



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 206 OF 2010

BETWEEN

EVANSON NJIRI WANJIHIA.....APPLICANT

AND

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

(Application for striking out the Notice of Appeal dated 24th June, 2009 from the ruling of the High Court of Kenya at Nairobi (Ali-Aroni, J.) dated 16th June, 2009

in

H.C.C.NO.5366 OF 1993)

RULING OF THE COURT

This is an application under **rule 80** (now replaced by **rule 84** of this Court's Rules. It seeks to have the notice of appeal filed on 24th June 2009 struck out. It is supported by the applicant's affidavit in support sworn on 17th August 2010.

The principal grounds which were articulated by the applicants counsel, Mr Muthee and upon which the application is based include that although the respondent had applied for the certified copies of proceedings on 24th June 2009 it has not to date filed a record of appeal nearly two years after the event; that the delay is in the circumstances inordinate; that the continuance of the case where judgment in favour of the respondent/applicant was given on 31st May 2005 is causing unnecessary anxiety because the appellant is now fairly old and weak; that the continuance of the appeal denies the applicant of the fruits of his judgment and it exposes him to unnecessary legal and attendant costs; that the respondent's inactivity is a travesty of justice and gross abuse of the appellate process of the Court and finally that it is the appellant's delay is due to the fact that the respondent enjoys and continues to enjoy a stay order from this Court.

In response to the application the respondent through its counsel Mr Ngacha filed an affidavit on 6th June 2011 in which it depones, inter-alia, that the requirements contemplated by **rule 80** have not been met because, first, the respondent has a strong appeal, second, the respondent has not failed to take any essential step within the prescribed time, third, the letter bespeaking proceedings dated 24th June 2009 brings the respondent within the proviso to **rule 82(1)** of the Court of Appeal Rules entitling him to a

certificate of delay setting out extension conferred by the rule; that by a letter dated 25th August 2010 the respondent followed up the letter bespeaking the proceedings by requesting for certified copies of the proceedings and as a result the apparent delay in filing the record can only be due to administrative delay attributable to the Court and therefore a matter beyond the control of the respondent; that although the suit was filed in 1993 the final judgment was delivered by the High Court on 31st May 2005 and since then the parties have continuously engaged the High Court; that the respondent has complied with the terms of the order for stay both at the High Court and the Court of Appeal, and finally that in the circumstances, the respondent should not be driven out of the seat of justice on account of administrative inhibitions beyond its control.

After taking into account the rival submissions as outlined above, we are of the view that the applicant has failed to demonstrate that the respondent has not taken any of the essential steps as envisaged under 84 in instituting the appeal aforesaid or that it has failed to honour any set timelines to speed up the process of appeal. In the circumstances, although we sympathise with the applicant who has deponed that he was ageing and ailing, the delay since the filing of the notice is principally due to administrative delay occasioned by the High Court in releasing the necessary documents for the purpose of instituting an appeal. We think that the respondent is not to blame, and further that the respondent is not in any way in violation of its duty to the Court or in violation of the principal aims of the overriding objective. Taking into account the Court's 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. In the result, the order which commends itself is to dismiss the application and the same is accordingly dismissed. As regards costs we order that the costs of the application abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 29th day of July, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR