



IN THE COURT OF APPEAL AT NAIROBI

CORAM: KARANJA, MARAGA & OUKO, J.J.A.

Civil Application No. Nai 337 Of 2013 (Ur 248/2013)

Between

GITHARA CHUCHU & 473 OTHERS.....APPLICANT

AND

KENYA PLANTERS CO-OPERATIVE UNION LTD.....RESPONDENT

(An application for dismissal of the Notice of Appeal dated 22nd February 2006 and the Notice of Appeal dated 24th July 2006 pursuant to the order of this Court in Civil Application No. Nai 109 of 2008 dated 20th September 2013, extending time within which the respondent must file and serve the record of appeal against the orders of the High Court of Kenya at Nairobi (Ojwang, J.) dated 17th February and 12th July 2006

in

HCCC NO.3619 OF 1983)

RULING OF THE COURT

The notice of motion application the subject of this ruling is dated 17 th December, 2013. It is pronounced to be brought under **Rules 47, 83 and 84** of this Court’s Rules and **Section 3A & 3B** of the Appellate Jurisdiction Act (Cap 9 of the Laws of Kenya).

Rule 47 basically deals with urgent applications, while **Rules 83 and 84** deal with striking out of notices of appeal, where a party who has filed a notice of appeal fails to institute an appeal within the appointed time.

We find it necessary to state this on the outset because there were other substantive prayers canvassed within the hearing of this application which have nothing to do with these Rules and which Rules cannot be brought within the ambit of **Section 3A and 3B** of the **Appellate Jurisdiction Act**. We shall revert to this issue later.

The application seeks three prayers. The first prayer is an order that the two notices of appeal filed in this court by the respondent dated 22 nd February 2006, and 24th July 2006 be “dismissed with costs”.

The second prayer is for the setting aside the orders of this Court dated 20 th September 2013. This we note is a prayer that cannot be brought within the ambit of the operation of **Section 3A and 3B** of the **Appellate Jurisdiction Act**.

In support of the notice of motion application is an affidavit sworn by Njoroge Mburu who describes himself as the chairman of the applicants, on 17th December, 2013 with several annexures. It sets out in detail the circumstances and reasons for the prayer for “dismissal” of the two notices of appeal. The affidavit nonetheless at paragraphs 6 to 16 canvasses substantive arguments as against the findings of the Judges in the ruling giving rise to the two notices of appeal.

In the ruling that is the subject of this application, the Court directed that the Deputy Registrar of the High Court supplies to the respondent, the proceedings of the High Court within twenty one days of the date of the Ruling, and for the appeal to be filed within ten days of receipt of the said proceedings. That was not done, hence this application.

In reply to the application and the supporting affidavit, is the affidavit of Hudson Wafula, a senior legal officer of the respondent sworn on 21st July 2014. In the said response, the respondent rests the entire blame for not filing the appeal at the doorstep of the court. According to the respondent, they requested for typed proceedings to enable them file the appeal but the same had not been supplied to them. In support of those averments, the respondent has annexed several copies of their letters to the High Court requesting to be supplied with the proceedings. The deponent strictly confines himself to the issue of striking out the notices of appeal and appears to have kept clear of the prayer and deponements in respect of the setting aside of the impugned ruling.

In his oral submission before us, Mr. Nabutete, learned counsel for the applicants, dwelt at length with the substantive findings in the ruling aside from the timelines in question, faulting the learned Judges on several of those findings and pronouncements, and justifying the findings of Ojwang, J. made in the ruling which is the subject of the intended appeal. Indeed he proceeded as if he was defending the appeal which is yet to be filed. This was in spite of this Court trying to redirect him to the proper course. He insisted on challenging the said ruling and ended up saying very little, if anything on the prayers to strike out the two notices of appeal.

Mr. Nabutete brought in **Rule 56** of this **Court’s Rules** which in our view had no relevance to the application before us. We say so because **Rule 56** deals with the procedure to be followed by the court in cases of non-appearance by the parties.

As far as sections **3A** and **3B** of the **Appellate Jurisdiction Act** is concerned, the same cannot come to the appellants’ aid. The principle embodied in these provisions, also known as the oxygen rule, is only invoked in circumstances where the Court needs to step in in order to stem injustice, where no other rules are applicable and where the justice of the case so demands. (See **Hunker Trading Company Ltd vs. Elf Oil Kenya Ltd [2010] eKLR**). In our considered view this is not one such case.

In his response, Mr. Ochieng, learned counsel for the respondent submitted, and rightly so, that the issue before the court was not the merits or demerits of the intended appeal which is what Mr. Nabutete had dwelt on. He urged that, learned counsel for the applicant had failed to demonstrate to the court that the respondents had been negligent in failing to file the appeal as directed by the Court. He relied on the letters they had sent to the Registrar of the court bespeaking the proceedings and the fact that the same had not elicited any response from the Registrar. Learned counsel undertook to take proactive steps to ensure that the proceedings were supplied to them without further delay to enable them file the appeal. He therefore, urged us not to strike out the notices of appeal in question.

We have considered the notice of motion along with the submissions of both counsel in as far as they were relevant to the issues before us.

On prayer one, we note with concern that this is a very old matter. It is in the interest of justice for all concerned that the matter be brought to a conclusion. We believe that it was this concern that prompted this court (differently constituted) in its ruling dated 20th September, 2013 to issue deadlines for the performance of the acts meant to expedite the filing of the appeal.

Having said so however, we note with equal concern that the said deadlines were not met. The

proceedings were requested for in time but they were not supplied. We were not told why it had taken that long to type the said proceedings. Blame for the delay cannot be solely visited on the respondents herein. Although, it was our stand that learned counsel for the respondents ought to have pursued the proceedings more proactively instead of folding their hands waiting for the Registrar of the High Court to call them when the proceedings got ready for collection, we find that the larger part of the blame lies with the court. Dismissing the two notices of appeal would certainly be unjustifiably punitive to the respondents. Moreover, we have since confirmed that the said proceedings are ready and the record of appeal can therefore, be prepared and filed with promptitude.

On the prayer that the entire ruling be set aside, our considered view is that we have not been properly moved to do so. The other issues raised in paragraphs 6 to 16 of the supporting affidavit repose in the intended appeal and can only be canvassed and determined in that appeal but not in the application before us.

In all, we find that the application before us lacks merit. The same is dismissed with costs in the appeal.

We nonetheless direct that the appeal be filed within 14 days from the delivery of this ruling failing which the appeal will be deemed as withdrawn pursuant to **Rule 83 of this Courts Rules.**

Dated and delivered at Nairobi this 10th day of October, 2014.

W. KARANJA

.....

JUDGE OF APPEAL

D. K. MARAGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR