



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & KARANJA, J.J.A) CIVIL APPLICATION NO. NAI 245 OF 2014

BETWEEN

KARACHIWALLA NAIROBI LIMITED..... APPLICANT

AND

SANJIVAN MUKHERJEE..... RESPONDENT

(Being an application to strike out the notice of appeal dated 12th September 2012, arising from the Judgment of the High Court of Kenya (J.B. Havelock, J.) dated 7th day of August, 2014

in

H.C.C.C. NO. 113 OF 2012)

RULING OF THE COURT

This is an application under **Rule 84** of the Court of Appeal Rules, 2010 and other enabling rules for an order that the Notice of Appeal filed by the respondent on 12th September 2014 be struck out on the ground that it was filed out of time without the leave of the court.

By a judgment dated 7th August, 2014 the High Court entered judgment for the applicant against the respondent for Kshs. 10,600,000/- with costs and interest at court rates.

1The respondent being aggrieved by the judgment filed a notice of appeal on 12th September 2014. By **Rule 75 (2)** of the Court of Appeal Rules, such notice of appeal is required to be lodged within 14 days of the decision. The stipulated 14 days expired on or about 21st August 2014. The notice of appeal was thus filed 36 days after the decision and 22 days out of time.

The respondent admits in his replying affidavit that the notice of appeal was filed out of time but explains that neither he nor his previous advocates was aware that the judgment was read on 9th August 2014, and that his previous advocates learnt from the court file on 10th September 2014 that the judgment was so delivered and that the present application was filed on 23rd September before he had an opportunity to make an application for extension of time. The respondent prays that the application be disallowed and the notice of appeal be deemed to be properly on record in view of the provisions of Article 159 (2) (d) of the Constitution.

Article 159(2) (d) of the Constitution enjoins a court or tribunal to be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

Mr. Khaseke, learned counsel for the respondent relied on two authorities for the proposition that the Court has jurisdiction to deem a notice of appeal filed out of time as properly filed.

2In **Abdirahman Abdi v. Safi Petroleum Products Limited & 6 others** –[2011] eKLR, this Court replying on the overriding objective of the court to do justice and on Article 159(2)(d) aforesaid, declined to strike out a notice of appeal which was filed one day out of time saying that the delay was excusable. In **Shabir Ali Jusab v. Anaar Osman Gamrai & Another** – **Supreme Court Civil Appeal No. 1 of 2013** – [2013] eKLR, the Supreme Court was asked through a preliminary objection to strike out a notice of appeal and the petition of appeal to that court on ground that the notice of appeal and the petition were filed out of time. The Supreme Court declined to strike out the notice of appeal and the petition and deemed the notice of appeal and the record of appeal to have been filed within time. The Supreme Court relied on its Rules – Rule 53 giving it powers to extend time, and Rule 55 which empower that Court to give appropriate directions in the case of non compliance with its rules or practice direction.

In dismissing the preliminary objection the Supreme Court said, among other things, that allowing the preliminary objection would deny the Court an opportunity to determine an important question of law and examine the substantive issues raised in the appeal. The Supreme Court’s decision is distinguishable from the instant case.

In the Supreme Court case, the substantive appeal had already been filed and the Court was being asked to strike out both the notice of appeal and the appeal. In our case, the substantive appeal has not been filed. Secondly, Rule 55 specifically gives the Supreme Court discretion to give appropriate direction having regard to the gravity of non compliance with the Rules.

In **Abdiraham Abdi** (supra) the delay was insignificant and the *deminimis* rule applied, that the law does not concern itself with trifles. That is perhaps why the court did not require the filing of an application for extension of time.

In the instant case, the delay was relatively substantial – 22 days. From 10th September, 2014 when the respondent learnt that judgment had been delivered to 23rd September, 2014 when the present application was filed, the respondent had about 14 days within which he would have filed an application for extension of time under Rule 4 of the Court of Appeal Rules. This application was heard on 30th July, 2015. There was nothing to stop the respondent from filing an application for extension of time long before the hearing date.

Inasmuch as the judicial discretion of the Court is invoked, the Court should not exercise its discretion to assist a party who is not vigilant.

The respondent will not suffer any prejudice if the application is allowed as he has a right to file an application for extension of time.

The notice of appeal filed by the respondent out of time and without leave of the Court is incompetent. The respondent should have filed the appropriate application to validate it. The discretion to deem a process filed out of time should be exercised sparingly in this Court should not be used to stultify Rule 4 and thereby exonerate a party from applying for extension of time.

For the foregoing reasons, the application is allowed. The notice of appeal dated 11th September 2014 and filed on 12th September 2014 is struck out as prayed with costs to the applicant.

Dated and Delivered at Nairobi this 2nd day of October, 2015.

E. M. GITHINJI

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR