REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & OUKO, JJ.A)

CIVIL APPLICATION NO. NAI 136 OF 2013 (UR 93/2013)

BETWEEN

MICHAEL MWALO.....APPLICANT

AND

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

(Being an application for striking out a Notice of Appeal of an intended appeal from a ruling and order of the Industrial Court of Kenya at Nairobi (Linnet Ndolo, J.) dated 8th March 2013

in

INDUSTRIAL CAUSE NO. 1093 OF 2012)

****

RULING OF THE COURT

A labour dispute in Industrial Court Cause No. 1093 of 2012 was compromised by the recording of a consent judgment in which the respondent in the instant application was ordered to pay to the applicant terminal dues amounting to Kshs. 11,532,869/=. The respondent appeared to have changed its mind and declined to comply with the consent order arguing, *inter alia*, that it was illegal as it was obtained in contravention of the National Social Security Fund Act since no authority was obtained from the Board prior to the recording of the consent. Consequently they returned to court to have the consent judgment reviewed, vacated or set aside and also to stay its execution. The Court (Ndolo, J.) heard the application and finding no merit in it dismissed it with costs to the applicant herein.

Being aggrieved, the respondent sought to challenge the dismissal on appeal to this Court by filing a notice of appeal on 20th March 2013. Between that date and 27th June 2013 when this application was brought, the record of appeal had not been filed, prompting this application. In it, the applicant is asking the Court to strike out the notice of appeal and to discharge the orders of stay of execution granted to the respondent by the Industrial Court on 15th May 2013.

It is the applicant's contention that although certified copies of the proceedings were ready by 4th April

2013, the respondent failed to collect them as a result of which the record of appeal has not been filed; that the time stipulated for filing the appeal having lapsed on or about 20th May 2013, the respondent is deemed under the **Rule 83** of the Court of Appeal Rules to have withdrawn the notice of appeal.

In response, the respondent argues that the application is misconceived, frivolous, scandalous and amounts to an abuse of the process of the court; and that it offends **Rule 84** of the Court of Appeal Rules. According to the respondent, they applied for typed proceedings on 20th March, 2013 and it was not until 29th May 2013 that they were notified by the Deputy Registrar, Industrial Court, that the proceedings were ready.

Upon receiving the notification, the proceedings were promptly collected on 31st May 2013. The court subsequently issued to them a certificate of delay confirming the fact that the respondent was notified on 29th May 2013 that the proceedings were ready for collection. In the circumstances, it is deposed, it became necessary to seek extension of time within which to file the intended appeal and an application to this end, being Civil Application No. Nai 213 of 2013, has been filed and is pending hearing and determination.

We have given due consideration to these arguments and the authorities cited by the respondent's counsel. Those submissions, we must observe, proceeded as though they were in relation to the intended appeal itself. For instance, the arguments, whether or not the Managing Trustee had the power to authorize the terms under which the suit was compromised; the powers of the Board *vis* a *vis* those of the Managing Trustee are matters to be determined in the intended appeal. Out of eight authorities cited by learned counsel for the respondent, five relate to circumstances under which a consent judgment may be set aside, again a matter for the intended appeal, hence our inability to comment on these, lest we pre-empt the intended appeal.

The application before us is brought under the provisions of **Sections 3A** and **3B** of the Appellate Jurisdiction Act, **Rules 1 (2), 42 (1) (2), 82 (1), 83** and **84** of the Court of Appeal Rules. Of immediate relevance to the matter under consideration are **Rules 82, 83** and **84,** relating, respectively, to the sixty (60) days period from the date of the lodgment of the notice of appeal, within which an appeal must be instituted, the effect of default in complying with that requirement and the grounds upon which a notice of appeal or an appeal may be struck out.

A party aggrieved by a decision of the High Court or a decision of any of the courts created under **Article 162 (2)** of the Constitution and who wishes to challenge that decision in this court must do so by, first, lodging in the court from which the appeal emanates, a notice of appeal within 14 days of the date of the decision. The party must, after lodging the notice of appeal, institute within sixty (60) days an appeal.

Rule 83 provides that:-

> **"83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served."**

Rule 84 further stipulates that:-

> **"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**.
>
> **Provided that an application to strike out a notice of appeal or an appeal**

> **shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."**

Based on these two provisions, the applicant contends that the respondent has failed to institute an appeal within 60 days and in addition, that it has not taken some essential step in the proceedings or done so within the prescribed time or that no appeal lies, in the first place. Where there is failure to appeal within 60 days, the Court on its own motion or on application by a party can make an order declaring that the notice of appeal has been withdrawn. In the second instance, on an application by an affected party, the court may strike out the notice of appeal on the ground that an essential step has not been taken within a prescribed time or at all.

It is well established in a plethora of decisions that as a general rule, the jurisdiction to strike out any part of the record is a draconian measure and an affront to the rules of natural justice. It is to be resorted to only in the most plain cases and even then employed sparingly. See **Wambua V. Wathome** [1968] EA 40. After the respondent timeously filed a notice of appeal, it was supposed to lodge the record of appeal within 60 days from 20th March 2013, the date the notice of appeal was lodged. In strict computation, the 60 days from that date, in accordance with **Rule 3** of the Court of Appeal Rules as well as **Section 57** of the Interpretation and General Provisions Act – Cap 2 of the Laws of Kenya, taking into account the "excluded days", the respondent ought to have filed the record of appeal not later than 12th June 2013. By 27th June 2013, when the instant application was made the record of appeal had not been filed. However, by dint of the proviso to **Rule 82 (1)** aforesaid, the period certified by the registrar of the superior court below as having been taken by that court to prepare and deliver to the respondent a copy of the proceedings, is to be excluded in computing the 60 days. But for the respondent to rely on this proviso, it must show, one, that it applied for the proceedings within 30 days of the date of the decision against which it desires to appeal, and two, that the letter bespeaking the proceedings was copied to the applicant.

The respondent wrote to the Deputy Registrar, Industrial Court, to furnish the copies of the proceedings and ruling on 20th March 2013, two days after the delivery of the ruling sought to be appealed against and therefore within the stipulated time. It is conceded that the letter was served upon the appellant.

Having satisfied the two requirements, the respondent was entitled to rely on the certificate of delay issued to it on 5th June 2013 confirming that it took the court 73 days (from 20th March to 31st May 2013) to prepare and deliver to the respondent certified copies of the proceedings and ruling.

A certificate of delay is *prima facie* evidence that the court took the period it relates to prepare and deliver the proceedings. A certificate of delay has always been relied upon unless salient and cogent reasons are set out to challenge it. See **Ratemo Oira T/A Ratemo Oira & Co. Advocates V. Blue Shield Insurance Co. Ltd** Civil Appeal (Application) No. 177 and 178 of 2009. See also **Safe Rentals Ltd. V. African Safari Club Ltd** Civil Appeal (Application) No. 225 of 2010.

In **Daniel Ng'ang'a Kanyi V. Sophinaf Company Ltd & Another,** Civil Appeal (Application) No. 315 of 2001 this Court stated that:-

> **"The certificate of delay confirms when delivery of the copies were made to the appellants. That is all that the rule requires of the court to consider. We are satisfied as no evidence has been placed before us to confirm otherwise, that any errors of omission or commission in this matter were made by the court."**

The applicant relies on a stamp for certification of a true copy of the original on the proceedings which bears a handwritten date of 4th April 2013, to argue that the proceedings were all along ready for collection and that the certificate of delay is, as a result, questionable. There is no evidence though that the certificate is a forgery or that it was obtained fraudulently and/or that the applicant raised that issue with the Registrar, the issuing authority. The evidence we have is that the respondent got to know that the proceedings and ruling were ready for collection when it received the Registrar's letter dated 29th May

2013.

Without evidence to the contrary, we are bound to accept the period of delay stated in the certificate of delay. It follows, from our computation of time and taking into account the period certified in the certificate of delay, that the instant application was prematurely made. We say no more on this aspect of the application in view of the impending arguments and determination of Civil Application No. Nai. 213 of 2013 (UR 153 of 2013) in which the respondent is applying for extension of time.

The final thing we want to address is the effect of **Rule 84** of the Court of Appeal on this application. It requires that an application like the one before us, for striking out the notice of appeal be brought within 30 days from the date of service of the notice of appeal on the other party. The applicant was served on 21st March 2013. The present application was filed on 27th June 2013, way after 30 days from the date the notice was served. Clearly, the application itself was brought out of time. For this reason and others, we have stated above, we come to the ultimate conclusion that the application lacks merit and is accordingly dismissed with costs.

Dated at Nairobi this 14th day of March 2014.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

REGISTRAR

/mgkm