



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & G.B.M. KARIUKI JJA)

CIVIL APPLICATION NO. NAI 39 OF 2009

(Application to strike out the Respondents’ Notice of Appeal in an intended appeal from the decision and Judgment of the High Court of Kenya at Nairobi (Ang’awa J) Dated 18th December, 2007

in

HC. Misc. Civil Suit No. 1345 of 2005)

BETWEEN

KENSILVER EXPRESS LIMITED & 137 OTHERS.....APPLICANTS

AND

THE COMMISSIONER INSURANCE.....1ST RESPONDENT

THE MINISTER OF FINANCE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE STATUTORY MANAGER

UNITED INSURANCE CORPORATION LTD.....4TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPLICATION NO. 305 OF 2013

(An application for leave to amend and file the Notice of Appeal dated the 24th of December, 2007 and serve all the affected parties out of time by substituted service and hearing of the application with Civil Application No. Nai 39 of 2009, Appeal from the decision and Judgment of the High Court of Kenya at Nairobi (Ang’awa J) Dated 18th December, 2007

in

H.C. Misc. Civil Suit No. 1345 of 2005

BETWEEN

THE COMMISSIONER OF INSURANCE.....APPLICANT

AND

KENSILVER EXPRESS LIMITED & 160 OTHERS.....RESPONDENT

RULING OF THE COURT

Before us are two applications which were heard back to back, with the concurrence of all learned counsel on board hence this joint ruling.

The first application No. Nai 39 of 2009 (UR) is dated 18th day of February, 2009 and lodged in this Court's Registry on 19th day of February, 2009.

The application is expressed to be brought under Section 3 (2) of the Appellate Jurisdiction Act and Rule 80 of the Court of Appeal Rules. It seeks to strike out the Notice of appeal dated 24th December, 2007 and filed on 4th January, 2008 by the 1st -3rd respondents and that of the 4th Respondent dated and filed on the 7th day of January, 2008. The application is based on the grounds in the body of the application, to the effect that the Respondents failure to lodge their records of appeal within sixty days of their filing of their notices of appeal should be deemed to be a withdrawal of the said Notices; that the respondents have not sought extension of time of this Court to regularize that position; and lastly that the respondents have no interest in lodging their appeal records in time since they have open ended stay of execution, orders in their favour.

The application is also supported by an affidavit of **Simon Chepkwony Kimutai** filed simultaneously with the application. In summary, the deponent deposes that the Judgment sought to be impugned was delivered in favour of the applicants on 18th December, 2007; the respondents filed their Notices of appeal as indicated above and duly applied for the supply of a typed copy of proceedings in time but since then, there has been no follow up requests for the supply of the said typed copy of the proceedings; that since the respondents secured a stay of execution order vide this Court's Civil Application No. 7 of 2008 granted on 18th April, 2008 the respondents have been indolent in the pursuit of their appeal; that this conduct on the part of the respondents has occasioned an injustice on the applicants hence the need to strike out their Notices of appeal to pave the way for the applicants to enjoy the fruits of their Judgment.

This application has been opposed by replying affidavits deposed by one **Mumut Ole Sialo** and filed on the same date of 25th June, 2009 and a further affidavit by the same deponent deposed and filed on the 6th day of July, 2009; one deposed by **Antony Oteng'o Ombwayo** deposed and filed on the same date of 1st day of December, 2011; a supplementary affidavit deposed by **Sammy Mutua Makove** deposed on the 7th day of May, 2013 and filed on the 10th day of May, 2013 and one deposed and filed by **Waigi Kamau** on the same date of 15th November, 2013 together with annexures annexed thereto to each of these respective replying affidavits.

In summary, the deponents have contended globally that they were aggrieved by the judgment of **Ang'awa J.** sought to be impugned; that they filed their Notices of appeal and promptly applied for the supply of a typed copy of proceedings in time and served on all learned counsel for parties participating in the High Court proceedings; that to date, they have not been advised by the High Court registry that the said proceedings are ready for collection. They concede they have a stay of execution order in their favour granted by this Court on the 18th day of April, 2008 in this Court's Civil Application No. 7 of 2008, but deny that they are using it as a delaying tactic; that to date no record of appeal has been lodged, but blame this delay on the non availability of a typed copy of the proceedings. Lastly that the applicant

has also contributed to the delay in the lodging of the record of appeal by being party to the presentation and opposition to numerous applications filed in the High Court file.

Mr. Waigi Kamaus' deponement laid blame on their officers who had changed jobs without proper handing over of the files relating to the proceedings herein causing the files to be misfiled in their registries, a situation he said had now been brought under control and they were going to ensure that prompt action is taken. He maintains the intended appeal is meritorious and it should not be struck off.

The second application is dated and filed on the same 8th day of November, 2013. It is expressed to be brought under the provisions of Section 3A and 3B of the Appellate Jurisdiction Act chapter 9 of the laws of Kenya, and Rules 1 (2) , 4, 17(1), 41, 42(1) 44 and 47 (1) of the Court of Appeal Rules. It seeks an order that this Honourable Court do grant leave to the applicant to amend the Notice of appeal dated the 24th of December, 2007 in terms of the amended draft annexed thereto and marked SMM2; that the Honourable Court does extend the time limited by the rules of the court to file and serve the amended Notice of appeal; that by reason of the large number of affected persons that require service, the court do grant leave to the applicant to serve the amended Notice of appeal by way of advertisement in the Daily Nation; that the said application be heard back to back by the same bench that shall hear and determine Nairobi Civil Application No. Nai 39 of 2009 **Kensilver Express Limited & 137 others versus the Commissioner of Insurance and 3 others** scheduled for hearing on the 12th day of November, 2013 and lastly that costs be in the cause.

The application is based on the grounds in the body of the application that when Nairobi Misc. Civil Suit No. 1345 of 2005 (OS) was filed, the applicant was then a department under the Ministry of Finance, and the Commissioner of Insurance was therefore represented by the office of the Attorney General; that vide legal notice No. 11 of 2006 the Insurance Act Cap 487 Laws of Kenya was amended thereby creating the Insurance Regulatory Authority as a body Corporate with power to sue and to be sued in its own name; that in pursuance to this change of status of the applicant, the applicant appointed its own legal counsel who filed a notice of change of advocate on the 24th day of February, 2012; that upon such change being effected, the incoming learned counsel for the applicant perused the numerous documentations subject of the High Court proceedings culminating in the Judgment sought to be impugned and that is when they discovered that there are more persons who should have been served with the notice of appeal already filed herein besides those indicated in the notice of appeal already served.

It is their stand that, the failure to include all the affected parties in the notice of appeal filed earlier was a mistake of the counsel then on record for the applicants at the material time and thus it should not be visited on them. That the applicant intends to file the record of appeal as soon as they are supplied with a copy of the typed proceedings; that the intended appeal is meritorious as it seeks to address matters of great public interest as the High court found the applicant a Regulator liable to settling colossal sums of unpaid claims with respect to policies of insurance entered into by the policy holders and the United Insurance Company Limited (Under Statutory management); That the Statutory Manager is in the process of securing funds in order to facilitate settlement of the pending claims and have presently realized Kshs. 200,000,000.00. towards that purpose.

Mr. Waigi Kamau learned counsel for the Attorney General supports the application. He concurs that the intended appeal raises issues of public interest and should be allowed to proceed on its own merit.

Application No. 305 of 2013 opposed on points of law by learned counsel **Harrison Kinyanjui** on behalf of **Ken Silver Express Limited & 137others** who were the named respondents to this application.

In their oral submissions to Court, learned counsel **Mr. Harrison Kinyanjui** reiterated both the grounds and deponements in the supporting affidavit and urged us to bring to an end the respondents mischief of perpetuating the existence of a non existent intended appeal and allow the application in No. Nai 39 of 2009. Failure to do so, learned counsel argued, will result in the Judgment granted in their favour being rendered nugatory and an empty shell.

In response to that submission, **Lucy Kambuni** Senior counsel, **Mr. Waigi Kamau** and **Mr. Milimo** all

gave concurrent submissions in opposition to the application in No. Nai 39 of 2009. In summary, they argued that they have given reasonable explanation for the failure to comply with the procedural lapse complained of; that the applicants too have not come to Court with clean hands as they have opposed some of the alleged numerous applications presented in the High Court file and other related matters; that that a striking out order will not be in the best interests of justice to both parties herein as it will not bring to rest the issues in controversy; it will instead prolong the litigation as it will simply pave the way for the respondents to restart a fresh the appellate process since the relevant rules permit such a process. Such a move on the part of the Court, they argued, will be an affront to the clear overriding objective principles set out in Section 3A and 3B of the Appellate jurisdiction Act as well as Article 159(2) (d) of the current Kenyan Constitution 2010. Further that no prejudice will be suffered by the applicants if the respondents are indulged to regularize their position.

Turning to the application in Nai. 305 of 2013 (UR 221/2013) **Mrs. Lucy Kambuni** senior counsel urged us to allow the reliefs sought arguing that they are not to blame for the 1st respondents' oversight and or non compliance with the requisite rules because previously it is the office of the Attorney General which used to represent the first respondent; that it is this office of the Attorney General which in advertently failed to observe the rules allegedly breached; that it was not until they came on record, perused the numerous material pertaining to this case that they realized that not all those who should have been served with the Notice of appeal had in fact been so served.

They concede that indeed true there is an error but this error is not fatal to their intended appeal. The same is curable; that they have moved with speed to regularize this error and they should be granted an opportunity to do so. They contend also that no prejudice will be suffered by the respondents to this application as the first respondent has put in place measures to safe guard their interests.

Further that there is justification in seeking to serve the notice of appeal by way of advertisement as there are numerous persons who may have an interest in the litigation giving rise to the intended appeal whose physical addresses are unknown to the applicant herein, hence personal service will not possible.

The Court is further urged to lean favourably towards the overriding objective principle and the rule on substantial justice as opposed to the technicality of striking out the notices in question. This will not only save on costs, but will go along way in meeting the ends of justice to all persons on board as well as progression of the finalization of the intended appeal.

Mr. Waigwa Kamau for the 2nd and 3rd respondents and **Mr. Milimo** for the 4th respondent in 39 of 2009 went on record as supporting wholly the application in 305 of 2013 (UR 221of 2013).

Mr. Harrison Kinyanjui for the respondents in 305 of 2013 opposed the application argueing that although they concede issues in controversy between the parties are issues of Public interest, that is no justification for the applicants to trample on the rights of the respondents by with holding them from the enjoyment of the Judgment adjudged in their favour; that the applicants are un deserving of the relief sought because, they have not sought leave of Court to enjoin the persons intended to be served with the amended Notice of appeal; that no sufficient explanation has been given as to why they failed to address this procedural lapse for the last five years; that the parties intended to be brought on board stand prejudiced as they have had six years of bliss knowing that they have a secure judgment in their favour.

We have also been invited to be guided by principles of case law. In **Harry Njai versus Taita Ranching Co. Limited Mombasa Civil Application No. 255 of 2010 (UR)** where this Court ruled inter alia that:-

“Section 3A and 3B as well as the provision of the new Constitution (Article 159) were meant to avoid a delay caused by application of technicalities. In the Board of Trustees National Social Security Fund and Six others versus Meshack Owino Onyango (suing as legal representative of the Estate of Silas Ochieng Onyango (deceased) Nairobi CA (Applicaiton) No. 87 of 2007 (UR) wherein this Court observed inter alia thus:-

“By Article 159(2) (d) of the new Constitution of Kenya, the Courts are now required to administer

justice without undue regard to procedural technicalities. In addition, this Court is required to give effect to the overriding objective of civil litigation enshrined in the Appellate jurisdiction Act (Cap 9 of law of Kenya) which is among other things to facilitate the just and expeditious resolution of appeals (see Section 3A (1) and (2) of the Act.

Thus it would be against the policy of the law to strike out the appeal on mere technicality raised in support of the application”

In *Deepak Chamanla Kamani and another versus Kenya Anti-corruption Commission and 3 others Nairobi CA (Application) 152 of 2009-* Drawing inspiration from the decision of *Lord Woolf* in the decision in the case of *BIGU 221 versus Bank Leisure PLC [1999] I.W.L.R 1926* this Court had this to say:-

“... the initial approach of the Courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the legislation. If away or ways alternative to a striking out are available, the Courts must consider those alternatives and see if they are more consoant with the overriding objectives than a striking out”

(2) Also while drawing inspiration from own decision in *City Chemist (NRB) and others versus Oriental commercial Bank Limited Civil Application No. Nai (Application) 302 of 2008 (UR 199/2008)* the following observations were made:-

“...is not to say that the new thinking totally uproots well established principles or precedent on the exercise of the discretion of the Court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners a like in determining with some measures of certainty the validity of the claims long before they are instituted in Court. It also guides the lower Courts and maintains stability on the law and its application.

See also *Housing Finance Company of Kenya versus Rose Wangari Ndegwa R. Mombasa CA(Application) 83 of 2008(U.R)* where this Court noted special circumstances of the case and declined to strike out the record of appeal on account of minor procedural lapses capable of being rectified and were sufficiently cured by the provisions of the appellate jurisdiction Act.

With the above guiding principles in mind, we now proceed to perform the simple task requested of us in both applications namely either to withhold or exercise our judicial discretion in the manner requested by either applicant. It is now trite that the exercise of judicial discretion is not only wide (with a wide latitude) but it is also unfettered, with the only fetter being that it should be exercised judicially; that is to say, not on whim, caprice or sympathy but on sound reason. See the case of *Githiaka versus Nduriri (2004) 2KLR67.*

In No. 39 of 2009, we are in agreement with the contention of the applicants that the respondents have admitted the existence of two procedural lapses namely failure to lodge the record of appeal within the stipulated sixty days; and secondly failure to serve the Notice of appeal lodged on to all the parties who participated in the High Court proceedings. We appreciate what has been breached are rules of procedure. It is now trite that rules of procedure are not meant for cosmetic value. They are meant to be obeyed, with the only caveat being that these be viewed as hand maids of justice and not yokes of oppression.

Indeed the rules of procedure permit an aggrieved party to move this Court to terminate the appellate process for the defaulting party. This is what the applicants in No.39 of 2009 what from our seat of justice. They have given their reason for moving in the manner they have moved. We find these to be sound reasons.

The soundness of the reasons advanced by the applicants in No. 39 of 2009 notwithstanding, the respondents on the other hand have invited us to find that, notwithstanding the admitted existence of the

procedural lapses noted above, there is none the less a way out. Away whereby Justice from our fountain of justice flowing directly from underneath our seat of justice is tempered with mercy and good common sense in order to afford a reprieve to a deserving defaulting party. This will not be taken as a matter of routine, but as a matter of peculiar circumstances prevailing herein which make it imperative on us not to punish the defaulting parties, but grant them a reprieve.

The respondents have argued that leaning towards granting a reprieve to the defaulting party herein will be in line with the overriding objective principle enshrined in Section 3A and 3B of the Appellate Jurisdiction Act (Supra) and the application of the non technicality justice clause enshrined in Article 159 (2) (d) of the 2010 Kenya Constitution.

The overriding objective principle is meant to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. The aim of the overriding objective principle is to ensure just determination of the appellate proceedings; the efficient use of the available judicial and administrative resources and the timely disposal of all proceedings in the Court, at a cost affordable by the respective parties, and lastly, the use of suitable technology. Whereas the principle in Article 159 (2) (d) of the Constitution 2010 enjoins Courts of law to lean towards rendering of substantial justice as opposed to technical justice. By substantive justice is meant merit disposal of matters before the Courts unless the circumstances of each case dictate otherwise.

The question we have to ask ourselves is whether granting the applicants in 39 of 2009 the relief sought will serve the ends of justice to the respective parties therein. In our opinion it will not. Reason is that a striking out order will not guarantee the applicants in 39 of 2009 an automatic access to the fruits of Judgment in the High Court proceedings, considering the presence of an admitted existence of an open ended stay order in Civil Application number 7 of 2008 staying the execution of the High Court Judgment. This means that the applicants will have to move this Court in Civil Application No. 7 of 2008 to have those orders discharged first before seeking the execution of the Judge a move likely to attract opposition from the respondents. A striking out order will also not finally determine the issues in controversy as between the respective parties herein. Such an order will simply pave the way for the respondents to restart the appellate process and seek leave of this very Court for extension of time lines within which to comply with the two procedural lapses, they are accused to have breached. Other than the delay in the realization of the fruits of the High Court Judgment, no other prejudice has been demonstrated to be likely to be suffered by the applicants if the respondents are given a conditional reprieve.

Turning to the application in Nai 365 of 2013, our jurisdiction has been invoked under the inherent jurisdiction Rule of this Court Rule 1 (2) and the attendant relevant discretionary Rules cited to us. Both the inherent jurisdiction rule as well as the other attendant discretionary rules give us a wide latitude in either granting or withholding the relief sought.

In **Sila Leo Mutiso versus Rose Hellen Wangari Mwangi [1999] 2EA 231** this Court ruled that the decision whether or not to extend time for appealing or doing anything under the act is essentially discretionary; save that the factors to be taken into account are first, the length of the delay; secondly, the reason for the delay; thirdly, (possibly) the chances of the appeal succeeding if the application is granted and; fourthly, the degree of prejudice to the respondent if the application is granted. In **African Airlines International Limited versus Eastern and Southern African Trade & Development Bank (PTA) [2003] KLR 140**. The Court is enjoined to take into account all the relevant factors in the exercise of its unfettered discretion. In **Githiaka versus Nduriri [2004] 2KLR 67 Ringera JA** (as he then was) added the Public importance of the matter if any, and generally the requirement of the interests of justice in the case as additional factors. Lastly in **Delphis Bank Limited versus Recco Builders Limited and another [2005] 346, Devrell JA** (as he then was) added that a defaulting party is not precluded from seeking leave either formally or orally to regularize the Notice of appeal, and where there is demonstration that despite the delay, the applicant has been diligent and that the intended appeal has merit and the extension of time sought would not prejudice the respondent, the Court can still exercise its discretion in favour of such a defaulting party.

Parties sought to be introduced by the leave to amend the notice of appeal sought participated in the High Court proceedings or were alternatively affected by the High Court proceedings. Such parties would have been invited to participate in the appeal process simply firstly by being cited in the heading Notice of appeal served as parties to the intended appeal, and secondly by being served with the Notice of appeal. Where they have not been so cited in the heading of the Notice of appeal, or where there is a procedural lapse like in the circumstances displayed herein, where they have neither been cited in the heading of the Notice of appeal lodged nor served with the said notice, the cure to this procedural lapse is not for the applicant to first seek leave of Court to join them to the proceedings before seeking the relief to amend and serve the Notice of appeal on them. The procedure employed by the applicants herein of firstly seeking leave to amend, followed by leave to serve them out of time is the correct procedure. Leave to join them first would have been necessary had the application in No. 305 of 2013 been filed in file No. 39 of 2009.

It is common ground that both the High Court proceedings as well as the intended appeal has generated a lot of public interest. The issues in controversy also involve a matter of public policy. We have also been told that the High Court proceedings subject of this appeal had been taken as a test suit. The end result of the appeal when finally determined is likely to impact either positively or negatively on to other persons beyond the number of those already on board in number 39 of 2009. It is therefore necessary to bring on board all those persons likely to be affected either positively or negatively by the outcome of the intended appeal.

Learned Senior counsel **Lucy Kambuni** currently on record for the applicants herein has given an explanation as to how the procedural lapse arose. We note from the record in 39 of 2009 that Senior counsel came on record in the year 2012. They took time to participate in the numerous applications filed in the High Court file. They also perused numerous related files and that is when they discovered that there are other persons who should be participating in the appeal process, but who had not been brought on board hence this application. We find nothing in the learned senior counsels' depositions and submissions to suggest that the explanation fronted by them is not the correct position.

Indeed the Notice of appeal sought to be regularized herein was lodged on 4th day of January, 2008 a period of five (5) years, ten (10) months and four (4) days to the presentation of the application under review; and one (1) year, eight (8) months and seventeen (17) days from the date learned senior counsel came on record for the applicant herein. It is however less than two (2) years. Can this be termed an inordinate delay? In our opinion it cannot. Reason being that the two years are sufficient to account for the period spent by learned senior counsel to participate in the numerous applications in the High Court file and other offshoot litigation, peruse the numerous files in other related matters, discover the procedural lapse aforementioned and then proceed to rectify the same in the manner sought.

Should we be wrong in our reasoning under number four (4) above, then we have to consider the issue of prejudice to either party in the event of either withholding or granting the relief sought herein. To us withholding the relief sought, will not be in the best interests of justice to the respective parties. Reason being that all those who should have been invited by the applicants herein to participate in the appellate process initiated herein will be condemned unheard for no fault of their own. **Two**, depending on how they react to the final result of the intended appeal, the intended result could trigger a flood gate of litigation and thus prolong the finalization of the issues in controversy herein. We see no prejudice in allowing the other relevant parties to this appellate process brought on board and have any issues in controversy between them and the applicants determined once and for all and bring this protracted litigation to an end. There has been no assertion by the respondents that any prejudice will be suffered by the respondents herein or that an award of costs will not be sufficient compensation to the respondents.

As for alternative service prayed for, we find this to be proper in view of the large number of parties intended to be reached, whose physical address we have been told are unknown to the applicants herein.

As for speedy progression of the typing of the record of proceedings; we agree with **Mr. Harrison Kinyanjui** that if the High Court Registry is not moving fast to avail these, the applicants have an alternative. They can photocopy the record, have these typed in their offices and then have these proof

read and certified by the Deputy Registrar.

In the result, and for the reasons given in the assessment in both applications, we are inclined to make the following orders in the disposal of each application.

Civil Application Number 39 of 2009

1. Prayer 2 and 3 are dismissed.
2. The applicant will however be compensated for by way of costs paid to them by the respondents, assessed at Kshs.30,000/= and to be paid within the next 10 days, failure of which the application stands allowed.
3. The respondents have sixty (60) days from the date of the reading of this ruling to lodge the record of the intended appeal.
4. In default of number 3 above, the dismissal orders in number 1 shall stand discharged.

In Civil Application No. 305 of 2013.

1. Prayer 2 is allowed. The applicants Notice of appeal be and is hereby amended in terms of the draft amended Notice of appeal annexed as SMM2.
2. The applicant has fourteen (14) days from the date of the reading of this ruling to serve the amended notice of appeal by way of advertisement once in the Daily Nation, on all parties.
3. The respondents to this application will be compensated for by way of costs, to be paid to them by the applicant, at Kshs.30, 000/=.
4. Thereafter parties to proceed according to law and on priority basis.

Dated and Delivered at Nairobi this 31st day of January, 2014

R.N.NAMBUYE

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JUDGE OF APPEAL

M.A.WARSAME

.....

JUDGE OF APPEAL

G.B.M. KARIUKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

D/o