



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, OTIENO-ODEK & KANTAI, JJ.A)

CIVIL APPLICATION NO. NAI. 93 of 2015

BETWEEN

AMIRALI SHARIFF.....APPLICANT

AND

LEISURE LODGESRESPONDENT

(An application to strike out the Notice of Appeal from the Award and Decree of the Industrial Court of Kenya at Nairobi (S. M. Madzayo, J.) dated 22nd May, 2012

in

Industrial Cause No. 826 of 2011)

RULING OF THE COURT

1. By Notice of Motion dated 15th August, 2014, the applicant **Amirali Shariff** pursuant to **Section 3A** and **3B of the Appellate Jurisdiction Act** and **Rules 83** and **84** of the **Court of Appeal Rules** (the Rules) seeks, *inter alia*, an order to strike out the Notice of Appeal dated 4th June, 2012 lodged by the respondent. The ground in support of the application is that the time for filing the appeal has long passed and it is clear from the respondent's conduct that it does not intend to file any appeal and or that the respondent is intent on delaying and or frustrating the applicant from recovering what is justly due to him.

2. Two affidavits in support of the application are deposed by **Messrs Amirali Shariff** and **Messrs Sanjeev Khagram**. The core of the application is that the record of typed proceedings was ready for collection on 11th December, 2013 but since then, the respondent has not taken any steps to file the record of appeal and that the time for filing the record of appeal lapsed on 5th March, 2014; it is stated that by letter dated 11th December, 2013, the Registrar of the Industrial Court now Employment and Labour Relations Court wrote to counsel for the applicant advising that the proceedings were ready for collection; that despite being advised that the typed proceedings were ready, the respondent had not taken any steps to file the record of appeal or to prosecute the intended appeal; that the sixty day period for filing the record of appeal has lapsed and this Court should strike out the Notice of Appeal dated 4th June, 2012 or in the alternative deem the said Notice as having been withdrawn.

3. In opposing the application, the respondent filed a replying affidavit dated 9th June, 2015 deposed by its advocate Mr. Walter Amoko. The averment in opposition is that the letter dated 11th December, 2013 from the Employment and Labour Relations Court registry was neither served nor received by the respondent who was not aware that the typed proceedings were ready for collection as at 11th December, 2013. It is deposed that several letters and reminders were written to the Employment and Labour Relations Court registry requesting the typed proceedings; that despite frequent follow-ups and reminders, no response was forthcoming; that on 28th March, 2014, another letter was written requesting for the proceedings; that this letter was copied to counsel for the applicant who neither responded nor stated that there was in existence a letter dated 11th December, 2013 advising that the typed proceedings were ready for collection.

4. Counsel for the respondent averred that by letter dated 3rd June, 2015, the Employment and Labour Relations Court registry clarified that the letter dated 11th December, 2013 was sent from the registry but with incomplete details of address which may have caused non-delivery of the said letter; the registry also indicated that they were re-typing the proceedings since the typed copies in the file were in a horrible state and the soft copy could not be traced. Relying on the registry's letter dated 3rd June, 2015, the respondent urged this Court to find that the letter dated 11th December, 2013 was never delivered to the offices of counsel for the respondent and that the typed proceedings were not ready for collection and that the sixty day period for filing the Record of Appeal started running from 5th June, 2015 when notification that the typed proceedings were ready for collection was given. The respondent urged this Court to find that as a result of the errors and mistakes by the registry, the respondent was not notified that the proceedings were ready for collection as at 11th December, 2013.

5. At the hearing of this application, learned counsel Mr. Sanjeev Khagram represented the applicant while learned counsel Mr. Walter Amoko appeared for the respondent.

6. Counsel for the applicant reiterated the grounds in support of the application and relied upon the two supporting affidavits. Putting emphasis on the letter dated 11th December 2013, counsel urged this Court to find that the said letter was valid having emanated from the registry stating that the typed proceedings were ready for collection and that the respondent had been dilatory and not diligent to file the record of appeal within the sixty day period allowed by the rules of this Court.

7. Counsel for the respondent urged us to dismiss the present application and make a finding that the mistake and errors on the part of the registry should not be visited upon the respondent. Counsel submitted that the registry's letter dated 3rd June, 2015 was self-explanatory and it clarified that the proceedings were being re-typed and the letter dated 11th December, 2013 had incomplete details of address which may have caused its non-delivery.

8. We have considered the present application and the affidavits on record and submissions by both counsel. The application has been brought pursuant to **Rule 84** which provides:-

“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 be 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 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be.” (emphasis ours).

9. In this matter, the applicant contends that although the Notice of Appeal was filed on 4th June, 2012, no appeal had been filed within sixty days as required by the Rules of this Court. Based on the proviso to **Rule 84** of the Rules, the application to strike out a Notice of Appeal can only be entertained if such an application is lodged within 30 days of service of the Notice of Appeal. The affidavit in support of the

instant application does not state when the Notice of Appeal was served upon the applicant. We observe that this application to strike out the Notice of Appeal was filed on 8th April, 2015 which is more than twenty four months from the date upon which the Notice of Appeal was filed. Under the proviso in **Rule 84**, the applicant, to succeed, could only bring the present application within 30 days from the date of service of the Notice of Appeal.

10. The present application on its face indicates that it was filed on 8th April, 2015 while the body indicates it was lodged at the Court of Appeal Registry on 8th April, 2014. Whereas this may be a clerical error, it is interesting to note that the Motion itself is dated 15th August, 2014. How could the Motion be dated after it was lodged at the Registry? An interesting observation is that the affidavit in support of the Motion is supposedly deposed by Mr. Amirali Shariff at page 5 of the record and purportedly deposed at Calgary in Alberta- Canada; the affidavit has no address of the notarizing attorney and the face of the affidavit bears a different name of Mr. Sanjeev Khagram allegedly as the deponent. Further, the supporting affidavit of Mr. Sanjeev Khagram dated 16th March, 2015 is not properly commissioned as it has no address of the commissioning advocate. We are of the considered view that the discrepancies on the dates on the face of the application and its supporting affidavits and the different fonts in the two supporting affidavits affect the veracity of the contents of the deposition.

11. On our part, we have also examined the contents of the letter dated 3rd June, 2015 from the Registry clarifying the incomplete address that may have led to non-delivery to the respondent's counsel of the letter dated 11th December, 2013. The relevant excerpts of the letter dated 3rd June, 2015 is as hereunder:

“I do confirm that the notice dated 11th December 2013 was indeed issued from this court. I also note that the notice was copied to your law firm but with incomplete details of address that may have caused non-delivery. On your letter dated 28th March 2014, the Executive Officer acted on the same by asking for re-typing of the proceedings since the typed copies in the file was in horrible state and the soft copy could not be traced. I wish to apologize to yourself and to your clients for the errors and mistakes in the process herein...The typed proceedings are now reading and you may collect the same upon payment of court fees...”

12. We are satisfied with the clarification by the Registry as per the letter dated 3rd June, 2015. On a balance of probability there is no proof that the letter dated 11th December, 2013 was received by counsel for the respondent. We are convinced that as at 3rd June, 2015, the respondent had not received typed proceedings and there had been no delay or failure to lodge the record of appeal within the stipulated time frame. Being satisfied with the explanation given by the Registry in its letter dated 3rd June, 2015 and noting the discrepancies on pertinent dates given on the face of the Motion and supporting affidavits, it is our considered view that the present application vide Notice of Motion dated 15th August, 2014 has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 25th day of September, 2015

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR