IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 19 OF 2014

BETWEEN

RODGERS ABISAI T/A ABISAI & COMPANY ADVOCATES..... APPLICANT

AND

WACHIRA WARURU..... 1ST RESPONDENT

THE STANDARD LTD..... 2ND RESPONDENT

(An Application to mark the Notice of Appeal dated 23rd May 2007, filed in an Intended Appeal from the Judgment of the High Court of Kenya at Nairobi (Kaburu Bauni, J.)

dated 18th May 2007, as withdrawn

in

ORIGINAL KISII H.C.C. NO. 52 OF 2001)

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RULING OF THE COURT

In a judgment dated and delivered at Kisii on 18th May, 2007, Kaburu Bauni, J. *(as he then was)* entered judgment for the applicant in this application dated 31st March, 2014, ***Rodgers Abisai t/a Abisai & Company***, ***Advocates*** who was the plaintiff in the High Court of Kenya at Kisii *Civil Case Number 52 of 2001* against the respondents in this Notice of Motion ***Wachira Waruru*** and ***The Standard Ltd*** who were the Defendants in that case in the total sum of Kshs.6,500,000/= together with costs of the suit and interest at Court's rates from the date of that judgment.

The respondents felt aggrieved. They filed Notice of Appeal against that decision through their then firm of advocates M/S Mohammed & Muigai. That Notice of Appeal was dated 23rd May, 2007, but was filed on 25th May, 2007. The record before us indicates that the respondents also filed in this Court, Notice of Motion seeking stay of the execution of that decree vide *Civil Application No. 141 "B" of 2007* and that application was granted by this Court on 3rd July, 2007. The respondents also wrote a letter to the Deputy Registrar dated 30th May, 2007, bespeaking typed certified copies of the proceedings and judgment for purposes of preparing the record of appeal.

As on 31st March, 2014, the respondents had not filed Record of Appeal on the matter. The

applicant, Rodgers Abisai, moved to this Court vide Notice of Motion now before us dated 31st March, 2014 and filed on 2nd April, 2014, through his firm of Advocates M/S Ogutu-Mboya & Company, in which he is seeking orders that:

"1. The Honourable Court be pleased to mark and/or deem the Notice of Appeal dated 23rd May 2007 and lodged in Court on the 25th day of May 2007, as withdrawn.

2. Consequent to prayer (1) herein being granted, the Honourable Court be pleased to discharge, vary and/or set aside the Order of Stay of Execution of the Judgment and Decree arising from Kisii HCC No. 52 of 2001, granted on the 3rd day of July 2007 vide Court of Appeal Civil Application No. 141 'B' OF 2007 (UR 92/2007).

3. The Honourable Court be pleased to grant and/or make such other orders as may be just, proportionate and expedient.

4. Costs of this Application be borne by the Respondents."

The grounds in support of the application are in a summary that the respondents were required, under the Rules to lodge record of appeal within sixty (60) days of the date of filing the Notice of Appeal which was 25th May 2007, but the respondents failed to do so and to date the same record of Appeal has not been filed and thus, the statutory duration for filing the record of appeal has since lapsed; that the respondents have not exhibited and/or exercised due diligence in the process of preparing and/or lodging the intended appeal if any in that they have not been *pro-active* whatsoever and howsoever; that notwithstanding that lack of interest in pursuing the issue to ensure the intended appeal is prepared and filed, the respondents continue to enjoy the stay orders in place; that the respondents are guilty of *indolence* and *laches*, whereas the continued existence of the Notice of Appeal causes unnecessary anxiety upon the applicant; that it is apparent, from the apathy exhibited that the respondents have lost interest in the intended appeal and thus the Notice of Appeal constitutes and/or amounts to abuse of the due process of the Court and that this is a proper application to be granted *Ex-debito justitiae*. There was an affidavit in support, which on the main highlighted the same grounds cited herein.

The respondents opposed the application through a Replying Affidavit sworn by Mr. Eric Kivuva, the legal officer of the second respondent, in which he depones that they were aggrieved by the judgment of Kaburu Bauni, J. and intend to appeal against it; that they filed Notice of Appeal and on 30th May, 2007, through their former advocates, they made request to the High Court for typed proceedings for purposes of the appeal and copied the same letter to the then applicant's advocate under the provisions of Rule 81 (1) and (2) of the then Court of Appeal Rules; that in compliance with the stay orders of the Court, the second respondent paid to the applicant part of the decretal sum Ksh.3.2 million together with costs; that the allegation that the respondents have made no effort to obtain proceedings is not true as the respondents have made efforts to obtain the subject copies of the proceedings and have as a result obtained proceedings for the period 18th May 2001 to 30th July 2002 which however cannot be used for mounting the appeal as part of the proceedings have still not been supplied to them; that no formal notification has been issued to them as to whether the typing of the requested copies of the proceedings is complete and the same are available for collection; that the firm of Advocates now on record for the respondents have sent its clerk to the registry on several occasions to follow up on the proceedings and has paid Ksh.300/= as deposit for the same copies; that these efforts are ongoing and that immediately the remaining part of the copies of the proceedings are received the record of the intended appeal will be filed. In a summary, the respondents – particularly the second respondent contends that as the High Court has not indicated to them formally that the copies of the proceedings and judgment are ready for collection, the time provided within the meaning of the proviso to Rule 82 and under Rule 83 of the Court of Appeal Rules has not expired; that the second respondent has considerable interest in the matter and feels a further period of 45 days would be sufficient for the record of appeal to be lodged.

Before us, Mr. Ogutu-Mboya, the learned counsel for the applicant, relying heavily on the grounds cited in the application and highlighted in the supporting affidavit reminded us that the delay in filing the record of appeal was already in excess of seven (7) years and while conceding that the letter bespeaking

copies of proceedings and judgment was duly written in time and served upon his firm in time, and that there does not appear to have been any formal response to that letter from the Court Registry, he nonetheless felt that as there was no tangible evidence that the respondents made serious follow up to ensure early response from the Court Registry, Notice of Appeal should be deemed withdrawn as a party cannot sit back and wait for actions to be taken expeditiously on any such matters as the preparation and supplying of the required copies of proceedings. According to him the enactment of ***Sections 3A*** and ***3B*** of the Appellate Jurisdiction Act was meant to encourage parties to assist the Court in facilitating the just, expeditious, proportionate and affordable resolutions of the appeals governed by the Act. He concluded by saying that the respondents have not exhibited in their replying affidavit or told the Court any action taken by them to ensure that the copies of proceedings were availed in good time. He referred us to several authorities on the issue.

Mr. Bosire, the learned counsel for the respondents on the other hand submitted that the delay in mounting the appeal was caused by the delay in receiving part of the typed copies of the proceedings from the High Court Registry. In his view, time can only start running against the respondents once the same copies of the proceedings are received. He referred us to this Court's Ruling in this case in respect of *Civil Application No. 26 of 2009* dated and delivered on 17th July, 2009.

We have anxiously considered the application, the record, the rival affidavits, the rival submissions by the learned counsel, and the law. It is not in dispute and Mr. Ogutu-Mboya, readily admits that the Notice of Appeal, the subject of this application was timeously filed. He also admits that the letter bespeaking copies of proceedings and judgment addressed to the Court Registry was sent in time and was copied to him. He further does not dispute the respondents' contention that the Court has not formally responded to that letter and thus has not told the respondents that the copies of proceedings they applied for were ready and could be collected by the respondents. All that Mr. Ogutu-Mboya contends is that the delay of over seven (7) years to mount an appeal is inordinately long and that the respondent had a duty to take steps to secure the expeditious typing and completion of the same proceedings and consequently to file the record of appeal within reasonable time. His contention is that in the absence of any tangible action (*and we believe he was referring to action such as written reminder to the Registry)* being exhibited to urge the Court to get the proceedings ready in good time, the respondents stand to be condemned on account of their indolence. Mr. Bosire, on the other hand rebutted that by arguing that they had taken action to get the proceedings supplied to them early apart from the letter bespeaking the same written on 30th May 2007 and that it is as a result of their subsequent action that they have now secured part of the proceedings. Mr Bosire also alluded to the fact that his firm was coming into the matter late, but in our view that is neither here nor there as the respondents have all along been represented both in the High Court and in this Court. He also said that the respondents could not mount an appeal without part of the copies of proceedings not yet received from court. In our view, much as we agree that the respondents should have, apart from their letter bespeaking copies of proceedings and judgment demonstrated that they have been all along interested in pursuing the appeal by sending reminders to the court registry and making visits to the court registry in pursuit of the response to their letter, nonetheless, without a formal communication from the court registry informing the respondents that the copies of proceedings they applied for are ready for collection, the respondents cannot in law be condemned and the Notice of Appeal timeously filed be deemed as withdrawn. This is mainly because, much as reminders and repeated visits to the court registry are necessary to keep the registry on their toes and to remind them of their duty to prepare the same copies expeditiously, nonetheless, that duty to prepare them and to supply them to the respondents and for that matter to any party still remains theirs and they must do it within the confines of time available to them. In that case it would be unfair to punish the party who has applied for such copies on grounds that the failure on his side to remind them of their duty has resulted in inordinate delay. The party that has applied for such copies has no executive powers on the Court's Registry and thus while agitating the registry to act quickly and supply the copies, must in practice accept that the registry has its own system of work which it must honour.

However, all said and done, without the copies of proceedings and judgment, the party seeking to appeal cannot mount any successful appeal. In fact if it attempted to do so, the same appeal would not see the light of the day. It would be struck out as incompetent. It is therefore not idle that the respondent waited, all for too long, for the copies of the proceedings and judgment they sought vide their advocates'

letter of 30th May 2007 to be supplied before they could prepare and file the record of appeal. In the *Application No. 26 of 2009*, we have referred to which was between the same two parties here and which was decided by this Court on the same issue, this Court differently constituted stated:-

> **"In the case before us, the Deputy Registrar has not replied to the request of the respondents and has not indicated at all whether any of the documents, certified or not are available. Further, Mr. Ogutu does not know whether these documents are available or not. He has none of them himself.**
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> **In the absence of any reply from the Deputy Registrar as to whether certified or uncertified copies of proceedings and judgment are available or not, it would be the height of injustice to condemn the respondents, who have been ably represented by Mr. Echessa, for failing to take an essential step to lodge the requisite record of appeal."**

The situation, in our view remains the same. Mr Ogutu referred us to three decided cases. In our considered view, none of these was relevant when facts of this application are considered. In the case of **Allan Oduor Osoro** *(suing as the Personal Representative of the estate of* **Pamela Akoth Midiwo vs Shajanand Construction Co. Ltd and another** - *Civil Application No. NAI 99 of 2012*, the copies of the proceedings along with certificate of delay were availed to the counsel for the respondent to enable him prepare the record of appeal but he did not do so in time on grounds that he was still waiting for a certified copy of the decree. The court rightly rejected that explanation. That was not a case where no copies of proceedings applied for were supplied and no communication as to whether the same were ready for collection like in this application before us. The second case was that of **Abdi Nassir Nuh v Abdureheman Hassan Halkano & 2 others** – *Civil Application No. 226 of 2008* at Mombasa. In that case the issue was that the record of appeal contravenes the then Rule 85 (1) (d) of the Court's Rules in that primary documents, namely trial Judge's notes of proceedings were not included in the record of appeal. That is clearly not the case before us. The last case of **James Ogendi v. Philip A. Anunda and Erastus Ombutu** *(who was third party)* was a High Court matter which clearly was decided by the High Court Judge upon the provisions of Civil Procedure Rules and was not anywhere near the matter before us which has to be decided on the basis of the Rules of this Court which not only provide for the period within which a Civil Appeal should be filed but also provides for what the parties should do in cases of delay caused by the late supply of copies of proceedings.

In conclusion, in our view, much as we feel the delay here is inordinate and the High Court is urged to supply the same copies of proceedings applied for expeditiously to avoid any further delay and accompanied hardships on parties, nonetheless, this application cannot succeed. It is dismissed with costs to the respondents.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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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