



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, M'INOTI & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI. 124 OF 2012 (UR 93 A/2012)

BETWEEN

JAMES GITAHU MWANGI APPLICANT

AND

SIMBA COLT MOTORS LIMITED RESPONDENT

(An application to strike out the Notice of Appeal dated 9th February, 2011 lodged on 9th February, 2011 from the Award of the Industrial Court at Nairobi (Isaac Mukunya, J) made on the 1st day of February, 2011

in

Industrial Court Cause No. 448 (N) of 2009)

RULING OF THE COURT

1. The application dated the 30th April, 2012 seeks to strike out the notice of appeal dated the 9th February, 2011, lodged on the 9th February, 2011 from the award of the Industrial Court at Nairobi (Hon. Justice Isaac E.K. Mukunya) made on the 1st February, 2011 in Industrial Cause No. 448 (N) of 2009.
2. The subject matter of the application arises from the judgment of the Industrial Court in Industrial Cause No. 448 (N) of 2009, in which the applicant was awarded payment of commission by the respondent for the period between 16th August, 2006 and May 2009, subject to netting of Kshs.110,000/= being one month's salary in lieu of notice of termination of employment by the appellant.
3. The background to this application may be summarized as follows. The applicant, James Gitahi Mwangi was employed by the respondent, Simba Colt Motors Limited as a fleet/government sales manager, at a basic salary of Kshs.45,000/= in July 2000. In June 2003, these terms were reviewed whereupon the terms of appointment provided for a sales commission of 4.5% payable to the applicant. The applicant resigned from the respondent's establishment in May 2009, whereupon he made claims for commission for sales worth Kshs.2,706,695,821/=, unpaid salary of Kshs.73,333/= and accumulated leave in the sum of Kshs.337,333/=. In total, the applicant's

claims amounted to Kshs.126,687,978/=. The respondent denied the applicant's claims and counter-claimed a month's salary in lieu of notice. Having considered the evidence and the submissions before it, the Industrial Court found for the applicant, awarding payment of commission as calculated by the respondent in terms of its orders. Following the award by the Industrial Court, the respondent herein filed a notice of appeal on the 9th February, 2011.

4. The applicant filed an application on the 8th May, 2012 seeking orders that the notice of appeal lodged on 9th February 2011 against the award against the respondent be struck out and/or deemed to have been withdrawn.
5. The application was supported by the applicant's affidavit sworn on 30th April, 2012. In the notice of motion, the following grounds were listed in the application:

“(1) The said Notice of Appeal is an abuse of the process of Court.

(2) No steps have been taken since its filing with a view to filing the intended appeal.

(3) The respondent has failed to file the intended appeal within 60 days from the date the proceedings and award were ready.

(4) The delay in filing the intended appeal is prejudicial to the applicant”.

6. Mr. Wamaasa, learned counsel representing the applicant, relied on the contents of the affidavit in support of the application and the grounds set out in the application as outlined above. In his submissions, he emphasized the respondent's failure to collect certified copies of the proceedings and the award for purposes of filing the appeal. The applicant submitted that whereas the proceedings of the Industrial Court were ready, over 100 days had since lapsed and the respondent had taken no steps to collect the same so as to file the appeal. The applicant averred that in failing to file the appeal, the respondent had sought to enjoy the order of stay of execution. This, in his view, was an inordinate delay. In urging this Court to allow the application, the applicant relied on the case of ***Abubakar vs Baya (2006) 1 KLR 1.***
7. Mr. Mohammed Nyaoga, learned counsel for the respondent, relied on the contents of an affidavit sworn in reply by Mwangi Mbogo, the respondent's manager in charge of legal and administrative matters on 11th September, 2013. He told this Court that the appeal had already been filed vide Civil Appeal No. 120 of 2012 and served on the 19th June, 2012. He submitted that although the appeal had not been filed but only the notice of appeal at the time the present application was filed, it was subsequently filed. Mr. Nyaoga further submitted that the delay was occasioned by the Industrial Court and not the respondent who has neither control nor authority over the court process. He explained that the respondent's advocates requested for proceedings through a letter dated 8th February, 2012; the Deputy Registrar of the Industrial Court notified the applicant's advocates on the 22nd May, 2012 to collect the proceedings and the certificate of delay was issued on 29th May, 2012. In view of these circumstances, the respondent urged us to consider the provisions of ***section 3A and 3B*** of the Appellate Jurisdiction Act.
8. Having considered the entire application and the submissions of the Counsel on record, it would appear that the applicant's issue is that there was an inordinate delay in filing the appeal yet the respondent continues to enjoy the order of stay. In response thereof, the respondent herein through the affidavit sworn by Mr. Mwangi Mbogo, stated that the Court of Appeal has held that the time frame within which the record of appeal must be filed is considered from the date when the parties are notified by the Registrar of the superior court concerned that the proceedings are ready for collection. Under this principle, it does not matter when the respondent through his or her means obtained the proceedings without official communication from the Registrar of the superior court.

9. Further, we also note that the applicant has indeed conceded that efforts were made to obtain copies of the proceedings. Indeed, the delay in providing copies of the proceedings was occasioned by the administration of the Industrial Court, a concession that the respondent is not to blame for the delay in the filing of the appeal. Under the proviso to **Rule 82 (1)** of the Rules of this Court, the time for filing the appeal starts to run from the date the respondent was notified by the Registrar that the proceedings were ready for collection, which is 22nd May, 2012.

10. It follows, therefore, that the application at hand lends itself to a straight-forward determination. It is now common wisdom that **sections 3A** and **3B** of the Appellate Jurisdiction Act (Cap 9 Laws of Kenya) and **sections 1A** and **1B** of the Civil Procedure Act (Cap 21 Laws of Kenya) requires this Court in applications such as this to take pause and consider the dictates of substantive justice. Further beyond these, are background constitutional norms which enjoin us to administer justice without undue regard to technicalities.

11. We are of the view that to allow this application would cause injustice to the parties and that in the spirit of the Constitution and the said legislation, we therefore disallow this application.

12. The Registrar of this Court is directed to have the appeal listed for hearing on a priority basis. We make no orders as to costs.

Dated and delivered at Nairobi this 8th day of November, 2013.

P. KIHARA KARIUKI

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PRESIDENT,

COURT OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR