IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA & OUKO & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 217 OF 2014 (UR 169/2014)

BETWEEN

QUICKLUBES E. A. LIMITED…..…..…APPLICANT

AND

KENYA RAILWAYS CORPORATION……..……..…..RESPONDENT

(An Application for an order that the appellant be deemed to have withdrawn its notice of appeal from the Judgment of the High Court of Kenya at Nairobi (Mabeya, J.) delivered on 28th September 2012

in

HCCC NO. 551 OF 2009)

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RULING OF THE COURT

Quicklubes E.A. Ltd Corporation (applicant) sued **Kenya Railways Corporation (respondent)** before the High Court of Kenya at Nairobi claiming several reliefs, which included a declaration that its eviction from it's business premises rented from the respondent was illegal and unlawful; special damages of Kshs. 61, 787,50/= and general damages for unlawful eviction.

Judgment was entered in the applicant's favour on 28th September, 2012 and it was awarded inter alia special damages of Kshs. 27,106,500/= and general damages of Kshs. 2,000,000/=. Aggrieved by the said judgment and decree, the respondent moved to this Court by way of the Notice of Appeal filed on 19th October, 2012. Apparently before the notice of appeal was filed, the respondent wrote to the Deputy Registrar of the High Court requesting for copies of the proceedings and judgment. The letter was copied to the respondent's counsel as required by the **Court of Appeal Rules (the Rules)**. The Deputy Registrar of the High Court informed the appellant's counsel that the proceedings were ready for collection on 11th June, 2014.

Under **Rule 82** of the **Rules**, the appellant was supposed to file the appeal within sixty (60) days from that date. That was not done. In the meantime, the appellant moved this Court under **Rule 5(2) b** of the **Rules** for orders of stay of execution pending the hearing and determination of the appeal. This Court in a ruling rendered on 26th July, 2013, allowed the application but on condition that the appellant deposited the decretal sum of Kshs. 31,817,131.50/= in an interest earning account in the joint names of counsel for

both parties.

To date the record of appeal has not been filed. The applicant filed this notice of motion on 19th August, 2014 under **Rule 20(2), 82** and **83** of the **Rules** seeking orders that the appellant's notice of appeal be deemed to be withdrawn; and that the decretal amount held in the joint Fixed Deposit Account No. ***[Particulars withheld]*** at Kenya Commercial Bank be released to it.

The notice of motion was duly served on learned counsel for the respondent but there was no response either by way of a replying affidavit or grounds of opposition. Mr. Wandago, learned counsel prosecuting the application on behalf of the applicant urged us to allow his application saying that the respondents went to sleep after they got the orders of stay and they have acted with disinterest and indifference in this matter. He reiterated that none of their averments had been controverted as no replying affidavit was filed in response. He also relied on his list of authorities filed on 5th November, 2014.

On the hearing date, Mrs. McAsila appeared for the respondent and responded on points of law from the bar. Her submission was that **Rule 83** is not mandatory and the court still has discretion not to deem the appeal as withdrawn. She also urged the court to invoke **Section 3A & 3B of the Appellate Jurisdiction Act** in considering whether to deem the appeal as withdrawn or not.

She confirmed to the court that they had already filed an application for extension of time within which to file the record of appeal. Since her address was by law confined to points of law, she could not explain the delay in filing the record of appeal. This in effect rendered her position bereft of the necessary foundation upon which she could build a strong case for the invocation of **Section 3A & 3B of the appellate Jurisdiction Act**. She said that the respondent would suffer enormous prejudice if the notice of appeal was deemed as withdrawn.

We have considered the notice of motion, the supporting affidavit, and the submissions of both counsel along with the cited authorities. **Rule 83** gives this Court unfettered discretion to deem an appeal as withdrawn if a party files a notice of appeal and then goes to slumber , by failing to initiate the other necessary processes to ensure that the appeal is filed and served. That usually happens in some cases where a party gets favourable interim orders as the hearing and determination of an intended appeal is awaited, and particularly when such orders are open ended. An appellant may also lack interest in the appeal, or the parties may even settle the matter out of Court but fail to inform the Court with a view to having the matter struck off the register of pending appeals. The Rule is meant to stem abuse of the court process and also promote efficiency in terms of case management. That is why the Court of Appeal Rules allows the court to invoke **Rule 83** *suo motu* if the respondent in the intended appeal does not move the Court.

It is a Rule that clothes the court with unfettered discretion. Nonetheless, as is always the case when the exercise of the Court's discretion is called in to play, the Court must exercise the same judicially and fairly and in a manner that will evidently protect the integrity of the court process. The same parameters apply when the court is called upon to invoke its discretion under **Section 3A** and **3B** of the **Appellate Jurisdiction Act.**

It is with this mind that we must now consider the circumstances of this application, which inevitably includes the conduct of both parties to determine whether our discretion can be exercised in favour of the respondent. We appreciate that the notice of appeal was filed with promptitude within the time allowed by **the Rules**. We also note that indeed, the letter bespeaking the proceedings was sent to the Deputy Registrar of the High Court on 3rd October, 2012 even before the notice of appeal was filed.

We note however, that there is no evidence whatsoever of the follow up of the proceedings. There is not in the record a single letter to the registry seeking to find out how far the typing of the proceedings had gone or when the same would be ready for collection. The record shows that the appellant filed the motion for stay of execution of the decree of the High Court on 17th July 2013 which was almost one year after the impugned judgment was rendered. The orders sought were granted on 26th July, 2013. With the

stay orders in its '*pocket*' the respondent appears to have gone to slumber.

When the proceedings became ready for collection, the court sent the usual notice of collection to the respondent on 11th June, 2014. Even as at the time of hearing the application, there is no evidence proffered by the respondent to show if the said proceedings were ever collected from the court and if so when.

The applicant moved to this Court under certificate of urgency seeking the present orders to enable it get the money deposited in a joint account pursuant to the Court order so that the directors of the company can pay school fees for their children. The application was duly served on the respondent on 28th October 2014 but the same did not elicit any response. According to learned counsel for the applicant, it was only after the Court served the hearing notice on the respondent that, it filed an application for extension of time instead of filing a replying affidavit. That application is actually not before us even as an annexure to an affidavit and we are not therefore able to know the reasons given for the delay.

We shall therefore confine ourselves to the material before us.

Evidently, there was need for the respondent to explain the implicit indifference it has displayed in this matter as averred by the applicant. In the absence of the said explanation, the respondent would need to convince us that it can seek refuge under the provisions of **Section 3A** and **3B** of the **Appellate Jurisdiction Act.**

This Court has stated in several matters that these provisions which created the '*Oxygen (O2) Principle'* must be applied with caution and only in the most deserving **c**ircumstances. We quote *in extenso* our holding in the case of **Hunker Trading Company Limited vs Elf Oil Kenya Limited (Civil Application No. Nai 6 of 2010),** which in our view is very relevant to the present circumstances:-

The applicant cannot be allowed to invoke the '02 principle' and at the same time abuse it at will… All provisions and rules in the relevant Acts must be '02 principle' compliant because they exist for no other purpose. The '02 principle' poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promoted good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the '02 principle' could easily become an unruly horse and therefore while the enactment of the 'double O' principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained."

This Court also stated in ***City Chemist (Nrb) & Another vs. Oriental Commercial Bank Ltd***, ***Civil Application No. Nai. 302 of 2008 (UR. 199/2008)*** as follows:-

"That however, is not to say that the new thinking totally uproots well established principles or precedent in 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 and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

As is clear from these decisions, the overriding principle does not debunk the cherished and well settled principles which the Courts have applied persistently and consistently over the years in the administration

of justice. These include the principles to be considered by the Court when called upon to exercise its discretion in favour of a party as we are have been asked to do in this matter. It is our view that the respondent has failed to bring its application within the ambit of sections **3A & 3B** of the **Appellate jurisdiction Act.**

It is our view that in the absence of any explanation on the conduct of the respondents in this matter, the Court has no basis whatsoever for invoking or applying the overriding principle as moved by counsel for the respondent. Doing so in our view would amount to encouraging indolence on the part of the respondent while at the same time perpetuating serious prejudice on the part of the applicant. We say so because, although the decretal amount is safe in a joint bank account, the same is of no assistance to the applicant as it remains inaccessible to it. The deposit should not be seen by the respondent as security for their inactivity or delay in the matter.

The conduct of the respondent in this matter cannot be countenanced. There is no foundation set for us to ground the overriding principle on. The respondent's application is built on quicksand and the same is destined to crumble. It would be an abuse of our discretion if we exercised it in favour of the respondent in these circumstances.

We find the application before us merited. In the circumstances, we allow it and order that the notice of appeal dated 18th October, 2014 filed in this Court on 19th October, 2012 be and is hereby deemed as withdrawn with costs to the applicant.

There being no appeal pending before this Court, we order that the money held in Account No. ***[Particulars withheld]*** at Kenya Commercial Bank be released to the applicant through its advocates on record as prayed.

The costs of this application are also awarded to the applicant.

Dated and delivered at Nairobi this 18th day of December, 2014.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR