IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 3 OF 2013 (UR. 1/2013)

BETWEEN

ENGINEER MICHAEL OCHIENG ……...……....APPLICANT

AND

JOSEPH NYAUMBA WEYA ……..…….....1ST RESPONDENT

MOSES AGUMBA …… 2ND RESPONDENT

(An application to strike out the notice of appeal from a ruling and order of the High Court of Kenya at Kisumu (Chemitei, J.) dated 28th September, 2012

in

H.C.C.C. MISC. APPL. NO. 60 OF 2012)

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RULING OF THE COURT

In a Ruling dated and delivered on 28th September, 2012, the High Court sitting at Kisumu (Chemitei, J.) refused preliminary objection dated 24th August, 2012 and filed on 27th August, 2012, found that the firm of Odera Obar & Company Advocates were not properly on record, proceeded to expunge from the same record all proceedings filed by that firm and further found that application for leave dated 15th August, 2012 was properly filed and served and so allowed the same in terms of prayer (b) thereof.

The respondents in this application namely ***Joseph Nyaumba Weya*** and ***Moses Agumba*** felt aggrieved by that Ruling and moved to this Court by way of Notice of Appeal dated 1st October, 2012 and filed in the High Court registry on 2nd October, 2012. This was timeous. Thereafter as at 22nd February, 2013 the respondents had not filed an appeal. According to the applicant ***Engineer Michael Ochieng***, as at 22nd February, 2013, sixty days had expired from the date the Notice of Appeal was filed and as the respondents in this application had not filed Record of Appeal, the applicant moved to this Court and filed this Notice of Motion dated 22nd February, 2013 and filed on 26th February, 2013 seeking three orders namely:

"1. That the Notice of Appeal dated 1st October, 2012 and filed in court on 2nd October, 2012 be

deemed as withdrawn and bestruck out.

2. That the stay of execution order and all consequential orders issued by this Honourable court in Civil Application Number NAI. 258 of 2012 (UR. 187.20 (2) be discharged.

3. That the costs of this application be awarded to the applicant in any event."

There were five grounds cited in support of the application and these were that: -

"(a) The respondents filed their Notice of Appeal dated 1st October, 2012 on 2nd October, 2012.

(b) The Respondents did not file and serve upon the applicant a letter applying for copies of typed and certified copies (sic) of the proceedings and Ruling in High Court Miscellaneous Application Number 60 of 2012 within thirty (30) days of the date of the decision of Honourable Justice Chemitei delivered on 28th September, 2012.

(c) The respondents have failed to lodge the Record of Appeal in the Court of Appeal registry within the legally stipulated period of sixty (60) days from the date of filing the Notice of Appeal as provided by Rule 82 of the Court of Appeal Rules.

(d) The Notice of appeal is deemed as withdrawn under Rule 82 of the Court of Appeal Rules.

(e) Despite the Notice of Appeal herein having been deemed as withdrawn, the Court of Appeal gave an order of stay of execution of the order of the superior court in High Court Miscellaneous Application Number 60 of 2012 made on 28th September, 2012 vide its Ruling delivered on 8th February, 2012 in Civil Application Number NAI 258 of 2012 (UR. 187 of 2012)."

The Notice of Motion was further supported by an affidavit sworn by the applicant on 22nd February, 2013. We think paragraphs 5 and 6 of that affidavit raise the main issue in the application and we do reproduce them. The applicant states in those paragraphs as follows: -

"5. That I am informed by my advocate Eric Masese, which information I verily believe to be true that:

a. *The Respondents did not file and serve upon him a letter applying for typed and certified copies of the proceedings and ruling of the superior court in Kisumu High Court Miscellaneous Application Number 60 of 2012 within the legally stipulated period of (30) days from 28th September, 2012, the date (sic) of the decision of Justice Hilary Chemitei, was delivered.*

b. *That my advocate has on more than one occasion searched the file in the superior court High Court Miscellaneous Number 60 of 2012 to find out whether, if at all, the Respondent's advocate <u>wrote a letter</u> to the Registrar of the superior court seeking a copy of all proceedings therein. However, despite these efforts he has not been able to find this letter on the court file.*

6. That I am informed by Eric Masese Advocate which information I verily believe to be true that Under rule 82 of the Court of Appeal Rules the Respondents having failed to file and serve the letter bespeaking proceedings, ought to have lodged their Record of Appeal within sixty (60) days of the date of filing of the Notice Appeal."

On this application being served, the respondents responded by way of a replying affidavit sworn by the first respondent Joseph Nyaumba Weya. In that replying affidavit, the respondents state at paragraphs 4 and 5 as follows: -

"4. That I am informed by my advocates on record aforesaid which information I verily believe to be true that by their letter of 11th October, 2012, they wrote to the Deputy Registrar of the High

Court in Kisumu humbly requesting to be furnished with the certified copies of the proceedings, together with the Ruling to enable them prepare the Record of Appeal (annexed and marked JNW2 is a true copy of the said letter.)

5. That a cursory glance at the aforesaid letter reveals that contrary to the assertions made by the applicant in his supporting affidavit the said letter was duly served upon his advocates M/s. Kosgey & Masese Advocates on the 5th day of October, 2012 whereas the Hon. Attorney General and Otieno Yogo & Advocates were served on the 3rd day of October, 2012, (annexed and marked JNW 3 is a true copy of the return of service sworn by Joel Velele Mwanzia.)"

The respondents proceed to state further that the same letter bespeaking the proceedings and copy of the ruling together with Notice of Appeal were served simultaneously and that the subject Record of Appeal was filed on 30th April, 2013 and that it was filed together with certificate of delay. The respondents annexed to their Replying Affidavit both the copy of the letter bespeaking the proceedings and copy of the ruling and the copy of certificate of delay.

The applicant filed supplementary affidavit but the main thrust of that is only that the Notice of Appeal was served upon a pupil in the firm of the applicant's advocates but that pupil did not receive the letter bespeaking the proceedings and copy of the Ruling. That pupil, a Mr. ***Norbert Obiro Sing'ora,*** also swore an affidavit in which he stated he was the person who received Notice of Appeal from the respondent's advocate's clerk but that he was not served with a letter the subject of the dispute. It is however telling that that pupil stated at paragraph 6 as follows: -

"That the signature appearing on the Notice of Appeal is mine and does not belong to the secretary and the affidavit of serve of Joel Mwanzia is false."

We will state herein why that allegation is important. However, suffice it to state that all Sing'ora's affidavit did was to deny that a secretary was served as had been stated by Joel Mwanzia and to emphasize that he is the person who was served. In short the issue of service at least of the Notice of Appeal is not in dispute but as to who was served and whether whoever was served was also served with the letter bespeaking the proceedings, is in dispute.

In his address to us Mr. Masese, the learned counsel for the applicant, invited us to strike out the Notice of Appeal and the record that was already filed, though was not subject of the application, on the main grounds that the letter bespeaking the proceedings was not written, filed and served upon the applicant and so the Notice of Appeal should be treated as withdrawn as no appeal was filed within 60 days after 2nd October, 2012 and as no such letter was written, filed and served, the respondents could not rely on the proviso to ***Rule 82*** of the Court's Rules. When we reminded him that as per the replying affidavit the appeal had been filed and certificate of delay indicates that such a letter existed, Mr. Masese shifted his stand and pegged his submissions on the main grounds that the letter was not served upon the applicant and when prompted that a copy of that letter bore rubber stamp of the firm of Advocates for the applicants and a signature, he felt the signature on that letter indicating acknowledgment of receipt of the same letter must have been a forgery. He also stated that the respondents delayed in collecting proceedings which were ready much earlier and thus the record was filed out of time.

Mr. Odera Obar, the learned counsel for the respondents, referred us to annextures to the respondents' affidavit and submitted that the letter was properly written, filed and served. As to the issue of failing to collect the proceedings timeously and hence delay in filing the appeal, Mr. Odera said they did collect the same when they received a letter from the registry informing them that the same were ready and could not have done so without such a letter.

We have considered the Notice of Motion, and we have no hesitation whatsoever in stating that it clearly lacks merit.

First, reading the certificate of delay annexed to the respondent' replying affidavit, which certificate was

not disputed, reveals that an application for certified copies of proceedings was made on 1st October, 2012, by Odera Obar & Company Advocates. Thus such a letter was in the court file. The Deputy registrar was an independent person in this matter and the applicant has not challenged his assertions in the certificate of delay. That assertion means that the applicant could not be right in saying that his advocate perused the court file and found no existence of such a letter.

Second, that letter having been written, a copy of it annexed to the Replying affidavit shows that it was served upon the Attorney General and the applicant's advocates and somebody at the applicant's advocates firm received it and signed for receipt. We have with our naked eyes compared that signature to the one appended to Mr. Sing'ora's affidavit and we cannot see any difference. In any case the respondents' advocates have not denied that the stamp upon which that signature was appended is theirs. Further and even of greater importance, Mr. Sing'ora in his affidavit has deponed at paragraph 4 which we have reproduced above that the signature appearing on the Notice of Appeal is his but significantly, he has not denied the signature in the copy of the letter bespeaking the proceedings. That signature is again to our naked eyes similar to the signature on the Notice of Appeal. In any case, it is the applicant who is denying that the signature in the letter was by them and needs to prove that assertion.

In our view, even if we were to proceed on the proof within the standard of probabilities required in civil cases, we cannot strike out a Notice of Appeal and/or Record of Appeal on such a doubtful allegation. Striking out a pleading or an appeal is a draconian step which can only be taken in the clearest of cases.

As to the issue of appeal being filed later as a result of the late collection of the proceedings when they were ready earlier, that is neither here nor there for the application before us is not seeking striking out of the record of appeal. It is seeking the striking out of the Notice of Appeal on grounds that as the Record of Appeal had not been filed within sixty (60) days of the Notice being filed it was deemed withdrawn. In any case, the ground advanced for seeking striking out of the record is also in our view and with respect flimsy and cannot succeed. There was no evidence that the respondents had been served with a letter by the High Court registry informing them that the proceedings were ready for collection. That being the case, even if they were late, they cannot be punished.

In short, the application lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Kisumu this 31st day of May, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

…….

JUDGE OF APPEAL

S. ole KANTAI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR