IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: OMOLO, ONYANGO OTIENO & NYAMU, JJ.A)

CIVIL APPLICATION NO. NAI. 255 OF 2010

BETWEEN

BENEDICT MWAZIGHE
HARRY NJAI ...……...…….APPLICANTS

AND

GASPER WALELE
CRISPUS MSAFWARI
TAITA RANCHING CO. LTD ……RESPONDENTS

(An application to strike out the notice of appeal lodged against the decision of in the High Court of Mombasa (Khaminwa, J.) dated 2nd November, 2007

in

H.C.C.C. NO. 189 OF 1994)
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RULING OF THE COURT

On 2nd November, 2007, the superior court (Khaminwa J.) delivered judgment in Civil Suit No. 189 of 1994. The respondents in this notice of motion, ***Gasper Walele, Crispus Msafwari*** and ***Taita Ranching Company Ltd,*** claim that they were not present in court on that date and neither were their advocates present. They came to know of the decision on 21st November, 2007. When they knew of the decision, they felt aggrieved with it and decided to appeal against it. Through their advocates, they filed notice of appeal in the superior court on that date. They however, did not write to the superior court to seek copies of proceedings and judgment. On 14th December, 2007, they filed chamber summons dated the same day and they sought in that chamber summons two prayers which were that the time for filing notice of appeal be extended to cover the period upto and including 22nd November, 2007, and that there be a stay of execution of the judgment delivered on 2nd November, 2007. That application was placed before Ojwang' J. who, in a ruling dated and delivered on 22nd October 2010, allowed the prayers and ordered the costs of that application to be in the then intended appeal. Thereafter no appeal was filed.

On 3rd November, 2010, the applicants in this notice of motion Benedict Mwazighe and Harry Njai, moved to this Court and sought striking out of the notice of appeal lodged on 21st November, 2007 on the grounds that:-

"(i) The respondents have not taken any essential step since the lodging of notice herein to have the

intended appeal instituted.

(ii) Sixty (60) days have elapsed since the lodging of the said notice.

(iii) No application for typed copies of proceedings was made and served upon the applicant's advocates.

(iv) The delay in instituting the intended appeal is inordinate and inexcusable.

(v) The notice of appeal herein clogs the applicants' right in pursuing their costs in the High Court case."

The notice of motion is supported by an affidavit sworn by the second applicant Harry Njai who depones that the notice of appeal lodged by the respondents on 21st November, 2007 was timeously served upon their advocates but since the filing and serving of the notice of appeal, no memorandum and record of appeal has been served upon them, and further and in any event that the respondents did not apply for copies of proceedings and judgment within the required thirty days from the date of the delivery of the subject judgment and thus since the sixty days have elapsed from the date of the delivery of judgment by the superior court, and since no record of appeal has been lodged and served as is required by the rules, the filing of the same record is already out of time and the proviso to ***rule 81*** would not come to the aid of the respondents. In response, the respondents filed a replying affidavit sworn by the first respondent Mr. Gasper Walele in which he stated that notice of appeal was lodged late on 21st November, 2007 because, the judgment was delivered in their absence and without their notice. Thereafter they applied to the superior court for extension of time to have the notice deemed as having been properly filed. That application was granted on 22nd October, 2010 and it was thereafter that they applied for copies of the proceedings and judgment. He added that the applicant had moved to the superior court for review of the order of 22nd October, 2010. In his submissions before us, Mr. Odongo, the learned counsel for the applicants reiterated on the main, the contents of Mr. Njai's affidavit and added that the order of 22nd October, 2010 could not aid the respondents as it stated that the time to file the notice of appeal was extended to cover the period upto and including 22nd November, 2007 which meant that there was still delay in filing the record of appeal as by the time the order was given on 22nd October, 2010, sixty (60) days from 22nd November, 2007 had long expired and as request for proceedings and judgment was not made and served within 30 days of the date of delivery of judgment by Khaminwa J, the proviso could not be of any help to the respondents. Mr. Khatib, the learned counsel for the respondents conceded that though the judgment the respondents seek to appeal from was delivered in the absence of the respondents, by the time they came to know of it on 21st November, 2007, the thirty days within which to make a request for copies of proceedings and judgment had not expired, nonetheless they did not apply for the copies. He blamed the former advocates for the respondents for that omission, but he also accepted that even after he was seized of the matter, he too did not make that application for proceedings as he was waiting for the decision of the superior court on the application for extension of time to file notice of appeal. He however referred us to a letter dated 25th October, 2010 addressed to the Deputy Registrar, High Court in which he requested for the same proceedings. That was clearly several years out of the thirty days allowed and apart from copying the letter to the advocates for the applicants, there was nothing to demonstrate that it was sent to them as the rule required them. Mr. Khatib however asked us to dismiss the application saying the dispute was between shareholders of a company.

It is not in dispute that the judgment the respondents seek to appeal against, was delivered on 2nd November, 2007. It is not in dispute that by dint of the order of Ojwang' J. delivered on 22nd October, 2010, the respondent had upto 22nd November, 2007 to file notice of appeal. He had filed it on 21st November, 2007. It is not in dispute that from that date 21st November, 2007 to the date this notice of motion was filed i.e. 3rd November, 2010, about three years, no memorandum and record of appeal had been filed and even by the date this matter was heard on 19th January, 2011 none had been filed. Lastly parties agree that no request was made for copies of proceedings and judgment within 30 days of the date of ruling and obviously no such copy was sent to the applicant.

Rule 81 (1) and ***(2)*** of this Court's Rules which was then in operation stated:-

"81 (1) Subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when notice of appeal was lodged.

(a) a memorandum of appeal in quadruplicate
(b) the record of appeal in quadruplicate
(c) the prescribed fee and
(d) security from the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An applicant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent."

It is clear that the appeal which is yet to be filed will be hopelessly out of time. That situation could 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. The allegation that the respondents were not aware of the date of the delivery of judgment until 21st November, 2007, cannot be of any assistance to the respondents because, by the time they came to know of the existence of the judgment on 21st November, 2007, thirty (30) days had not expired. They still had about ten (10) days within which such a letter could have been written and sent to the applicant. If they were able to prepare and file notice of appeal as they did, what could have stopped them from writing a short letter similar to the one they wrote on 25th October, 2010 and send a copy of it to the applicants? None at all. In our view the sixty day-period for lodging memorandum and record of appeal started running from 21st November 2007 considering the extension granted by Ojwang' J. and that that was the date when notice was filed. If after sixty days from that date the memorandum and record were not filed, then only compliance with the proviso to ***rule 81 (2)*** as spelt out above could have helped the situation. That 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 have considered whether the recent amendments to Appellate Jurisdiction Act which introduced ***section 3A*** and ***3B*** and whether the provisions of ***Article 159*** of the New Constitution could breath a new life into this matter, but with respect, we are unable to find anything that would assist the respondents in this matter. This is because ***section 3A*** and ***3B*** as well as the provisions of the new Constitution were meant to avoid a delay caused by application of technicalities, but in this matter the omission would end up in more delay and thus defeat the principle of expeditious disposal of cases enshrined in ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act.

In our view, the notice of appeal cannot stand, it is struck out with costs to the applicants. It is ordered.

Dated and delivered at Mombasa this 4th day of March, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……..
JUDGE OF APPEAL

J. G. NYAMU

…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR