



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPEAL NO. 101 OF 2014

BETWEEN

MUKENYA NDUNDA..... RESPONDENT/APPLICANT

AND

CRATER AUTOMOBILES LIMITED..... APPELLANT/RESPONDENT

***(Being an appeal against the Judgment/decree of the High Court of Kenya, Nairobi (Mabeya J.)
delivered on 28th day of September 2012***

in

H.C.C.C. NO.998 OF 1999)

RULING OF THE COURT

1. Mukenya Ndunda (**the applicant**) has by the notice of motion dated 9th June 2014 applied for orders to strike out the record of appeal and the supplementary record of the appeal lodged on 6th May 2014 and 23rd May 2014 respectively.
2. The **respondent/appellant**, Crater Automobiles Limited, filed the appeal against the judgment of the High Court (Mabeya J) delivered on 28th September 2012 in Nairobi H.C.C.C. No.998 of 1999. In that suit the applicant was the 1st defendant and the respondent/appellant was the 2nd defendant. The plaintiff in the suit was Kenya, Tanzania, Uganda Leasing Limited which is not privy to the notice of motion before us (or the appeal). Its claim against the two defendants was for Shs.10,125,395/= plus costs and interest. The money claimed was predicated on a Hire Purchase Contract.
3. The applicant made a counter-claim in the suit against the plaintiff seeking various declarations including a declaration that the alleged Hire Purchase Agreement was void. It also counterclaimed for damages for trespass to property and conversion of goods and breach of contract and wrongful sale. The suit was determined on 28th September 2012 when Mabeya J gave judgment in favour of Kenya Tanzania Uganda Leasing Limited and against the respondent/appellant in the terms stated in the decree as follows
—

“15. In the end therefore, I enter judgment for the plaintiff as follows:-

a. as against the 1st defendant

i. in terms of prayer Nos. (a), (b), (c), (d), (j) and (k) of the Amended Defence.

ii. I assess the damages in (j) and (k) at Ksh.3 million taking into consideration, the amount the plaintiff had already paid, the age and value of the said motor vehicle at the time of repossession and sale by the 1st defendant.

iii. I dismiss Prayer Nos. (f), (g) and (h) as there was no evidence to establish those claims.

b. as against the 2nd defendant, in terms of prayer Nos. (e) and (i) of the Amended Defence. If for any reason the 2nd defendant is unable to release the said titles within 30 days of this judgment, the 2nd defendant shall pay to the plaintiff a sum of Ksh.300,000/= for purposes of the plaintiff processing new titles for the subject properties in accordance with the relevant laws.

c. as against the 1st and 2nd defendant, jointly and severally, the costs of this suit.

d. interest on the amount decreed herein shall be 12% per annum from the date of this judgment until payment in full.

It is against that judgment that the respondent/appellant appealed.

4. By a memorandum of appeal dated 3rd April 2014, the appellant proffered nine grounds of appeal in which he challenged the decision of the High Court. The main thrust of the appeal was that there was no evidence to justify the impugned decision. The grounds in extenso stated—

1. That the learned Judge erred in law and in fact in holding that the respondent had proved her case against the appellant on a balance of probabilities.

2. That the learned Judge erred in law and in fact in failing to consider the submissions made on behalf of the appellant.

3. That the learned Judge erred in law and in fact in placing reliance on non-probative factors on the veracity of the respondent's testimony

4. That the learned Judge erred in law and in fact in holding that the valuation reports produced by the respondent were linked to the title thereto being surrendered as security to the appellant whereas there was no evidence to that effect

5. That the learned Judge erred in law and in fact in making alternative findings on unpleaded matters and in the absence of any evidence in support of such a finding

6. That the learned Judge erred in law and in fact in holding that the respondent's title documents were in possession of the appellant without any evidential basis whereas it was the testimony of the appellant that it was its policy not to take any security and when there would have been no purpose of the appellant retaining the documents.

7. That the learned Judge erred in law and in fact in making findings that were incongruent to the observations made in the course of the judgment.

8. That the learned Judge erred in law and in fact when in the absence of any evidence, proof, legal basis and or material held that the appellant was liable to pay the respondent Ksh.300,000/= to underwrite the procurement of new title documents.

9. That the learned Judge erred in law in issuing orders and or granting reliefs that were either

sought in the pleadings nor proved to be due to the respondent.

5. When the application by notice of motion dated 9th June 2014 came up for hearing before us on May 25th 2015, learned counsel **Miss Mokobu**, appeared for the applicant while learned counsel **Mr. Kisilah** appeared for the respondent/appellant.

6. Miss Mokobu urged us to strike out the record of appeal and the supplementary record of appeal on the ground that they are incurably defective because the record was filed out of time; that it was served out of time; that there was breach of the Court of Appeal Rules; that the record of appeal omitted a primary document to wit a decree; that the omission of the primary document was prejudicial to the applicant; that the supplementary record of appeal was filed without the leave of the

Deputy Registrar in breach of rule 88 of this court's rules; that the delay in filing appeal was not occasioned by the trial court; that the appellant/respondent exhibited gross indolence on account of which this court should deny the relief sought; and that on the basis of the decision in the case of **MUNICIPAL COUNCIL OF KITALE V. FEDHA** (Civil Appeal No.7 of 1983) the appeal is incompetent because a primary record is not included. Counsel also cited the decision in **KIBORO V. POSTA TELECOM CORPORATION** [1974] EA 155.

7. In opposition to the application, Mr. Kisilah, relied on the replying affidavit sworn by him on 14th July 2014. He underscored the fact that striking out of the appeal is a very drastic step; that the court is enjoined to do justice under the Appellate Jurisdiction Act; that no purpose will be served by striking out the appeal; that the appeal should be determined on merit; that the 60 days for lodging appeal should run from the date the certificate of delay was issued on 14th April 2014; that as the record of appeal was filed before the expiry of that period, it was not filed out of time; that the record and supplementary record of appeal were served in time; that Article 159(3)(d) of the Constitution requires that parties be afforded opportunity to ventilate their case without undue regard to technicalities; that the record of appeal was filed on 6th May 2014 and was within time.

8. Counsel for the respondent cited three authorities, to wit -

(i) Ratemo Oira T/A Ratemo Oira & Company Advocates v Blue Shield Insurance Co. Ltd [2010] e KLR;

ii. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] e KLR;

iii. Municipal Council of Nyeri vs Mwangi Mutahi Ruga & Another, [2014], eKLR"

9. In Ratemo's case (supra), an application to strike out the record of appeal was premised on the ground stated by counsel from the bar, namely, that the appellant had not complied with rule 81 (2) in that the letter bespeaking the copies of the proceedings and ruling was not sent to him. However, the Deputy Registrar had in the Certificate of Delay alluded to the letter and the date it was written and the court therefore found that the letter existed. The court pointed out that the issue of the absence of the letter needed to be stated in the affidavit in support of the application to strike out as it was sufficiently serious and could lead to striking out of the appeal. The court found no merit in the application to strike out and dismissed it. It is clear that this decision does not support the respondent's case as the facts are dissimilar.

10. In Nicholas Kiptoo's case (supra), there was delay of four days in serving the record of appeal. In his ruling, Ouko JA found that the failure by the respondent/appellant in serving the notice of appeal within seven days did not occasion the latter any real injustice. The learned Judge found that there was no evidence that there was intentional or contumelious default on the part of the appellant and for their inconvenience the respondents could be compensated in costs. He declined to strike out the record of appeal.

11. In the case of Municipal Council of Nyeri (supra), non-compliance with mandatory procedural rules was alleged. In his ruling, Kiage JA stated that *“the court cannot in absence of a plausible or any reasonable explanation by the party in default, turn a blind eye and excuse the default.”*

12. We have carefully perused the application and the replying affidavit and have given due consideration to the rival submissions of counsel and the authorities cited.

13. First, under rule 1(2) of **the Court of Appeal Rules**, the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court is not limited. As has been pointed out many times, in dealing with appeals before it, this Court is enjoined under Section 3A(1) of **The Appellate Jurisdiction Act**, Cap 9, to facilitate the just, expeditious, proportionate and affordable resolution of the appeals. But the application of the principles in Section 3A (supra) is not meant to demean the rules of procedure without which capriciousness and uncertainty would ensue, and hence chaos and impunity. Where rules of procedure are in harmony with Sections 3A (1) and 3(B) (1) of the Appellate Jurisdiction Act, they can only serve to further the administration of justice as they offer certainty. They must therefore be enforced.

14. For this reason, where a litigant has been tardy or flippant or has without sufficient cause, failed to observe the rules of procedure, the Court will be disinclined to exercise its discretionary power to forestall the consequences of non-observance with the rules. The new dispensation ushered in by Article 159 (3) (d) of The Constitution did not do away with the principle of fairness which is the basis in our jurisprudence nor did it oust the need for consistency and precedent.

15. Emphasizing the importance of rules of procedure, Lord Radcliffe put it thus in *Esso Petroleum Co. Ltd v. Southport Corporation*. (1956] AC 218 at pg 241 on the issue –

“Proper use of them (i.e. rules of procedure) shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them pedantry or mere formalism, I do not see what part they have to play in our trial system.”

So as to further the overriding principles, the Court is enjoined to determine appeals justly. Undue regard to procedural technicalities should not thwart administration of justice (Article 159 (3)(d)) of the Constitution).

16. Effectively, the relief sought, in the application is for striking out of the appeal. Striking out of an appeal or a notice of appeal without which no appeal lies on the grounds that the rules of procedure have not been complied with normally occurs before the Court has addressed the merits or otherwise of the appeal. It is a drastic action. The power to strike out an appeal or a notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.

17. In a matter like this, the policy of the Court is guided by the principle of what best serves the interest of justice by weighing the scales to establish whether justice is better served by striking out the notice of appeal or by sustaining it and thereafter paving way for the hearing of the appeal on its merits.

18. We take the view that where there is a plausible explanation for non-observance of the rules of procedure or where default is not flagrant, flippant, deliberate or reckless or where it has not occasioned prejudice to the other party that cannot be redressed by way of costs, the Court should be disinclined to strike out an appeal. We take the view that the rules of procedure are designed to assist in the administration of justice. They are intended to serve as the hand-maidens of justice, not to defeat it. It is for that reason, for instance, that rule 4 of the Rules of this Court, has conferred on the Court unfettered discretionary power to extend time set by the Rules. The Constitution (in Article 159(3)(d)) enjoins Courts to do justice to the parties and to avoid undue regard to procedural technicalities where such technicalities stand in the way of justice, and for that reason, courts in paying obeisance to the Constitution have inherent jurisdiction to waive the strict application of such rule or rules as may be a

hindrance to dispensation of justice.

19. In the **Iron & Steelwares Ltd v. Martyrs & Co.** [1956] XXIII pg 175) Worley, President of the then Court of Appeal for Eastern Africa, expressed the view that Civil Procedure Rules are handmaidens of justice and stated:-

“we think that the High Court in its inherent jurisdiction to control its own procedure has a discretion to waive the strict application of Order XVI rule 2 and has a duty to ensure that each party is given a fair opportunity to state its case and to answer the case made against it ...”

20. That policy, as the late Madan JA, as he then was, opined in **D.T. Dobie & Co. (K) Ltd V. Muchina** [1982] KLR I in relation to striking out of a suit, should “aim at sustaining rather than terminating litigation.”

“The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment.”

Although this was said in the context of striking out a suit as opposed to striking out a notice of appeal, or an appeal, the policy holds true in all these cases.

21. In the instant application, the judgment appealed against was delivered on 28th September 2012 and the notice of appeal was filed on 9th October 2012. Under Rule 82(1) of the Court of Appeal Rules, the appeal should have been instituted within 60 days of the date of the Notice of Appeal. Such period ended on 9th December 2012 unless the proviso to rule 82 (supra) applied. Rule 82 and the proviso thereto stipulate –

“Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –

a. A memorandum of appeal, in quadruplicate;

b. The prescribed of appeal, in quadruplicate;

c. The prescribed fee; and

d. Security for the costs of appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

22. The appellant did within 30 days of the date of delivery of the judgment apply in writing for the proceedings and ostensibly served a copy of the letter bespeaking the copies of the proceedings on the advocates for the applicant. Accordingly, the appellant was entitled to take advantage of the proviso to rule 82 and to have excluded (in computing the time within which the appeal was to be instituted) such time as was certified by the Registrar of the High Court as having been required for preparation and delivery to the appellant of a copy of the proceedings.

23. The certificate of delay shows that the Deputy Registrar notified the appellant’s advocates on 18th February 2014 that the proceedings were ready for collection. The certificate of delay further shows that court fee for the proceedings was paid on 26th February 2014 and the proceedings were then collected. It took the respondent a week to pay for the proceedings from the date of notification that they were ready. That was excusable as the period was not inordinate.

24. The rules entitled the appellant to lodge appeal within 60 days from the date of the Notice of Appeal, that is to say 60 days from 9th October 2012 but as there was apparent compliance with the proviso to rule 82, the appellant was entitled to exclude in the computation of the 60 days such time as was required by the Deputy Registrar to prepare and supply the applicant with a copy of the proceedings. The period between 28th September 2012 and 18th February 2014 when the Deputy

Registrar's notice was sent to the appellant's advocates informing them that the proceedings were ready ought to be excluded in the computation of the time for filing appeal.

25. In effect, therefore, the 60 days period would then run, not from the date of the notice of appeal on 9th October 2012, but rather, from 18th February 2014. That period would elapse on 18th April 2014. The appellant filed the appeal on 6th May 2014, and clearly it was out of time. We take judicial notice that 18th February 2014 was a Tuesday. The appellant had up to 19th April 2014 to file the appeal. Rule 3 of this

Court's Rules does not exclude Saturdays and Sundays in the computation of time. Only public holidays and Christmas vacation are excluded save that if the last day for filing was a public holiday or was a Sunday (or a Saturday) the period would include the next following day.

26. In this case, as the 19th of April 2014, being the last day for filing of the appeal, was a Saturday and as the Court registry was not open then, the appellant was entitled to lodge it on the next following day, that is to say, Monday the 21st of April 2014. The appeal was however lodged out of time on 6th May 2014. There was no extension of time sought or obtained for the appeal to be lodged out of time. The delay was of 16 days.

27. It was conceded that the record of appeal was served on 23rd May 2014. Having been filed on 6th May 2014 the record should have been served within seven (7) days of filing as required by rule 90 (1) of this Court's Rules. If it had been duly filed on 6th May 2014, then service would have been by 13th May 2014 and not on 23rd May 2014 which was 17 days out of time and in clear breach of rule 90(1).

28. It is conceded that the record of appeal did not contain the decree or the certificate of delay. Rule 87 of the Rules of this Court sets out the copies of documents which the record of appeal to this Court as the first appellate court must contain. Rule 87(1)(h) shows that a decree must be included as a primary document in such appeal. It was not included in the record filed on 6th May 2014. However, if the appellant had duly filed the record of appeal on 6th May 2014, he could have taken advantage of rule 88 which allows filing of a supplementary record without leave within 15 days of filing the record. The supplementary record was filed outside the period of 15 days donated by rule 88, without leave of the Deputy Registrar.

29. What explanation did the appellant through his counsel offer for these blunders? The record shows that the appellant's counsel was tardy in taking action to lodge the appeal and showed flagrant disregard for the rules. He failed to offer any plausible explanation why he did not file or serve the record of appeal or the supplementary record in time. He could have taken advantage of the rules of this court to seek enlargement of time to file and serve the record and the supplementary record of appeal. He did not, thus the record and the supplementary record of appeal are clearly incompetent having been filed out of time.

30. In the result, we allow the notice of motion dated 9th June 2014 and accordingly strike out the record of appeal and the supplementary record of appeal dated 6th May 2014 and 23rd May 2014 respectively.

The costs of the motion shall be borne by Crater Automobiles Ltd, the respondent in the motion.

Dated and delivered at Nairobi this 6th day of November 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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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