



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MWERA & J. MOHAMMED, J.J.A.

CIVIL APPLICATION NO. NAI. 133 OF 2013(UR.90/2013)

BETWEEN

PETER KARANJA KURIA.....APPLICANT

AND

CARLILE COLLEGE.....RESPONDENT

(Application to strike out an appeal from the judgment and decree of the Industrial Court of Kenya at Nairobi (Buyan Ongaya, J) dated 16th November, 2012

in

H.C. INDUSTRIAL CASE NO. 561 OF 2012)

RULING OF THE COURT

Before us is an application by way of a notice of motion presented to court on 24th June, 2013. It is premised on **Rule 42, 83 and 84** of the Court of Appeal Rules. Four (4) reliefs are sought namely:-

1. the Court of Appeal in pursuant to rule 83, order the Civil Appeal No. 128 of 2013 to have been deemed defaulted and withdrawn;
2. to strike out the record of appeal in Civil Appeal No. 128 of 2013;
3. the execution of judgment and decree by Honourable Buyan Ongaya on November 16th 2012 be allowed;
4. that cost of the application be borne by the respondent.

The application is grounded on six (6) grounds in the body of the application as well as a supporting affidavit deponed by **Peter Karanja Kuria**, the applicant, which is very brief and straight to the point together with annexures thereto.

The application is opposed by a replying affidavit deponed by **Cosmas Chahenza Advocate**, learned counsel currently on record for the respondent.

In a summary, the applicant's argument is that the Industrial Court delivered judgment in the applicant's favour on 16th November, 2012; the respondent aggrieved by that judgment filed and served a notice of

appeal within the stipulated time on 19th November, 2012; that from the date the notice of appeal was filed and served, time for the lodging of the record of appeal within 60 days started running and considering that there was Christmas vacation in between, the respondent ought to have lodged the record of appeal by 12th February, 2013.

It is further the applicant's argument that the respondent failed to file their record of appeal on 12th February, 2013 whereupon they sought leave of the court for extension of time within which to file the record of appeal. This request, on the part of the respondent, gave rise to the ruling by this Court delivered on the 24th May, 2013 by which the respondent was given 15 days within which to lodge its record of appeal out of time. Had the respondent complied with that order, their record of appeal ought to have been lodged on 18th June, 2013 which deadline the respondent did not meet. It is therefore the applicant's contention that since the respondent has not moved diligently to speed up the progression of the appeal there is no justification for the continued enjoyment of the stay orders granted in their favour by the Industrial Court. That these should be discharged so that the money adjudged in favour of the applicant is released to him. The applicant also added that he has a sick wife in the United States of America and needs funds for her treatment.

In response *Mr. Chahenza* for the respondent, relying on the content of the replying affidavit deposed by *Mr. Chahenza* together with the annexures annexed thereto does not dispute the background information to the application as outlined by the applicant above. He also concedes that indeed they filed a notice of appeal in time; that they failed to lodge the record of appeal within the stipulated time; that indeed they sought an extension of time within which to lodge the record of appeal and they were given fifteen (15) days within which to do so but unfortunately they lodged the record of appeal six (6) days late.

Mr. Chahenza added that they had filed another application on 3rd July, 2013 application in the appeal, which is yet to be disposed off seeking enlargement of time to have the now filed appeal admitted out of time. It is *Mr. Chahenza's* contention that the applicant should have directed the current application in the appeal filed for ease of reference. Lastly, that there is no way this Court can strike out or deem the now-filed appeal as having been withdrawn during the pendency of an application to have it admitted out of time. He however left the issue of costs and partial release of the decretal sum to the Court.

We have given due consideration to the rival pleadings and arguments herein and in our opinion we are satisfied that the applicant has a genuine concern because he has a judgment in his favour. We also note that the respondent has a right to exercise its undoubted right of appeal and seek a second opinion through their now filed appeal which is filed pending validation. We also find that it is unsafe for us at this stage to interrogate the issue of the respondent's non-compliance with the indulgence accorded to them on their first application for extension of time as in doing so we would be pre-empting the outcome of the pending application for admission of the appeal out of time.

We however cannot lose sight of our role namely to do justice to both parties as they stand before us. In balancing our scales of justice we have to note that our mandate invoked under **Rules 83** and **84** of this Court's rules is purely discretionary. It is now trite that the exercise of judicial discretion is not absolute. It is however unfettered with the only fetter being that it be exercised not on whim but judiciously with a reason. We have done so and in the circumstances of this case we find it prudent not to accede to the applicant's request to strike out the respondent's appeal. Reason being that striking out of the appeal as requested would deny the respondent a chance of being heard on the application for validation that is pending disposal. However, in doing so, we have to consider the fact that the applicant has not contributed to the situation that the respondent finds themselves in. It is therefore necessary for us to give a conditional reprieve to the respondent. This will be in the best interest of both parties. In the result we make the following orders in the disposal of the applicant's application filed on 24th June, 2013:-

1. The said application is disallowed to enable the respondent prosecute its application for enlargement of time to admit Appeal No. 128 of 2013 out of time on condition that a sum of Ksh.1,380,000/= being part of the decretal sum adjudged in favour of the applicant be released to him within fourteen (14) days of today's order.

2. In default of the condition in No.1 above the applicant's application filed on 24th June, 2013 shall stand allowed and the respondent's appeal No. 128 of 2013 shall stand struck out and or deemed to have been withdrawn.
3. The applicant will have costs of this application.

DATED and DELIVERED at NAIROBI this 8th day of NOVEMBER, 2013.

R.N. NAMBUYE

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JUDGE OF APPEAL

J.W. MWERA

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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