



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ONYANGO OTIENO, KARANJA & MARAGA, JJ.A.)

CIVIL APPLICATION NO.NAI. 206 OF 2010

BETWEEN

EVANSON NJIRI WANJIHIA.....APPLICANT

AND

CALTEX OIL (KENYA) LIMITED.....RESPONDENT

(An appeal for striking out the Notice of Appeal dated 24th June 2009 from the Ruling of the High Court of Kenya at Nairobi (Ali Aroni) dated 16th June 2009

in

HCC NO. 5366 OF 1993)

RULING OF THE COURT

The notice of motion at Bar is the one dated 3rd of November 2011 and filed on 15th of December 2011. It is pronounced to be brought under **Rules 82(1)** and **84** of the Court of Appeal Rules and **Sections 3A** and **3B** of the Appellate Jurisdiction Act. It is filed within another notice of motion namely **Civil Application No. Nairobi 206 of 2010** and it principally seeks *an order that the respondent's notice of appeal dated 24th June, 2009 and filed on 24th June, 2009 be struck'.*(Sic)

The notice of motion within which this one is filed was filed on 18th August, 2010. The same was actually heard on 4th July, 2011 and a considered ruling on the same was rendered on 29th July, 2011.

That notice of motion was seeking the exact same orders as the current one i.e the striking out of the respondent's notice of appeal dated 24th June, 2009 and filed the same day.

In that ruling, this Court after observing that the delay complained of by the applicant was principally caused by the court and not by the respondent held that:-

“Taking into account the courts duty under Section 3A and 3B of the Appellate Jurisdiction Act, in exercising our power under the rule, we consider that it would be fair and just to encourage the appeal to be heard on merit.”

The application for striking out the notice of appeal was consequently dismissed. The respondent did not nonetheless file the appeal for its determination on merit and this is what prompted the applicant to file this motion seeking the striking out of the same notice of appeal.

The motion is opposed vide the replying affidavit of **Daniel NgacaGachugia** learned counsel for the respondent dated 21st February, 2012 which addresses both the facts surrounding this matter and also the law applicable. It will not be necessary for us to repeat the depositions pertaining to the facts surrounding this case. From the replying affidavit of the respondent's counsel before us, two important pertinent points of law arise.

Firstly, counsel for the respondent submitted that the application is fatally defective as this Court having dealt with the same application earlier on, is *functus officio* (see paragraph 8 of the replying affidavit). This point was expounded in his learned counsel's submission in court.

Secondly, that the application is bad in law as the same contravenes **Rule 84** of the Court of Appeal Rules which provides that an application for striking out a notice of appeal "*shall not*" be brought after the expiry of 30 days from the date of service.

We have considered the notice of motion along with the rival affidavits and the submissions of both counsel.

Firstly, we note that the notice of motion filed on 18th August, 2010 was actually heard and determined and thus concluded. **Civil Application No. 206 of 2010** was thus spent. The applicant herein could not therefore file another similar application within the already spent notice of motion. For that reason alone, the notice of motion now before us is fatally and incurably defective. We also find that the recourse of striking out the notice of motion was spent once the first notice of motion was dismissed.

Secondly we find that the notice of motion was filed outside the 30 days limitation period which is in contravention of **Rule 84** of the Court of Appeal Rules. The application is therefore untenable and bad in law. We dismiss the same and order that costs of this application be paid by the applicant.

Dated and Delivered at Nairobi this 4th day of May, 2012.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR