



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 10 OF 2014

BETWEEN

MUNICIPAL COUNCIL NYERI.....APPLICANT/1ST RESPONDENT

AND

MWANGI MUTAHI RUGA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(An application to strike out an appeal from the Judgment of the Industrial Court of Kenya at Nyeri (Aboudha, J.) dated 26th November, 2013 & Ruling dated 17th December, 2013

in

H.C.C.A No. 206 of 2010)

RULING OF THE COURT

1. Before us is an application brought pursuant to **Rule 84** of the **Court of Appeal Rules** (the Rules) seeking *inter alia* an order striking out the appeal on the ground that it had been filed out of time.
2. The 1st respondent contended that the Notice of Appeal was lodged on 24th December, 2013; the said Notice of Appeal was in respect of both the judgment dated 26th November, 2013 and the ruling dated 17th December, 2013; in respect of the judgment dated 26th November, 2013 the said Notice was filed out of time. It was deposed on behalf of the 1st respondent that the Notice of Appeal was served out of time; the letter dated 7th January, 2013 requesting copies of proceedings in the High Court was not copied to the 1st respondent's advocates on record; the appeal herein was lodged out of time without leave of the Court. Finally, that the Record of Appeal was served out of time.
3. In response, the appellant deposed that the appeal was competently before the Court; at the material time of service of the record, there was no advocate on record for the respondents. He deposed that the 1st respondent filed Notice of Appeal on 28th November, 2013 and took no further step. According to the

appellant, the application to strike out the appeal was filed with mischief on the part of the 1st respondent.

4. We have considered the application and submissions by parties. We cannot help but note the application does not set out grounds in support thereof contrary to **Rule 42** of the Rules. **Rule 42** provides:-

“Subject to sub-rule (3) and to any other rule allowing informal application, all applications to the Court shall be by motion, which shall state the grounds of the application.”

Consequently, the application herein is defective.

5. Without prejudice to the foregoing, we deem it necessary to consider the merits of the application. **Rule 84** of the Rules provides:-

“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 30 days from the date of service of the Notice of Appeal or Record of Appeal as the case may be.”

6. In this case, the 1st respondent contends that the Notice of Appeal filed on 24th December, 2013 in respect of the judgment dated 26th November, 2013 was filed out of time. The 1st respondent also contended that the Notice of Appeal was never served upon the respondents until 26th March, 2014 when the record herein was served. Based on the proviso to **Rule 84** of the Rules, the 1st respondent's application in respect of the Notice of Appeal can only be entertained if it was brought within 30 days of service of the Notice. Therefore, when was the impugned Notice served upon the 1st respondent? The appellant contended that he filed the Notice of Appeal on 24th December, 2013 and left copies at the Industrial court registry to be served upon the respondents. We take judicial notice that from the inception of the Industrial court, service of processes and pleadings was effected by the court upon parties. Having expressed ourselves as above, we give the appellant the benefit of doubt and deem that the Notice of Appeal was served upon the respondents within the requisite time frame, that is, within seven days of the date of filing of the Notice.

7. The 1st respondent also argued that the appeal herein was filed out of time. The appellant herein under **Rule 82** of the Rules was required to lodge the appeal within 60 days of filing the Notice of Appeal. In computation of time within which to lodge an appeal, **Rule 82** provides that any period certified by the Registrar as having been required to prepare proceedings should be excluded. In **Mariam Abubakar Ireri & another -vs- National Cereals & Produce Board – Civil Application No. 9 of 2008** this Court held,

“In view of what we stated earlier, that upon requesting for copies of proceedings from the court and because the letter bespeaking those proceedings was copied to the applicant's counsel, time prescribed for filing an appeal stopped running. The running of time resumed on or about 3rd September when copies of proceedings were delivered to the respondent.”

8. The 1st respondent argued that the appellant was not entitled to rely on **Rule 82(2)** of the Rules because he did not serve the respondents with the letter requesting proceedings. From the record, we note that the appellant requested for copies of proceedings on 7th January, 2014. The appellant maintained that he left copies of the letter at the Industrial court to be served upon the respondents. Based on the judicial notice herein above stated on service of pleadings and processes by the Industrial court, we are unable to

determine whether or not the said letter was served upon the respondents. Having expressed ourselves as herein above we cannot also penalize the appellant for the omission or inaction of the Industrial court. Therefore, we deem that the said letter was served upon the respondents.

9. Time within which the appeal could be filed begun to run on 24th December, 2013 when the Notice of Appeal was filed and stopped running on 7th January, 2014 when the appellant requested for proceedings; eight days had lapsed. Time continued running again on 4th February, 2014 when the Industrial court availed the proceedings to the appellant vide a letter dated 4th February. We find that the said letter is synonymous with a Certificate of Delay. Therefore the appeal ought to have been filed on or before 28th March, 2014. Consequently, the record which was filed on 5th March, 2014 was filed within the requisite time frame. On the issue of service of the Record of Appeal, we note that the appellant did not effect service within the requisite time frame. However, we are inclined to invoke the overriding objective of this Court and extend time within which the appellant could serve the Record of Appeal to enable the appeal be determined on merit.

10. The upshot of the foregoing is that 1st respondent's application is dismissed with costs to the appellant.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO- ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR