IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO.46 OF 2014

BETWEEN

RANSA COMPANY LIMITED …….....1ST APPLICANT

HATIBU ABDALLA JUMA …….……..…….....2ND APPLICANT

KASSIM SHARRIF ……..…….…..3RD APPLICANT

AND

MANCA FRANCESCO ……....RESPONDENT

(Being application to strike out the notice of appeal and the entire record of appeal arising from the judgment/decree of the High Court of Kenya at Malindi (Meoli, J.) dated 18th February, 2014

In

HCC No.36 of 2014)

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RULING OF THE COURT

We have been invited by the applicant in the instant motion dated 3rd March,2015 brought pursuant to **Rule 84** of **the Court of Appeal Rules** to strike out both the notice of appeal and the entire record of appeal on the grounds that judgment in the primary suit was delivered on 18th February,2014 and the notice of appeal lodged on 6th March, 2014, was outside the prescribed period by two days; that the notice of appeal has not been served; that the record of appeal has omitted several primary documents; and that the record of appeal was itself filed out of the stipulated sixty days.

The respondent in opposing the application conceded in the replying affidavit that indeed the notice of appeal was filed on 6th March, 2014 a mere, two days out of time; that he had instructed his erstwhile advocates, Katsoleh & Co.Advocates to start the appeal process immediately the judgment was rendered; that the delay in filing the record of appeal was occasioned by the failure of the court to supply copies of the proceedings and judgment even after numerous follow-ups; that failure by his advocate to serve a copy of the letter bespeaking proceedings was an excusable mistake which ought not to be visited upon the respondent, that the trial court issued a certificate of delay confirming that indeed the court contributed to the delay; that upon seeing the delay the respondent instructed the current advocates,

Marende Birir Shimaka & Co.Advocates to represent him in the matter; that the advocates were unable to ascertain the status of the case and to formally come on record as the relevant file was misplaced in the registry; that this application was brought only after the applicant's advocates had obtained leave as a result of indulgence extended to them by the respondent; that in terms of **Rule 88** the applicant shall be seeking for leave to include the omitted documents by way of supplementary record of appeal; and that in the interest of justice the applicant beseeched us to dismiss the application.

Both sides have cited authorities in support of their respective arguments, which we shall consider. Mr.Sumba for the applicants at the commencement of the arguments confirmed that the applicant's advocate has never been served with the notice of appeal until the morning this application came up for hearing, although lodged on 6th March, 2014. The Attorney General, although a party in the High Court has not been joined in the appeal. Mr.Ngari representing that office associated himself with Mr.Sumba's submissions and supported the striking out of the appeal.

Ms Thuku, representing the respondent pleaded with the Court to excuse the respondent's transgressions, which in her opinion amounted only to technicalities; and that a delay of only two days is not excessive but excusable; that the mistakes of the applicant's former advocate cannot be visited upon him; that the Court ought to save the appeal so that it is heard on merit and spare the parties the expense of starting the process afresh.

We do not consider it necessary to go into the depth of the application as the critical aspects have not been controverted. For instance it has not been disputed that the notice of appeal was filed late and was also only served on the day this application came up for arguments. Similarly it is common ground that the record of appeal was filed outside the sixty days from the date of the decision sought to be challenged, in violation of **Rule 82(1)** & **(2)** of the Court of Appeal Rules. Finally it is conceded that several primary documents have been omitted from the record.

In terms of **Rule 75(2)** of the Court of Appeal Rules a notice of appeal must be lodged within fourteen (14) days of the date of the decision against which it is desired to appeal. The notice appeal in this matter was lodged sixteen (16) days after the judgment was delivered.

The respondent was also required by **Rule 77 (1)** to serve on all persons directly affected, within seven (7) days, copies of the notice of appeal. Further by dint of **Rule 82**, within sixty (60) days of the date when the notice of appeal was lodged, the respondent ought to have instituted the appeal. It is admitted, with respect to the former requirement that the notice appeal has never been served on the applicant and the Attorney-General. As a matter of fact the two were being served on the day this application came up for hearing. Regarding the latter requirement, the appeal was instituted on 9th October, 2014, some six (6) months from the date of the judgment. Because these essential steps were not taken or taken within the prescribed time, the applicant was permitted and indeed moved under **Rule 84** to apply for the striking out of both the notice and the appeal, even though Civil Appeal No.46 of 2014 has been filed.

Having satisfied ourselves that essential steps in filing and serving both the notice and record of appeal were not taken or taken within the time prescribed by the Rules, the only question we are left to determine is whether, given the nature of the omissions, the notice and the record of appeal can be salvaged by our exercising inherent powers conferred by **Article 159 (2) (d)** and **Sections 3A** & **3B** of the Appellate Jurisdiction Act.

The jurisdiction under Rule 84 is discretionary. As usual such jursidction is a qualified power which must be exercised in accordance with the rule of reason and justice and not according to personal whims of the Judges or on irrelevant considerations but on firm basis. Put differently by this court in **Paul Wanjohi Mathenge** vs **Duncan Gichane Mathenge**(2013) eKLR.

> ***"The discretion …is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice."***

A total of 20 authorities were cited to persuade us one way or the other, with the applicant relying on 15

and the respondent on 5. If for nothing else, this large number authorities alone demonstrate the drastic nature of the orders we have been invited to issue. Those authorities relate to the exercise of this court's discretionary power under **Article 159(2) (d)** and **Sections 3A** & **3B** aforesaid. The common thread running through these authorities can be summarized as follows:

i. While the overriding principle introduced by the cited provisions of the law will serve the administration of justice well, it is not a panacea for all ills and in every situation. A foundation must be properly laid for its application**. See Mradura Suresh Kantaria** v **Suresh Nanalal Kantaria** Civil Appeal No.277 of 2005

ii. Both **Article 159** and **Sections 3A** & **3B** are meant to avoid a delay caused by application of technicalities but if delay is likely to be caused by failure of the appellant to take essential steps in the proceedings, the appeal or notice of appeal will be struck out. **See Benedict Mwazighe & another v Gasper wahele & 2 others** Civil Application No.255 of 2010

iii. The "02 principle" must not be applied arbitrarily and its application must not create uncertainty. It must be guided by sound judicial foundation. If improperly invoked the principle could become unruly horse **see Hunter Trading Co.Ltd** v **Elf Oil Kenya Limited**, Civil Application No.6 of 2010.

iv. The overriding principle has not uprooted well established principles, precedent or rules of procedure, but rather it has enriched those principles while emboldening the court to be guided by a broad sense of justice and fairness in the administration of justice **See City Chemist(Nbi) & another** v **Oriental Commercial Bank Ltd** Civil Application No.NAI.302 of 2008.

v. Failure to comply with **Rules 75(2)** and **82 (1)** is so grave and renders the notice and the record of appeal incompetent as it goes to the jurisdiction of the court that renders the overriding principle inapplicable. **See** also the following;

Ramji Devji Vekaria v **Joseph Oyula**, Civil Application No.154 of 2010, **Felister Wakonyo Wamahiu** v **Joseph Wachira Mwangi** Civil Application No.8 of 2013 and **Patrick Kivunya Kithinji** v **Victor Mugira Marete** Civil Application No.48 of 2014.

We must, of course emphasise that each case must be considered on its own peculiar circumstances.

We find in this matter that although the notice of appeal was filed only two days after the time stipulated by the Rules, without leave extending time and without any explanation being offered, it matters not the period of delay. Secondly even if the notice of appeal was to be spared, the appeal itself was instituted several months out of time and the explanation offered is not plausible. Assuming that the delay was caused by the court in supplying copies of the proceedings as suggested by the respondent, there is no evidence of any letter by the respondent to the court, copied to the applicant, bespeaking proceedings as required by **Rule 82(2)**. Further more and of significance, according to the certificate of delay issued by the Deputy Registrar, High Court, the days to be excluded is only between 19th March, and 25th July 2014. No explanation has been proffered for the delay between August and October, 2014 when the appeal was ultimately instituted.

The Rules of this court are quite accommodative but for the respondent and his legal counsel's indolence, they failed to sieze the several options provided by the Rules. The Rules allow the respondent to seek leave of the court's Registrar to include any document omitted from the record by filing a supplementary record of appeal. **See – Rule 88**. The court also has a general power vested by Rule 4,

"…on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court …for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended"

The respondent failed to utilize this provision only waking up when this application was brought and now wants us to assist him clinging on the straw of **Article 159** and **Sections 3A** & **3B**, that he is not to blame but his erstwhile advocates; that those omissions ought not be visited upon him and that they are only of a technical nature.

One of the principles guiding this Court in the discharge of its appellate function is to ensure that justice is not delayed by either side of the dispute. The "02 principle" on the other hand enjoins all players in the justice system to facilitate the just, expeditious, proportionate and affordable resolution of appeals. They also demand that an advocate and parties in an appeal presented to the Court are under a duty to assist the Court to further the overriding objective and to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court. When all parties play their part there will be timely disposal of the proceedings.

With the introduction of these principles parties can no longer hide their failures behind abstract excuses that their advocates mistakes cannot be visited upon them. **Article 159** and **Sections 3A** and **3B** have clearly replaced **Section 3A** of the Civil Procedure Act which was, before the enactment of **Article 159** and the "02" principle, the most misapplied provision, where advocate and parties took refuge in whenever they were not certain. These inherent powers are to be resorted to only in situations where there are no specific or alternative provisions of the law.

We come to the conclusion that both the notice of appeal and the record of appeal are incompetent and accordingly strike them out with costs.

Dated and delivered at Malindi this 31st day of July,2015

ASIKE-MAKHANDIA

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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