



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 17 OF 2015 (UR 13/2015)

BETWEEN

ERASTUS ONYANGO NYAMORI APPLICANT

AND

COUNTY GOVERNMENT OF MIGORI FIRST RESPONDENT

MIGORI COUNTY GOVERNOR

(ZAKARY OKOTH OBADO) SECOND RESPONDENT

(Application for an order of evacuation/striking out the Notice of Appeal under rule 83 and 84 of the Court of Appeal Rules, 2010 and subsequent lifting of the orders of the Court of Appeal (Maraga, Ouko & Kantai) dated 23rd April, 2015)

in

THE MATTER OF THE RESPONDENTS' CIVIL APPLICATION NO. 80 OF 2014

AND

THE MATTER OF INDUSTRIAL CAUSE NO. 308 OF 2014)

RULING OF THE COURT

1. By an application dated 27th April, 2015, the applicant sought one substantive order:

“2. That the Honourable Court be pleased to evacuate/strike out the Notice of Appeal dated 17th December, 2014 and to lift the subsequent orders of this Honourable Court dated 23rd April, 2015 Staying Execution of the Orders of the Industrial Court (Employment and Industrial Relations Court) dated 3rd December, 2014 and an Order Staying further proceedings in Industrial Cause No. 308 of 2014.”

2. The application was brought under **rules 82 (1), 83 & 84** of the **Court of Appeal Rules** and **Article 159 (2) (b)** of the **Constitution of Kenya, 2010**. It was supported by an affidavit sworn by the applicant. The gravamen of the application is that the respondents had failed to file the record of appeal within a period of sixty (60) days from 17th December, 2014 when they lodged the notice of appeal.

3. **Mr. Ogwe**, learned counsel for the applicant, submitted that the delay in filing the appeal is prejudicial to the applicant as there was an order to reinstate the applicant and pay him damages but the orders had been stayed by this Court pending hearing and determination of an intended appeal.

4. Mr. Ogwe added that the registry had verbally informed him that the proceedings were ready for collection but the respondent had not paid for them. For that reason he urged the court to strike out the notice of appeal.

5. **Thomas Kwanga Mboya**, the Legal Advisor, the County Government of Migori, filed a replying affidavit on behalf of the respondents. He stated that the notice of appeal that was filed on 17th December, 2014 was accompanied by a letter requesting for certified copies of typed proceedings, and the ruling of the Employment and Industrial Relations Court delivered on 3rd December, 2014. The notice of appeal and the letter were served upon the applicant through his advocates then on record, M. M. Omondi & Company Advocates.

6. Mr. Mboya further deposed that the respondents had so far neither been furnished with the documents sought, nor received a letter from the deputy registrar advising that the proceedings were ready for collection.

7. **Mr. Sagana**, learned counsel for the respondents, made brief submissions that basically amounted to a rehash of the respondents' replying affidavit. He added that under **rule 84** of the **Court of Appeal Rules** an application to strike out a notice of appeal ought to be made within 30 days from the date of filing the notice of appeal, which was not the case here.

8. We have considered the application and the brief submissions by counsel. It is not disputed that both the notice of appeal and the letter bespeaking proceedings were served upon the applicant's advocates on 17th December, 2014. Although the applicant alleges that the typed proceedings are ready for collection, there is absolutely no evidence to that effect. Without such evidence, the respondents cannot be faulted for failing to file the record of appeal within the stipulated period of sixty days from the date of filing the notice of appeal as required under **rule 82** of the **Court of Appeal Rules**.

9. Where an application for a copy of proceedings has been made in accordance with **sub-rule (2) of rule 82** within thirty days of the date of the decision against which it is desired to appeal, such period as the registrar may certify as having been required for the preparation and delivery of the proceedings must be excluded.

10. We must however reject the respondents' contention that the applicant herein ought to have filed the application to strike out the notice of appeal before expiry of thirty days from the date of service of the notice of appeal. Where the appellant has upto sixty days from the date of filing the notice of appeal to file the record of appeal, it would be an absurdity to hold that the application to strike out the notice of appeal has to be filed within thirty days of lodging the notice of appeal. See the decision of this Court in **Lither Peter Muia & Another V Zuena Ngando Kababu** [2015] eKLR.

11. We find this application lacking in merit and dismiss it with costs to the respondents.

DATED at Kisumu this 25th day of September, 2015

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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