



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OKWENGU & SICHALE, JJ.A.) CIVIL APPEAL (APPLICATION) NO. 152 OF 2013**

**IRENE NASERIAN KARBOLO..... APPLICANT AND  
KENYA AIDS NGOs CONSORTIUM ..... RESPONDENT**

*(Being an application to strike out the Appeal against the whole Judgment and Decree of the Industrial Court of Kenya at Nairobi*

*(Ongaya, J.) dated 18<sup>th</sup> October, 2012*

*in*

*Industrial Court Cause No. 1937 of 2011)*

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**RULING OF THE COURT**

[1] Irene Naserian Karbolo who is the applicant before us is the respondent in Civil Appeal No. 152 of 2013. She has moved the court under Rule 84 of the Court Rules for orders to strike out Civil Appeal No. 152 of 2013 with costs.

The appellant in that appeal is Kenya Aids NGOs Consortium who is the respondent to the applicant’s motion. The motion is supported by two affidavits both sworn on 6<sup>th</sup> August, 2013, by the applicant and his counsel Laichena Mugambi respectively

[2] The following facts which are not disputed emerge from the affidavits: The applicant a former employee of the respondent lodged a claim in the Industrial Court against the respondent for general damages for unlawful termination of employment. On 18<sup>th</sup> October, 2012, the Industrial Court (Ongaya, J.), delivered a judgment in favour of the applicant for Kshs.899,300/=, plus interest at court rates from the date of judgment till payment in full, and 75% of the costs of the claim. On 24<sup>th</sup> of October, 2012, the respondent lodged a Notice of Appeal under Rule 75 of the Court Rules against the judgment delivered by the Industrial Court. This was followed by an application for stay of execution of the judgment pending appeal. The application was heard by Rika, J. who issued orders on 7<sup>th</sup> December, 2012, staying execution of the judgment pending appeal on three conditions. First, that the respondent do pay the applicant Kshs. 449,650/= within 7 days of the ruling, secondly, that the balance on the principal sum of Kshs. 449,650/=, costs and interest as given in the judgment be deposited in an interest earning joint account in the names of the parties advocates within 3 months from the date of the ruling; and lastly, that in default of compliance with condition one or two, the order for stay of execution would lapse and the applicant would be at liberty to proceed with the execution of the whole decree. The respondents did not

meet any of the conditions given by Rika, J. However, following discussions between the parties and their counsel, on 18<sup>th</sup> December, 2012, the respondent's advocate forwarded a cheque to the applicant's advocate for payment of the decretal amount less costs and interests.

[3] The applicant maintains that the payment made by the respondent was in full settlement of the applicant's claim and on the understanding that a consent letter signed by the parties to this effect would be filed in court. Instead, the respondent did not file the consent letter but on 12<sup>th</sup> July, 2013, filed a memorandum of appeal and a record of appeal in Civil Appeal No. 152 of 2013, with a view to proceeding with the appeal. The applicant, therefore, prays that the appeal having been compromised, it is an abuse of the court process and should be struck off.

[4] While the respondent admits through a replying affidavit sworn by its Executive Director, Allan Ragi, that payment of the principal judgment sum was made to the applicant, the respondent maintains that the negotiations were limited to the application for stay of execution pending appeal and, therefore, the settlement does not affect the appeal. It is contended that the appeal raises serious issues regarding employment and redundancy; that its determination would be beneficial to industrial relations; and that, it would be in the interest of justice that the application be heard and determined on merit.

[5] We have given this application due consideration. There is no dispute that the respondent has paid the principal judgment sum. The issue is whether this payment compromises the respondent's appeal. In addressing this issue, the communication between the parties is revealing. As at 13<sup>th</sup> December, 2012, when the first letter was written by the applicant's counsel, the respondent had not met the first condition given by Rika, J., for payment of the sum of Kshs.449,650/= as per the order dated 7<sup>th</sup> December, 2012. The letter dated 13<sup>th</sup> December, 2012, written by the applicant's counsel that led to the payment of the principal sum stated as follows:

**“RE: INDUSTRIAL COURT NO. 1937 OF 2011 IRENE NASERIAN KARBOLO vs KENYA AIDS NGOs CONSORTIUM**

*The above matter refers and to the tele-conversation between our Mr. Laichena and your Ms Oduor.*

*We write to inform you that strictly on a without prejudice basis, our client has agreed to the payment of the decretal amount being Kenya Shillings Eight Hundred and Ninety Nine Thousand Three Hundred (Kshs. 899,300/=), less costs and interest subject to the following conditions: -*

*i. That the respondent pays the full amount being*

*Kshs.899,300/- on or before close of the day on Tuesday 18<sup>th</sup> December, 2012.*

*ii. Failure to honour clause (i) above the orders of the Honourable Court delivered on the 7<sup>th</sup> day of December, 2012, to take effect.*

*Yours faithfully,*

***For: LAICHENA MUGAMBI & CO. ADVOCATES”.***

The response by the respondent's advocate dated 18<sup>th</sup> December, 2012, was as follows:

**“RE: INDUSTRIAL COURT NO. 1937 OF 2011 IRENE NASERIAN KARBOLO vs KENYA AIDS NGOs CONSORTIUM (KANCO)**

*We refer to the above matter.*

*We also make reference to your letter dated 13<sup>th</sup> December, 2012, and confirm that our client is agreeable to the offer therein.*

*Pursuant thereto, find herein enclosed cheque No. 610007 dated 17<sup>th</sup> December, for Kshs. 899,300.*

*Find also enclosed herein consent letters dated 18<sup>th</sup> December, 2012 for purposes of having the matter marked as settled. Kindly execute the same and forward to us for further action.*

*Yours faithfully,*

***NUNGO, ODUOR & WAIGWA ADVOCATES***”.

[6] From the above correspondences, it is evident that the payment of Ksh.899,300/= by the respondent was in full and final settlement, and in consideration of a consent being signed and filed for the appellant’s claim to be marked as settled.

The applicant agreed to accept only the principal amount thereby abandoning her right to pursue the costs and interest on the principal sum which had also been awarded to her by the Industrial Court. This could only have been in consideration of the matter being finalized instead of being protracted further by way of an appeal. Further, the respondent accepted the terms of the settlement and forwarded a consent letter for execution by the applicant. The consent letter having been duly signed by the applicant and the cheque for the sum of Kshs. 899,300/= forwarded and accepted, a binding agreement ensued and the respondent is estopped from reneging from that agreement.

0. Rule 84 of the Court Rules states as follows:

**“84. Application to strike out notice of appeal or appeal**

**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.**

**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”.**

[8] In this case, although it is not clear when the applicant was served with the record of appeal, the record of appeal was lodged in court on 12<sup>th</sup> July, 2013 and it could only have been served on the applicant thereafter. The applicant filed the motion before us on 6<sup>th</sup> of August, 2013. Thus, the motion was brought within the time frame provided under **Rule 84**. The issue is whether there is sufficient ground to strike out the appeal under that rule. The overriding objective of the **Appellate Jurisdiction Act** as provided under **Section 3A** of that **Act** is to facilitate the just expeditious proportionate and affordable resolutions of the appeals governed by the Act.

[9] Although the respondent failed to file the consent letter, it is bound by the agreement whose purpose was to bring the dispute to an end by marking the applicant’s claim as settled. By that agreement the appellant waived its right of appeal and the appeal does not, therefore, lie. Further, to allow the prosecution of an appeal in a suit settled by the consent of the parties would be inimical to the efficient use of judicial time and an abuse of the court process. The prosecution of the appeal would also be contrary to the overriding objectives of the Act and Rules, as it would allow for protraction of a dispute already settled and not facilitate the just, expeditious and affordable resolutions of the appeal. Accordingly, we allow the applicant’s motion and strike out the appeal. We award costs of the motion, and costs of the appeal to the applicant.

Those shall be the orders of this Court.

**Dated and Delivered at Nairobi this 22<sup>nd</sup> day of May, 2015.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**