IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, ONYANGO OTIENO & VISRAM, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 154 OF 2010

BETWEEN

RAMJI DEVJI VEKARIA .....APPLICANT/RESPONDENT

AND

JOSEPH OYULA ..... RESPONDENT/APPELLANT

(Application to strike out notice of appeal and record of an appeal from the ruling of the High Court of Kenya at Eldoret

(Mwilu, J.) dated 9th December, 2009

in

H.C.C.C. NO. 92 OF 2007)
****
RULING OF THE COURT

On 9th December, 2009, Mwilu J. delivered a ruling on a Chamber Summons dated 6th October 2009 filed in the High Court at Eldoret Civil Suit No. 92 of 2007. The respondent in this notice of motion before us dated 17th August, 2010, Joseph Oyula, felt aggrieved. He filed notice of appeal against that ruling on 18th December 2009. That notice of appeal was not served upon the applicant in this notice of motion, Ramji Devji Vekaria till 15th January 2010. It would appear that the respondent wrote a letter to the Registrar bespeaking the proceedings, but that letter was not sent to the applicant as was required by the second proviso to the then ***rule 81*** now ***rule 82*** of this Court's Rules. The respondent nonetheless, proceeded and filed the record of appeal on 18th June 2010, well out of the sixty days stipulated in the Rules of this Court. On 25th August 2010, the applicant moved to this Court by way of notice of motion dated 17th August 2010 in which he is seeking orders that:-

> ***"(a) The appellant's notice of appeal dated 18th December 2009 together with the record of appeal lodged in court on 18th June 2010 in Eldoret Court of Appeal Civil Appeal No. 11 of 2010 by the respondent be struck out.***
>
> ***(b) The applicant be awarded the costs of this application."***

The grounds cited in support of the application were that:-

"(i) The ruling that gave rise to the appeal was delivered on 9th December 2009.

(ii) The respondent lodged a notice of appeal against the said ruling on 18th December 2009.

(iii) The respondent did not copy any letter requesting for certified copies of the proceedings to the applicant's advocates.

(iv) The respondent ought to have therefore lodged his appeal within sixty (60) days of the court's ruling.

(v) The appeal was however not lodged until 18th June 2010 a period of over 4 months out of time.

(vi) The appeal was therefore lodged out of time without leave as rule 81 of the Court of Appeal is not therefore available to the respondent.

(vii) The notice of appeal was served out of time without leave."

Those grounds were supported by an affidavit sworn by the applicant/ respondent, Ramji Devji Vekaria sworn on the same date 17th August 2010.

In response, the respondent/appellant, in his replying affidavit sworn by him on 8th February 2011, stated that the application is misconceived and should be dismissed; that his notice of appeal was immediately dispatched to the applicant/respondent for service but service could not be effected as the applicant's advocates had already closed their office for Christmas and were to re-open in January 2010; that his advocates requested for copies of proceedings at the same time they filed notice of appeal; that his advocates informed him that although the letter bespeaking copies was not copied to the applicant's advocates, nonetheless a copy of it was sent to the offices of the advocates for the applicant; that the proceedings were ready by 19th April 2010, and on their collection, the superior court issued certificate of delay confirming that the delay was caused by the Court Registry in preparing the copies of the proceedings; that immediately on receipt of the copies of proceedings, the respondent/appellant filed the record of appeal and thus there was no delay in filing the appeal and in any event, the applicant/respondent has not suffered any prejudice.

Mr. Gicheru, the learned counsel for the applicant/respondent in his submissions highlighted the grounds in support of the application as stated above and urged us to accept that as the letter bespeaking the copies of proceedings was not sent to the advocates for the applicant/respondent nor to the applicant/respondent himself the respondent/appellant cannot benefit from the proviso to ***rule 81*** (now ***rule 82)*** of the Rules of the Court. That being the case, the record of appeal which should have been filed within sixty (60) days of the date the notice of appeal was filed, was not so filed and was filed way out of time as the proviso to ***rule 81*** could not be invoked.

Mr. Kitiwa, the learned counsel for the respondent/appellant conceded that notice of appeal was not served within the time stipulated in the Rules but that was because the offices of the applicant's advocates were closed. On the delay to file the appeal in time, Mr. Kitiwa said a certificate of delay was annexed to the replying affidavit and he requested us in the circumstances to exercise our discretion under ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act and do what he called justice. He insisted that although the letter they wrote to the Deputy Registrar bespeaking the copies of proceedings was not copied to the advocates for the applicant/respondent, it was nonetheless sent to them. He urged us to dismiss the application. In response, Mr. Gicheru, submitted that the provisions of ***sections 3A*** and ***3B*** aforesaid cannot be invoked in this matter as those provisions do not allow parties to flout the rules.

We have considered the application, the grounds in support of the application, the affidavits, the submissions by the learned counsel and the law. We would be prepared to accept, in the circumstances of

this matter, that there is doubt as to whether an attempt was made to serve notice of appeal in time as the respondent/appellant says and to give the benefit of that doubt to the respondent/appellant. In doing so we have considered that the notice of appeal was filed on 18th December, 2009, a date very close to the commencement of the Court vacation, and we take judicial notice that a number of advocates do close their offices for December vacation. We are not however convinced that the respondent/appellant sent a copy of the letter addressed to the Deputy Registrar bespeaking copies of proceedings to the applicant/respondent. The respondent/appellant in person depones in his affidavit on that issue at paragraph 9 as follows:-

"9. That I am informed by my advocate which information I verily believe to be true that although the said letter was not copied to the applicant nonetheless, a copy was sent to their offices."

That allegation leaves a lot to be desired. One may ask, why was it not copied to the applicant if a copy was meant to be sent to them? When was it sent to them? Who sent it to them? If the respondent/appellant's advocates are the ones who wrote it, and sent it, why did they not call a process server or for that matter a clerk who sent it to swear an affidavit to that effect? All these glaring questions are not answered. We are far from accepting those allegations as true. We hold therefore that no letter bespeaking the copies of proceedings was sent to the applicant/respondent or his advocates as is required vide proviso to ***rule 81*** or now ***82 o***f the Court's Rules. That in effect means that the respondent/appellant cannot benefit under the provisions of that rule and thus the record of appeal was clearly filed out of time and without leave of the Court.

Mr. Kitiwa urges us to exercise our discretion pursuant to the provisions of ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act. With respect, this is not a matter in which those provisions can be invoked. This is an omission that goes to the root of the Rules i.e. whether or not a party can file an appeal out of time and without leave of the court. To invoke the provisions of ***section 3A*** and ***3B*** would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. ***Sections 3A*** and ***3B*** were not meant for that. In the case of ***Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010***, this Court considered the applicability of those sections in detail and stated inter alia as follows:-

"It seems to us that in the exercise of our powers under the "0_2 principle" what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are "0_2" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the "0_2 principle" could easily become an unruly horse."

This Court also stated in ***City Chemist (Nbi) & Another vs. Oriental Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (Ur.199/2008)*** as follows:-

"That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

We respectfully agree with those sound legal sentiments. We may cite one more case of ***Mradura Suresh Kantaria vs. Suresh Nanalal Kantaria Civil Appeal No. 277 of 2005*** (unreported) where this Court stated as follows:-

"The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panasea for all ills and in every situation. A foundation for its application must be properly

laid and the benefits of its application judicially ascertained."

The above are the answers to Mr. Kitiwa's submissions. We think we have said enough to indicate that the notice of motion is based on sound grounds and must succeed. It is allowed with the result that Civil Appeal No. 211 of 2010 lodged at Eldoret Court of Appeal Registry which is Civil Appeal No. 154 of 2010 is struck out with costs to the applicant in this notice of motion who is the respondent in the appeal. Orders accordingly.

Dated and delivered at Eldoret this 25th day of March, 2011.

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR