



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI**

Civil Appli 288 of 2006

VIOLET MUMBUA NDAMBUKI APPLICANT

AND

THE ATTORNEY GENERAL RESPONDENT

(An application for striking out notice of appeal in an intended appeal from a judgment of the High Court of Kenya

airobi (Ang'awa, J.) dated 17th December, 2004

in

H.C.C.C. NO. 601 OF 2002)

RULING OF THE COURT

The matter before us is a notice of motion filed under *rule 80* of the rules of this Court seeking an order that we strike out a Notice of Appeal dated 18th January, 2005 and filed on 20th January, 2004.

The record availed to us is fairly thin on facts but we can ascertain the following facts from the affidavits: -

In April, 2002 the respondent herein sued the Attorney General on behalf of the relevant Ministry of Government to recover special and general damages arising from a road traffic accident. Upon service of the summons to enter appearance the Attorney General did file an appearance. When no defence was forthcoming, leave was obtained for entry of interlocutory judgment and it was granted. It would then appear that the Attorney General filed some defence before the formal proof but that purported defence was struck out by Ang'awa J. on 20th July, 2003. The Attorney General then appears to have made an intimation to appeal against that order by filing a Notice of Appeal and also an application for stay of further proceedings. The application for stay was dismissed and the matter was subsequently heard before Ang'awa J. on 16th December, 2004. On 17th December, 2004, judgment was delivered awarding the applicant (the plaintiff) general damages in the sum of Shs.7,950,000 and special damages in the sum of Shs.75,312. The decree issued forth for that sum with interest thereon on 20th April, 2005 and the respondent has been attempting to execute the decree without success due to the pendency of certain matters. One was a notice of motion filed before this Court as **Civil Appl. NAI. 296/06** filed on 24th

November, 2006 seeking extension of time to file and serve a record of appeal to challenge the order by Ang'awa J. made on 20th July, 2003 striking out the defence filed by the Attorney General. We are informed by both counsel that the application came up for hearing before a single Judge of this Court on 7th May, 2007 but it was dismissed for want of attendance by the Attorney General or his representative. The other matter is the application now before us.

When the judgment was delivered on 17th December, 2004, the Attorney General filed a Notice of Appeal to challenge it on 20th January, 2005. There is no issue relating to the time of filing or service of that notice as the respondent's advocates filed their notice of address for service on 4th February, 2005. Ordinarily the record of appeal ought to have been filed within 60 days of the lodging of the Notice of Appeal vide **rule 81 (1)** of our rules. But no appeal was filed within that period. It would appear however, from the annexures to the affidavit in support of the application, that copies of proceedings and judgment were not ready until both parties were notified by the court on 27th April, 2006 that they could collect and pay for them. Another annexure confirms that the Attorney General collected certified copies of the proceedings and judgment on 13th July, 2006. By the time this application was filed on 16th November, 2006 however, no appeal had been filed, hence the application to strike out the notice of appeal.

What does the Attorney General have to say by way of explanation?

In a vaguely worded affidavit in reply, Mr. Mwangi Njoroge a Litigation State Counsel swore: -

“2. *THAT the defendant's defence was struck out by the Hon. Mary Ang'awa (sic) and the applicant moved to the Court of Appeal upon becoming aware of this fact, thereby filing an application for extension of time to wit Civil A[application No. 296 of 2006 which the plaintiff has been served with and which has now been set down for hearing on 7/5/2007. (Annexed hereto is a copy of the Notice of Motion marked “MNI”).*

3. *THAT the respondent herein is desirous of appealing against the said judgment but counsel has been involved in the preparation of the application Civil Nai. 296 of 2006 among other duties.*

4. *THAT I am aware that most of the time that has elapsed since the institution of the said notice of appeal is comprised (sic) of the time within which the respondent was just awaiting the certified copies of the documents required. When they were availed the respondent began by filing the application that was most urgent at the time, that is Civil Application No. Nai. 296 of 2006.*

5. *THAT the application for striking out herein was made almost at the same time that the respondent was filing the Application No. Nai. 296 of 2006.”*

The eight-paragraph affidavit is devoted to **Civil Application NAI. 296/06** which, as correctly observed by learned counsel for the applicant Mr. L.N. Kimondo, relates to a different matter and not the notice of appeal against the judgment delivered on 17th December, 2004. The little that has been disclosed of that application is the motion itself and a supporting affidavit which has no annexures. At all events, that application was dismissed on 7th May, 2007 as observed earlier and is therefore of no relevance here. The fact of the matter is that there is no explanation offered for the delay in filing the memorandum of appeal and the record of appeal pursuant to the notice of appeal filed on 20th January, 2005. From all indications, the Attorney General went to sleep in the matter and must therefore face the consequences of his indolence. There is no indication that the Attorney General applied for copies of proceedings and judgment timeously and whether there was compliance with **rule 81** of the Court's rules. In the absence of such proof, the period of delay which is unexplained and which continues to accumulate since no application has been made to arrest it, is from April, 2005 upto date. Even when there is uncontroverted evidence that the copies were collected by the Attorney General in July, 2006, there is an unsupported assertion that they were collected in October, 2006, and in our view such assertion would carry no weight. Even if that was so, no action had been taken in respect of the matter by the time the application now before us was filed in November, 2006.

Learned State Counsel Mr. E.O. Bitta made a spirited defence of the Attorney General's apparent lethargy by stating that their office was busy with the other application relating to the same matter which was more urgent. It is not easy to understand that argument when there were admittedly two separate notices of appeal each of which required urgent attention. That there was ultimately no attendance before the learned single Judge of this Court to prosecute the so-called urgent application on 7th May, 2007 is even less understandable. Be that as it may, we are satisfied that the application made before us is well merited. We grant it as prayed and order that the notice of appeal dated 18th January, 2005 and lodged in court on 20th January, 2005 be and is hereby struck out. Costs of the application shall be borne by the respondent in the application.

Dated and delivered at Nairobi this 8th day of June, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR