



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: ONYANGO OTIENO, VISRAM & OKWENGU, JJ.A)

CIVIL APPLICATION NO. 281 OF 2011

BETWEEN

WAMUHU MAINA DAMAIYO (Suing as the Administratrix

of the Estate of Gabriel Maina (Deceased)..... APPLICANT

AND

GATEWAY INSURANCE COMPANY LIMITEDRESPONDENT

(An application to have the Notice of Appeal from the Judgment of the High Court of Kenya at Mombasa (L. Njagi, J) dated 22nd May, 2009 in Civil Appeal No. 83 of 2008 be marked as withdrawn

RULING OF VISRAM, JA

This is an application by way of notice of motion brought under **Rule 83** of the Court of Appeal Rules (the Rules) in which the applicant (respondent in the appeal) seeks an order that the notice of appeal dated and lodged in court on 28th May, 2009 in Civil Appeal No. 83 of 2008 be deemed as withdrawn on the following grounds;

“(a) That the respondent's appeal against the applicant in Mombasa Civil Appeal No. 83 of 2008 was dismissed on 22nd May 2009.

(b) That the respondent filed a Notice of Appeal in the superior court dated 28th May 2009.

(c) That proceedings in the superior court were typed and certified on 21st May 2010.

(d) That ever since the proceedings were typed and certified, the respondent has failed to institute an appeal within the appointed time.”

The appeal herein relates to a motor vehicle accident resulting in the death of Gabriel Karanja Maina. His estate successfully sued the owner of the motor vehicle insured by the respondent, and when it failed to recover any damages from the said owner, sued the respondent insurer and obtained judgment. The respondent's first appeal to the High Court was unsuccessful and he proceeded to file this Notice of Appeal giving rise to this second and possibly final appeal to this Court.

Having filed the notice of appeal on 28th May, 2009, the respondent took no further action to file the

record of appeal. It is not in dispute that the proceedings of the High Court were typed and certified on 21st May, 2010, and the respondent knew of that fact. In any event, the applicant's advocate informed the respondent by its letter dated 1st June, 2010 that the proceedings were ready and asked them to take further steps to file the record of appeal. The respondent did absolutely nothing. It has not even filed a replying affidavit to the application before us, thus accepting the facts outlined in the affidavit in support of the application.

Based on the above facts, none of which are in dispute, Mr. Godfrey Mutubia, learned counsel for the applicant, urged us to grant the order sought.

Mr. Mburu Kariuki, learned counsel for the respondent, while not disputing the facts simply relied on **sections 3A and 3B** of the **Appellate Jurisdiction Act**, arguing essentially that the Court should not rely on mere technicality to defeat the respondent's claim.

With respect, this is not a matter in which those provisions can be invoked. This is an omission that goes to the root of the Rules i.e. whether or not a party is obliged to observe the time frames provided in the Rules for the advancement of its case. To invoke the provisions of **section 3A and 3B** in total disregard for the time lines provided, would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. **Sections 3A and 3B** were not meant for that. In the case of *Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. Nai. 6 of 2010*, this Court considered the applicability of those sections in detail and stated *inter alia* as follows:-

“It seems to us that in the exercise of our powers under the ‘02 principle’ what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “02” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “02 principle” could easily become an unruly horse.”

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.”

I respectfully agree with those sound legal sentiments. I may cite one more case of *Mradura Suresh Kantari vs. Suresh Nanalal Kantaria Civil Appeal No. 277 of 205* (unreported) where this Court stated as follows:-

“The overriding principles will no doubt serve us well but it is important to point out that it is not going to be the 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.”

The above are the answers to Mr. Kariuki's submissions. I think I have said enough to indicate that the notice of motion is based on sound grounds and must succeed. In the event, the notice of appeal dated 28th May, 2009 is struck out. Costs shall be to the applicant in this notice of motion who is the respondent in the appeal. Orders accordingly.

Dated and delivered at Mombasa this 24th day of January, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

RULING OF J. W. ONYANGO OTIENO, J.A.

I have had the opportunity of reading in draft, the ruling of my brother Visram, J.A. I do concur with him fully and I have nothing useful to add. In the event the orders of the Court are as proposed by Visram, J.A.

This ruling is delivered pursuant to Rule 32(3) of this Court's Rules as Okwengu, J.A. is abroad on further studies and cannot avail herself to peruse and approve the Ruling.

Dated and delivered at Mombasa this 24th day of January, 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR