IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE, KIAGE, JJ.A)

CIVIL APPLICATION NO. NYR.12 OF 2015

BETWEEN

MARTIN KABAYA……..……..……APPLICANT

AND

DAVID MUNGANIA KIAMBI…….…… RESPONDENS

(An Application to strike out Notice of Appeal dated 13th February 2006 and filed in court on the 15th February,2006 from the judgement delivered at Meru (Sitati J.) dated 5th May 2005)

In *HCCC. NO.70 OF 1999)*

****

RULING OF THE COURT

By his application dated 27th March 2015 expressed as brought under Rules 81 and 82 of the Court of Appeal Rules, the applicant Martin Kabaya seeks to strike out the Notice of Appeal dated 13th February 2006. He also prays that the costs of the motion and of the notice of appeal be paid by the respondent. The two grounds on which the application is based appear on the motion as;

a. **The Respondent has failed to institute any appeal within the prescribed time.**
b. **The delay/failure in filing the intended appeal is inordinate and inexcusable.**

In support of the application, the applicant's learned counsel Mr.

Cicilio Muraya Mwenda swore an affidavit on 27th March 2015 in which he stated that he filed suit for the applicant at the High Court in Meru in 1999 and, after a full trial, obtained judgment in the sum of Ksh.1,638,090 plus costs and interest. He exhibited the decree.

What then followed is deposed to as follows;

> ***"5. THAT the respondent did not file notice of appeal in time and had to apply to the Superior Court for enlargement of time as per the notice of motion marked …..***
>
> ***6. THAT subsequent to the application for enlargement of time, a consent was***

negotiated where the respondent was extended time upon the payment of Ksh.800,000 as shown by the copy of consent letter marked ….

7. THAT on 13.3.06 the respondent filed a notice of appeal in the High Court of Kenya at Meru as per copy annexed …"

After that notice of appeal was filed, the respondent did not file any appeal. Not even after being prompted by the applicant's enquiry by a letter dated 19th June 2006. The record of appeal remains unfiled to date and the applicant now seeks to have the notice of appeal struck out, urging that the eight years that have elapsed since the notice was filed is too long and unexplained a time.

The respondent did not file any affidavit in opposition to the application and we take it, therefore, that the factual foundation of the application as we here stated it, remains, uncontroverted. At the hearing of the motion, the respondent's learned counsel Mr. Rukioyah explained the failure to file a replying affidavit as attributable to his difficulty in getting instructions from the statutory manager of the respondent's insurer, Blue Shield Insurance Company Limited. He also explained that the insurer was placed under statutory management on 26th November 2011 and the statutory manager obtained a moratorium vide Nairobi HCCC No. 547 of 2012.

The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog.

The Constitution, the Appellate Jurisdiction Act and the Court of Appeal Rules, all envision that justice shall be rendered in an efficient and expeditious manner. Thus, a notice of appeal, a rather simple and straight forward document, a form of which is provided in the Schedule to the Rules of Court, is required to be filed within fourteen days of the decision intended to be appealed against. Where an intended appellant fails to comply with that timeline, his recourse is to move a single Judge of this Court under Rule 4 for enlargement of time.

The path chosen by the respondent to remedy the initial delay was a curious, if futile one. He applied to the High Court. That court of course has no jurisdiction to enlarge time for filing appeals to this Court. The operative rules are the Rules of this Court and that power resides exclusively in this Court. The application to the High Court was incompetent and the consent entered into by the parties for extension was an inefficacious nullity. The notice of appeal was therefore filed out of time in the eyes of this Court.

Even had the notice been valid as filed, Rule 82 requires that the record of appeal be filed within sixty days. The notice of appeal having been lodged in the High Court on 15th February 2006, the record should have been filed by 16th April 2006, at the latest. More than nine years later, the record remains unfiled and there are no indications that it will be, any time soon. Barring the feeble attempt to explain events after 2011, the long and inordinate delay remains unexplained.

We are cognizant that under Rule 84 of the Rules, (which is the proper rule the applicant should have cited in the first place, but we allowed him to amend his motion accordingly) an application to strike out should have been brought within thirty days of being served with the notice of appeal. The application before us is also hopelessly out of time and would not be granted. This Court has pronounced itself on the mandatory nature of the rule so that an application brought late is an afterthought and incompetent. See, **MUNICIPAL COUNCIL OF MAVOKO – V-S ARISTOCRATS CONCRETE COMPANY LTD** [2015] eKLR and **GICHUKI KINGARA & CO. ADVOCATES –VS- AL JALAL ENTERPRISES LTD & 2 OTHERS** Civil Application No. NAI 211 of 2012 (UR 156/2012)

(Unreported).

Does that save the notice of appeal? It does not. Given what we have already stated about that notice, we invoke the provisions of Rule 83;

> ***"If a party who has lodged a notice of appeal fails to institute 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. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."***

The notice of appeal is accordingly deemed as withdrawn. We make no order as to costs given the applicant's own default.

Dated and delivered at Nyeri this 1st day of July 2015.

P. N. WAKI

.....

JUDGE OF APPEAL

R. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR