



**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPLICATION NO. 11 OF 2015**

**BETWEEN**

**BOB MUNIALO .....APPLICANT**

**AND**

**NATION NEWSPAPER LIMITED ..... RESPONDENT**

**(An Application for setting aside the orders of 8<sup>th</sup> June, 2011**

**in Civil Application No. Nai. 216 of 2011 (UR 155/2010)**

**and striking out of Notice of Appeal lodged**

**in Busia on 15<sup>th</sup> December, 2009**

**in**

**BUSIA H.C.C.C. NO. 8 OF 2011)**

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**RULING OF THE COURT**

1. This is an application under **Rule 83** of the **Court of Appeal Rules** for an order to deem the respondent's notice of appeal dated 10<sup>th</sup> December 2009 as withdrawn and/or to strike it out. The application also seeks a further order that the deposit of the decretal sum in the joint account in the names of the advocates for the parties be released to the applicant.
2. The application is premised on the ground that the respondent has not filed a record of appeal pursuant to the said notice thus rendering the extent notice of appeal an abuse of the court process.
3. The applicant's case is that since the filing of the notice of appeal on 15<sup>th</sup> December 2009 and obtaining an order staying the execution of the decree in HCCC No. 8 of 2001, the respondent has not taken any reasonable steps to file the record of appeal. In the affidavit in support of the application, the applicant deposed that his application No. 149 of 2012 which sought similar orders as those sought in this one was dismissed on the ground that the respondent had not been supplied with a competent decree which is one of the essential documents that should be included in a record of appeal. However, since

5<sup>th</sup> October 2013 when the respondent was supplied with a competent decree, it has not filed a record of appeal. In the circumstances, in the applicant's view, the notice of appeal is an abuse of the court process. It should therefore be deemed as withdrawn or be struck out, and the decretal sum deposited in a joint account in the names of Advocates for the parties should be released to the applicant

4. The application is seriously opposed. Relying on the averments in the replying affidavit, Mr. Kathithi, learned counsel for the respondent, argued that this application is not only incompetent and bad in law for seeking omnibus prayers, but is also *res judicata* hence an abuse of the court process. The prayers sought in this application were the same ones sought in the applicant's Civil Application Nos. 206 of 2011 and 149 of 2012 both of which were dismissed.

5. Mr. Kathithi further argued that since the delivery of the ruling in Civil Application No. 149 of 2012, despite several requests, the respondent has not been supplied with a copy of that ruling which it wishes to include in the record of appeal. In the circumstances, he prayed that this application be dismissed with costs and the respondent be allowed to file a record of appeal without a copy of that ruling and other documents.

6. We have considered these rival submissions and carefully read the record in this application. The matter is not *res judicata* as the respondent claims. In the absence of a copy of the ruling in Civil Application No. 206 of 2011, we accept Mr. Jumba, learned counsel for the respondent's information that that application was withdrawn.

7. Counsel for both parties agree that the prayers in this application are more or less the same as the ones in Civil Application No. 149 of 2012. Counsel also agree that that application was argued and a ruling delivered dismissing it mainly on the ground that the respondent had not been supplied with a competent decree. In our view, that does not make the matter *res judicata*. The delay complained of in that application was up to the date of that application. The delay in this one is in respect to the period subsequent to the dismissal of that application.

8. If a respondent in a civil appeal seeks the dismissal of the appeal on the ground of delay in filing the record of appeal or failure to prosecute the appeal and the application is dismissed, the appellant in such appeal cannot sit pretty, and be heard to seek shelter under the doctrine of *res judicata* for his subsequent failure to take steps to prosecute his appeal.

9. As we have said the applicant's Civil Application No. 149 of 2012 was dismissed mainly on the ground that the respondent had not been supplied with a competent decree. In his affidavit in support of this application, the applicant averred that the respondent was on 5<sup>th</sup> October 2013 supplied with a competent decree. That averment has not been controverted. We also note from the replying affidavit of Loice Wairimu Kagucia sworn on 27<sup>th</sup> February 2013 and filed in Civil Application Number 149 of 2012 that the respondent was supplied with copies of the proceedings in September 2010. Despite that, the respondent has not explained why it has, to date, not filed the record of appeal.

10. We reject the respondent's claim that the delay has been caused by the failure to obtain a copy of the ruling in Civil Application No. 149 of 2012 as a red herring. With due respect, we do not see how a copy of that ruling will help either party in the intended appeal.

11. For these reasons we are satisfied that the respondent has failed to explain why it has not filed the record of appeal since 5<sup>th</sup> October 2013 when it was supplied with a competent decree. In the circumstances, we allow this application and order that the respondent's notice of appeal dated 10<sup>th</sup> December 2009 and lodged in Busia HCCC No. 8 of 2001 be and is hereby deemed as withdrawn under **Rule 83** of the **Court of Appeal** Rules. The deposit of the decretal sum held in the joint account of the advocates for the parties shall be released to the applicant forthwith. The applicant shall have the costs of this application.

**Dated and delivered at Busia this 31<sup>st</sup> day of July, 2015.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**