedings and delivered them to the court registry notified the respondent's advocate of this fact in a letter dated 25th August, 2014. For the two reasons that the respondent failed to serve upon the applicant the notice of appeal and also to institute the appeal, the applicant seeks that we either deem the respondent to have withdrawn the notice of appeal or we strike it out for failing to take essential step in the proceedings.

The respondent, relying on two affidavits, sworn by its learned counsel, **Mr. Gikandi Ngibuini**, and **Mr. Michael Otieno** a process server, contends that by annexing to this application a copy of the notice of appeal without disclosing the source is in itself an admission by the applicant that it was served with it; that both the notice of appeal and the advocate's letter dated 30th November, 2011 to the Deputy Registrar, High Court bespeaking proceedings were served on the applicant's advocate on the same day; that from the applicant's letter of 5th February, 2014 and from the proceedings before and rulings by **Mureithi, J** and **Mukunya, J** on 20th February 2012 and 14th February, 2013, respectively, it is obvious that the applicant was aware of the notice of appeal; that at no time did the respondent's advocate receive the alleged letter from the applicant's advocates notifying them that the typed proceedings were ready for their collection; that in any case the process server served the applicant's advocates on 5th December, 2011 at 11.15 a.m. with a certificate of urgency together with a notice of motion, notice of appeal and the letter to the Deputy Registrar bespeaking proceedings; that the receptionist at the applicant's advocate's chambers declined to disclose her name, but took the documents to some office and when she returned she asked the process server to return later for his stamped copy. But because he had instructions to return the copy acknowledging service to the instructing advocates the process server elected to forego the acknowledgement of service by a stamped copy. He was also advised by counsel for the respondent that there was no point of swearing an affidavit of service at the time because the applicant's advocates had filed grounds of opposition to the motion for an injunction.

We shall consider two broad questions; whether the respondent has failed to take an essential step in the appeal process and whether the respondent was prevented from instituting the appeal within the time appointed by a justifiable cause.

After the delivery of the impugned ruling on 29th November, 2011 the respondent who was aggrieved had fourteen (14) days from that date to lodge a notice of intention to appeal. Within seven (7) days from the date of lodgment of the notice all persons directly affected by the appeal ought to have been served with copies of the notice of appeal. Within sixty (60) days following the lodging of the notice that the appeal can be instituted. Two steps towards institution of an appeal are therefore critical and if omitted altogether or if the appeal is lodged in violation thereof the consequences may be dire and

include striking out of the notice or the appeal itself. The notice of appeal must first be lodged and then served on persons affected, keeping the timelines in mind. The importance of the last requirement has been explained by this Court in **Sheikh v Sheikh (1985) KLR 649** as follows;

> ***"The object of rule 76 (1) (today** Rule 77 (1)**) of the Court of Appeal Rules in obliging an appellant to serve copies of the notice of appeal on the parties directly affected by it is that the rights of a party likely to be directly affected by the result of the appeal should not be affected without the party being provided an opportunity of being heard."***

In a more recent decision rendered on 12th February 2010, the Court emphasized that;

> ***"It follows that although Rule 76** (read 77) **is a procedural rule based on the Appellant Jurisdiction Act, it has deeper roots in the Constitution so as to safeguard due process. Indeed, in the hierarchy of fundamental rights, the right of hearing ranks very high. For this reason we think that failure to serve the notice of appeal renders a notice of appeal incompetent including the record of appeal itself. This is because Rule 76 (1) is a mandatory requirement and provides that all persons directly affected by the appeal must be served with a notice of appeal …." See M.S. vs.N.K. Civil Appeal No.277/2005 (UR)***

We shall revert to these pre-Constitution of Kenya 2010, decision shortly.

The bone of contention is the respondent's insistence that the notice of appeal was served on the applicant. In an affidavit sworn four (4) days before this application was argued, the process server, Michael Otieno deposed that he "*tendered*", together with other documents the notice of appeal on the firm of advocates representing the applicant. He did not, however, demonstrate who he served only explaining that the receptionist declined to disclose her name. Secondly he was not patient enough to return later for a stamped copy to authenticate service on the ground that he had instructions to return the copies. In addition learned counsel for the respondent would rather we draw an inference that there was service merely because the applicant's advocate has failed to explain the source of a copy of the notice of appeal annexed to the affidavit in support of this application. That demand is strange as it shifts the burden to the applicant to show that the notice of appeal was served on it. But of significance the process server has annexed to his affidavit of service two copies of the notices of appeal sworn to have been served on the applicant on 5th December, 2011. While both notices are dated 1st December, 2011 the first one, although bearing registry stamp of that date, is not signed upon lodging by the Deputy Registrar of the High Court, as is the case with the second notice, which is signed by the Deputy Registrar and the date of its lodgment reflected as 19th December, 2011. Two questions beg for answers. When was the notice of appeal lodged – was it 1st or 19th December, 2011? If it was lodged on 19th December, 2011 which appears to us to be the case from the authentication by the Deputy Registrar's signature, the second question is, how was it possible to serve it on 5th December, 2011 when it was lodged thereafter on 19th December, 2011- was it served before it was lodged?

Strangely the process server swears that he also served on that day, along with the notice of appeal, a court order dated 20th December 2011, again a future date. All these discrepancies taken together and bearing in mind the provisions of **Rule 17** of the **Court of Appeal Rules** the conclusion is inevitable. But before we come to that conclusion we reproduce herebelow the pertinent provisions of **Rule 17** due its relevance to our ultimate decision.

> ***"17. (1) Where by these Rules any document is required to be served on any person, service may be effected in such way as the Court may in any case direct, and in the absence of any special direction shall be made personally on the person to be served or any person entitled under rule 22 to appear on his behalf or by any other recognized mode of service as provided under Order 5 of the Civil Procedure Rules, 2010.***

> ***(2) Where any document is required to be served on the appellant or on the respondent and two or more appellants or respondent, as the case may be, are represented by one advocate, it shall be sufficient if one copy of that document is served on that advocate.***
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> ***(3) For the purpose of this rule, service on a partner or a clerk of an advocate at the office of the advocate shall be deemed to be service on the advocate.***
>
> ***(4) Proof of service may be given where necessary by affidavit, unless in any case the Court shall require proof by oral evidence"***

The process server failed to adhere to these rules with the result that we come to the conclusion that there was no service of the notice of appeal on the applicant.

We turn to the second question. Whether the notice of appeal was lodged on 1st or 19th December, 2011, by dint of **Rule 82** the appeal ought to have been lodged within sixty (60) days thereafter. That, it is clear to us, has not been done to this date, nearly four (4) years later.

It appears to us, from the narrative of events that apart from a solitary letter written to the Deputy Registrar on 30th November 2011 bespeaking proceedings the respondent, as it were, took a back seat as there was no threat to its *status quo* having obtained an injunctive order. Instead it was the applicant that took the initiative of typing the proceedings to expedite the process. The only other letter after the one of 30th November, 2011 was written on 15th January, 2015, a few months after this application was instituted. Between 23rd February, 2015 when the application was adjourned to 4th May, 2015 when it was argued, strangely learned counsel for the respondent informed us that he had been notified by the registry on 30th April, 2015 that he could collect the proceedings. As a sign of good faith and to rebut the claim by applicant that the proceedings all along had been ready for collection since 25th August 2014 and that they were according notified, we expected counsel to present, even from the bar, that notification from the Deputy Registrar.

The Business of this court cannot be conducted in such a casual way. The decisions in **Sheikh** and **M.S.K**. v **S.N.K** (Supra) demonstrate a strict application of the aforesaid rules relating to appeals to this court. It is our considered view that the advent of **Article 159** of the **Constitution** and **sections** 3A and 3B of the Appellate Jurisdiction Act brought a new paradigm to litigation that placed strict obligation on the courts, litigants and counsel to facilitate a fair, just, proportionate, cost effective and expeditious resolution of cases in order to achieve substantial justice. These provisions are not intended to provide sanctuaries for indolent parties. In this regard we can do no better than to reiterate what this Court stated in **Abdirahman Abdi** v **Safi Petroleum Products Ltd and 6 others**, Civil Application No.NAI.173 of 2010. (UR) 4

> ***"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice…***
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> ***In the days long gone the Court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellant Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the Court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the Court strike out the offending document. In short, the Court has to weigh one thing against another for the benefit of the wider interest of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the Court has to do justice between the parties without undue regard to technicalities of procedure. That is***

> ***not however to say that procedural improprieties are to be ignored altogether. The Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the Court strikes its document."***

It should follow that the overriding principle does not cover situations aimed at subverting these objectives, inexcusable mistakes or lapses of counsel or negligent acts, or dilatory tactics or acts constituting abuse of the court process.

The respondent cannot be permitted by the Court to use its process to perpetuate a lethargic pace at the expense of the applicant. We reiterate that the respondent, apparently buoyed by the existence of an interlocutory injunction in its favour and fall-back position in the pending **HCCC No.35 of 1997**, has found no motivation to do anything towards the intended appeal. As we cannot help it in that course and for the reasons stated earlier we strike out the notice of appeal with costs to the applicant.

Dated and delivered at Malindi this 29th day of May, 2015

ASIKE-MAKHANDIA

……..……..

JUDGE OF APPEAL

W. OUKO

……...……..

JUDGE OF APPEAL

K.M'INOTI

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR