IN THE COURT OF APPEAL
AT NYERI

(CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A)

CIVIL APPLICATION NO. NAI. 182 OF 2011 (NYR. 17/2011)

BETWEEN

JULIUS KIRUMA KARIUKI ..... APPLICANT

AND

KAMAU MWANGI ..... 1ST RESPONDENT
NAHASHONI MWANGI MBOGO ..... 2ND RESPONDENT
PETER GITHINJI ..... 3RD RESPONDENT
ATTORNEY GENERAL ..... 4TH RESPONDENT

(An application to have Notice of Appeal dated 22nd June, 2009 be withdrawn and filed on the 22nd June, 2009 against the judgment of the High Court of Kenya at Nyeri (Makhandia, J) dated 18th June, 2009

In

H.C. C. C. No. 64 of 2003)
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RULING OF THE COURT

We have before us, a Notice of Motion dated 28th June, 2011 and filed on 29th June, 2011 in which the applicant Julius Kiruma Kariuki is seeking four orders namely:-

"***1. That the Notice of Appeal filed in the High Court at Nyeri on the 22nd June, 2009 by the 2nd and 3rd respondents be withdrawn.***

2. That upon withdrawal of the Notice of Appeal filed in the High Court at Nyeri on the 22nd June, 2009, the stay Orders obtained on the 24th September, 2010 by the 2nd and 3rd Respondents be set aside or discharged.

3. That in the alternative but without prejudice to prayer 2 above the 2nd and 3rd Respondents be directed to file their record of appeal within a period to be prescribed by the court failure to which the orders obtained on the 24th September, 2010 be automatically discharged.

4. That the costs of and incidental to this application be provided for."

The grounds upon which the application is brought are that since 22nd June, 2009, when the notice of

Appeal sought to be withdrawn was filed, no essential steps have been taken to file the intended appeal; that after filing the Notice of Appeal the second and third respondents applied for and obtained orders for stay of execution on 24th September, 2010 and since obtaining the same orders, they have made no efforts to institute the substantive appeal much to the prejudice of the applicant; and that the mandatory sixty (60) days allowed for filing the appeal from the date of pronouncement of judgment has expired and the respondents have not filed the intended appeal, nor have they sought extension of time to do so and it is clear that as the respondents have obtained stay orders, they no longer wish to proceed with the intended appeal. There is an affidavit in support of the application. The second and third respondents opposed the application and in a replying affidavit, sworn by the second respondent on his behalf and on behalf of the third respondent, the respondents contend that they have not moved to file the intended appeal because they have not been supplied with copies of proceedings and judgment they applied for through their various advocates, immediately after the judgment, despite several reminders sent to the court and personal visits to the court to press for the supply of the same. Copies of the same letters and reminders were annexed to the replying affidavit.

Mr. Kuloba, the learned counsel for the applicant addressed us at length on the application, urging us to allow it as the respondents were apparently not eager to file the intended appeal having obtained stay orders in their favour. In his view, apart from the letter dated 19th June 2009 addressed to the Deputy Registrar, High Court at Nyeri, by C.K Mwihia & Co., Advocates, who have since ceased to act for the respondents, there is no any other valid letter evidencing persistent pressure for the copies of proceedings and judgment from the court to demonstrate the respondents' active interests in the intended appeal as all other alleged reminders have no court stamp to indicate they were indeed valid reminders. Mr. Kangata, the learned counsel for the second and third respondents, in his submissions highlighted the contents of the replying affidavit and invited the Court to observe that the endorsements on letters and reminders written by the respondents' advocates show that they were received by the court. He also maintained that physical visits had also been made to the court registry to check on whether the copies of the proceedings and judgment were ready for collection but to no avail. In his submission, the respondents were interested and were pressing for the supply of the subject copies but the court had not supplied them. They would take immediate action to mount the appeal immediately the same copies were supplied to them. The party cited in the application as the first respondent is non-existent as the suit was withdrawn against him. Ms. Munyi, the learned counsel for the fourth respondent had no submissions to make as indeed the Notice of Appeal sought to be withdrawn was not filed by the fourth respondent

We have anxiously considered the application, the affidavit in support of it, the replying affidavit and the annextures to it, together with the submissions by the learned counsel and the law. In our considered view, none of the prayers sought by the applicants can be granted. This is because, clearly, the application is premature. The judgment, the second and third respondents seek to appeal against was delivered on 18th June , 2009. On 19th June 2009, the then advocates for the second and third respondents wrote a letter to the Deputy Registrar, High Court, seeking certified copies of proceedings and ruling. Even though certified copies of proceedings were not necessary, nonetheless, they sought copies of the proceedings only one day after the delivery of the subject judgment. They also proceeded and lodged Notice of Appeal timeously. Later, M/s Muriuki Kangata & Co. Advocates, came on record for the respondents and they also sought copies of proceedings vide their letter dated 25th May, 2010. There is handwritten assessment of fees noted on that letter, a clear indication that the letter was delivered to the court registry. Again in a letter dated 15th February, 2011, the same advocates reminded the registry of the need to have the same copies supplied to them urgently and claiming that personal visits had also been made to the registry in pursuit of the copies of proceedings and judgment. The court registry has not supplied the copies requested. The applicant does not say copies are ready but the respondent has failed and or refused to collect them. In those circumstances, it would be unfair to expect the respondents to mount an appeal as that would not to be possible. It would also not be proper to order the respondents to file record of appeal within a period to be prescribed as that would be an order in vain since the respondents would not be expected to comply with such an order without their being supplied with the copies of the proceedings and judgment. As the Notice of Appeal in issue cannot be withdrawn, there can be no basis for setting aside the stay orders obtained earlier on.

In the result, the application lacks merit and cannot be granted. It is dismissed with costs to the second and third respondents.

Dated and delivered at Nyeri this 2nd day of December, 2011.

E.O. O'KUBASU
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JUDGE OF APPEL

E.M. GITHINJI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.