



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, WARSAME & AZANGALALA, JJ.A)**

**CIVIL APPLICATION NO NAI 63 OF 2015**

**BETWEEN**

**JAMES ODUOR OWISO.....APPLICANT**

**AND**

**KAPA OIL REFINERIES.....1<sup>ST</sup> RESPONDENT**

**GERALD IRUNGU MWANGI.....2<sup>ND</sup> RESPONDENT**

***(an application to deem as withdrawn and/or strike out the 1<sup>st</sup> respondent's notice of appeal dated 23<sup>rd</sup> October 2014 from the ruling and order of the High Court of Kenya at Nairobi (Waweru, J.) on 10<sup>th</sup> October 2014***

***in***

***H.C.Misc. Civil Application No 463 of 2014)***

**\*\*\*\*\***

**RULING OF THE COURT**

The 1<sup>st</sup> Respondent, Kapa Oil Refineries was the defendant in a suit where James Oduor Owiso, the applicant herein, had sued it and Gerald Irungu Mwangi, the 2<sup>nd</sup> respondent. Judgment in favour of the applicant was delivered on the 27<sup>th</sup> August 2013. Thereafter, the 1<sup>st</sup> respondent applied to the High Court for enlargement of time within which it could file its appeal. On 10<sup>th</sup> October 2014, the High Court dismissed the 1<sup>st</sup> respondent's application. The High Court found that there was an inordinate delay that had not been sufficiently explained and accounted for on the part of the respondents. Being aggrieved with that finding the 1<sup>st</sup> respondent, lodged a notice of appeal on the 23<sup>rd</sup> October 2014, expressing its intention to appeal against that ruling. This notice was not served upon the applicant until the 18<sup>th</sup>

February 2015.

Now, the applicant has brought this application under rules 77(1), 82 (1) and (2), 83 and 84 of the Court of Appeal rules in which he seeks an order that this Court deem as withdrawn the 1<sup>st</sup> respondent's notice of appeal. In the alternative, the applicant asks that the Court strike out the said notice of appeal, and that the respondent be condemned to pay the costs of this application.

The application is based on the grounds that the sixty (60) days limitation period within which the memorandum and record of appeal ought to have been filed lapsed on the 14<sup>th</sup> January 2015 and that therefore, the notice of appeal should be deemed as withdrawn as stipulated under the provisions of rule 83 of the Court of Appeal Rules.

The applicant further states that the 1<sup>st</sup> respondent has not complied with mandatory rules of procedure: the notice of appeal was not served upon him within the mandatory seven day period after it was filed, which contravenes rule 77 of the Court of Appeal rules. In addition, the applicant contends that the respondent did not serve them with any letter seeking proceedings as required by rule 82 of the Rules. According to the applicant, the pendency of the notice of appeal is an abuse of the court process and should be struck out.

According to the respondent, the failure to serve the notice of appeal is due to shortcomings at the High Court registry. The respondent contends that after the notice was lodged, it went missing, and was only traced on 17<sup>th</sup> February 2015. It was after the deputy registrar had signed and sealed the notice that it was served upon the applicant.

The 1<sup>st</sup> respondent contends that the delay in obtaining typed proceedings has been caused by the fact that the file has been active, as the parties have filed bills of costs that are pending taxation, and that it has filed in the High Court an application to extend time to prefer its appeal. The 1<sup>st</sup> respondent asks us not to grant the orders sought in this application as this would deny it an opportunity to prosecute its appeal, which is arguable and has a high probability of success.

We have considered the application as well as the rival submissions of counsel. Rule 84 of this Court's rules provides:

***“84. 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 been taken within the prescribed time.”***

The applicant contends that the 1<sup>st</sup> respondent herein has not taken some essential steps: these steps include, serving the notice of appeal within time as is required by rule 77 (1) of the rules, and that he has not filed the substantive appeal within the sixty (60) day period provided in rule 82 of the rules.

The 1<sup>st</sup> respondent on its part states that the shortcomings in filing the notice of appeal were caused by the registry, which misplaced the appeal. Rule 77 of the Courts rules provides that:

***“77. (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”***

We have perused the notice of appeal in question. It appears that it was lodged on the 23<sup>rd</sup> October 2014 which is fourteen days within the date of the decision that it was intended to appeal from. It is also apparent that the notice was not served on counsel for the applicant until 18<sup>th</sup> February 2015.

It is clear that the explanation proffered by the 1<sup>st</sup> respondent to explain the delay in service of the notice of appeal is unacceptable. First, the rules of the Court do not require that a notice of appeal be sealed by this Court before they are served upon all parties affected by the appeal. To comply with rule 77, service of a notice of appeal that has been lodged with the High Court suffices. Secondly, it is apparent on the face of the notice of appeal that the notice was served on applicant's counsel on 18<sup>th</sup> February 2015 - before it was sealed by this Court. There is no reason therefore why there was delay in serving the notice; this delay in service of the notice of appeal remains unexplained.

Again, it cannot be denied that the sixty days within which the 1<sup>st</sup> respondent was to file the substantive

appeal have long expired.

While counsel for the 1<sup>st</sup> respondent states that an attempt to procure typed copies of the proceedings have been frustrated by the activity in the High Court file, no consideration can fall on this statement because as the applicant stated, the 1<sup>st</sup> respondent never served on the applicant or the 2<sup>nd</sup> respondent a letter asking for certified copies of proceedings. In ***Benedict Mwazighe & Another v Gasper Walele & 2 Others [2011] eKLR (Civil Application No. Nai. 255 of 2010)*** the Court expressed itself on this very matter as follows:

***“It is clear that the appeal which is yet to be filed will be hopelessly out of time. That situation could have been salvaged if there was proof that the respondent had, within thirty (30) days from the date of the delivery of judgment, written a letter to the Deputy Registrar, bespeaking the copies of the proceedings and judgment and if such a copy of such letter had been sent to the applicant. . . . If after sixty days from that date the memorandum and record were not filed, then only compliance with the proviso to rule 81 (2) as spelt out above could have helped the situation. That rule is the same in the new Rules except it is now rule 82 and the letter is now required to be “served” upon the respondent instead of being ‘sent’ to the respondent and rule 112 is now rule 115. Since the respondent failed to comply with it, nothing would salvage the appeal. Hence the notice of appeal no longer serves any useful purpose.”***

That passage applies with full force to the circumstances surrounding the application under our determination. There have been serious lapses and omissions on the part of the 1<sup>st</sup> respondent and as such, the applicant is well within his rights to ask for the notice of appeal to be struck out. We find that the notice of appeal lodged in the High Court on the 23<sup>rd</sup> October 2014 cannot stand. It is hereby struck out. The applicant will have the costs of this application.

**Dated and Delivered at Nairobi this 25<sup>th</sup> day of September, 2015**

**H. OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**