



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWILU, KIAGE & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI 144 OF 2013 (UR 97/2013)

BETWEEN

NYAMODI OCHIENG NYAMOGO .....  
APPLICANT

AND

TELKOM KENYA LIMITED ..... RESPONDENT

(An application to deem withdrawn the respondent's Notice of Appeal dated 5th July, 2012 from the Judgment of the High

Court of Kenya (Nambuye, J) dated 22nd June, 2012

in

HCCC NO. 1736 OF 1993)

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RULING OF THE COURT

The motion on notice before us was filed by the applicant, *NYAMODI OCHIENG NYAMOGO* on 1st July, 2013, under *Rule 83 of the Rules of this Court* and seeks one primary relief, namely an order that the respondent's notice of appeal dated 5th July, 2012, and filed in this Court on 13th August, 2012 be deemed to have been withdrawn. The consequential reliefs sought are vacation of the High Court orders of stay of execution granted pending the hearing and determination of the intended appeal, release to the applicant of the decretal amount deposited in court as a condition for the said stay of execution and costs of the application.

The motion is supported by an affidavit sworn by the applicant on 1st July, 2013, in which he deposes that the High Court delivered the judgment, the subject of the intended appeal, on 22nd June, 2012. Thereafter, the respondent filed a notice of appeal dated 5th July, 2012. Since filing the said notice of appeal, (the Court stamp indicates that the notice of appeal was filed in this court on 13th August, 2013), the respondent has not filed the appeal. It should have done so within 60 days of the date of the filing of the notice of appeal as required by *Rule 82 (1) of the Rules of this Court*.

There is no dispute that the respondent did not apply for certified copies of the proceedings within 30 days of the date of the judgment, or at all, to enable it lodge the intended appeal. On 19th September,

2012, the respondent applied in the High Court for extension of time within which to apply for certified copies of the proceedings. The High Court, correctly in our view, declined the application on the grounds that it did not have jurisdiction to extend time under *Rule 82 (2) of the Rules of this Court*. By another application dated 31st October, 2012, the applicant applied to a single judge of this Court for extension of time to apply for typed copies of proceedings and judgment. The application was heard by *Karanja, JA* who on 10th May, 2013, held that *Rule 82* did not impose a time limit within which parties must apply for proceedings and therefore the application for extension of time under that rule was misconceived.

The respondent appears to have let matters lie after that. It did not file any replying affidavit in opposition to the present application, and on the date of the hearing of the application, on 30th September, 2013, the respondent was not represented though there was evidence that its advocates had been served with a hearing notice for that day. Mr Sumba, learned counsel for the applicant urged us to grant the application as the respondent had failed to institute the intended appeal within the appointed time.

The proviso to *Rule 82*, allows a party who has, within 30 days of the judgment, applied to the registrar of the High Court in writing for certified copies of the proceedings and copied the application to the opponent, in computing the 60 days required for filing of the appeal, to exclude the time certified by the registrar as having been required for the preparation and delivery of the proceedings. Having failed to comply with the requirements of that proviso, the respondent is precluded from enjoying the benefits of the proviso. That means the respondent was obliged to file its appeal within sixty days from the date of lodging the notice of appeal.

Dealing with an application similar to the present one, this Court in *BENEDICT MWAZIGHE & ANOTHER V GASPER WALELE & 2 OTHERS, MSA CIVIL APPLICATION NO. NAI 255 OF 2010* expressed itself as follows:

*“It is clear that the appeal which is yet to be filed will be helplessly out of time. That situation would have been salvaged if there was proof that the respondent had, within thirty (30) days from the date of the delivery of judgment written a letter to the deputy registrar, bespeaking the copies of the proceedings and judgment and if such a copy of such letter had been sent to the applicant. In this case at the end of 30 days from 2nd November 2007, no such letter had been written and a copy sent to the appellant. This was readily conceded... If after 60 days from that date the memorandum and record of appeal were not filed, then only compliance with the proviso to rule 81 (2) as spelt out above could have helped the situation. The rule is the same in the new rules except it is now rule 82 and the letter is now required to be “served” upon the respondent instead of being “sent” to the respondent and rule 112 is now rule 115. Since the respondent failed to comply with it, nothing would salvage the appeal. Hence the notice of appeal no longer serves any useful purpose.”*

We are alive to the provisions of section 3A of the Appellate Jurisdiction Act which stipulate that the overriding objective of that legislation and the rules made thereunder, including the rule under which the present application is made is “to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.” The provision further enjoins us to aim for, among other things, the just determination of proceedings, efficient use of available judicial and administrative resources, and the timely disposal of proceedings at a cost affordable by the parties. In *MRADURA SURESH KANTARIA V SURESH NANALAL KANTARIA, CA NO. 277 OF 2005*, this Court expressed itself as follows regarding the overriding objective:

*“The overriding 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”. (Emphasis added)*

In the absence of any response or explanation from the respondent, we are satisfied that no appeal has been filed within the prescribed time.

Accordingly we allow the applicant's application filed on 1st July, 2013, and order that the respondent's notice of appeal dated 5th July, 2012, is hereby deemed to have been withdrawn. The applicant shall have costs of this application.

Dated and delivered at Nairobi this 29th day of November, 2013.

P. M. MWILU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR