



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 203 OF 2010

IRENE CATHERINE ATIENO CLAIMANT

VERSUS

PETRO OIL KENYA LIMITED RESPONDENT

RULING

V.N. Okata & Co. Advocates for the Claimant

Sheth & Wathigo Advocates for the Respondent

1. This application dated 9th September 2013 filed by Notice of Motion under the provisions of Rule 82 and 83 of the Appellate Jurisdiction Act by the claimant seeking dismissal of the notice of Appeal for want of prosecution and funds deposited in the joint account of the advocates herein be released to the claimant. The application is supported by the annexed affidavit of the claimant. The claimant also filed a Further Affidavit dated 11th November 2013. The application is opposed by the respondent who filed the Replying Affidavit dated 10th October 2013. Both parties filed their written submissions.
2. The application is based on the grounds that the respondent filed their Notice of Appeal on 21st January 2011 and served the claimant on the 25th January 2011 and the claimant filed the notice of address on 6th April 2011 and since the respondent has failed to institute their Appeal after 60 days from the date of filing. This is a clear indication that the respondent has no interest in lodging an appeal and the notice should be dismissed for want of prosecution. Other grounds are that the sum of Kshs.1, 187,657.00 deposited in the joint interest earning account of both advocates in bank of Africa (K) Ltd Mombasa Branch and the interest that has accrued to Kshs.1, 302,248.00 as at 6th August 2013. That it is in the interests of justice that these orders be given so that justice can be served and litigation come to an end.
3. In reply the respondent state that their filed the application for stay which was heard ex parte and when the same came for hearing, the ruling was to be delivered on notice which has never been served upon the respondent. That the Rules under which the application is based upon are Court of Appeal Rules and the application as filed is incompetent and this court lack jurisdiction to hear it. The respondent requested for typed proceeding herein but the same have never been supplied to them despite frantic efforts to follow up on this application for proceedings. That time stopped running once the Notice of Appeal was filed and the respondent applied for typed proceedings.
4. In submissions the claimant stated that the respondent filed their Notice of Appeal on 21st January 2011 and has never filed the Appeal. Under Rule 82 and 83 of the Appellate Jurisdiction Act an application can be lodged at the appropriate registrar within 60 days from the date the notice of Appeal is filed seeking dismissal of the notice of appeal is a party who has lodged an notice of appeal fails to

institute an appeal within the appointed time and shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or an application by a party make such order.

5. That in this case the respondent has not filed an Appeal despite 60 days lapse on the grounds that they have not received Notice of Delivery of the ruling which ruling was delivered on 9th February 2012 which cannot be the case as the respondent filed for stay pending appeal on 22nd July 2011. There is no explanation as to why the appeal has not been filed after three years. The respondent is thus enjoying the stay pending an appeal but this appeal has never been filed 3 years later. That the notice of appeal should be deemed as withdrawn and the sums payable to the claimant in Account No. 02035 710018 held by Bank of Africa Limited Mombasa Branch be released to the claimant.

6. In response the respondent submitted that the application by the claimant is brought under sections 82 and 83 of the Appellate Jurisdiction Act but the Court has no jurisdiction by virtue of the court decision in the case of *Owners of the Motor Vehicle Vessel 'Lilian S' vs Caltex Oil [Kenya] Ltd [1989] KLR 1* where the Court of Appeal held that jurisdiction is everything. The Appellate Jurisdiction Act together with the Court of Appeal Rules governs proceedings in the Court of Appeal and this application ought to have been filed before the Court of Appeal. In *Kenya Union of Commercial Food and Allied Workers vs Keroche Industries Ltd and 2 others, Cause No.772 of 2010* and the court held that it did not have jurisdiction to entertain a matter before the Court of Appeal.

7. The respondent further submits that under Rule 82 of the Court of Appeal Rules, where a party has applied for a copy of the proceedings within 30 days, time required to prepare and deliver proceedings as certified by the registry of the superior court, time will not be computed as to when an appeal should be lodged. The respondent applied for proceedings on 21st January 2011 but there is no communication from the court registry and the respondent having complied should benefit from Rule 82. In this case the respondent filed an application for stay pending appeal whose ruling was to be on notice and to date the respondent has not received this notice of delivery. The respondent has a good appeal and should be allowed to prosecute it. There is security deposit in a joint interest earning account and thus the claimant will not suffer any loss or damage and the application should be dismissed.

8. On the operative provisions under which the application is based, I agree with the respondent that the Appellate Jurisdiction Act and the Rules thereto apply with regard to proceedings before the Court of Appeal. The Industrial Court has its own Industrial Court Procedure Rules which Rules apply for all proceedings lodged before this Court. Where these Rules of the Industrial Court lack in a particular situation, which is not the case here with regard to the nature the claimant is seeking to apply the Appellate Jurisdiction Act, then a party can rely on any other written law especially the Rules of procedure application to proceedings as before a High Court, the Industrial Court being a Superior Court of record. For the claimant thus to rely on Rule 82 and 83 of the Appellant Jurisdiction Act is a premature process.

9. That said the Industrial Court under its inherent powers granted as under section 3 and 12 of the Industrial Court Act and under the provisions of section 20, in any proceedings to which this Act applies, the Court shall act without undue regard to technicalities for the due performance of the work of this Court. I take due regard that both parties herein are represented and ought to apply the appropriate Rules of this Court and with that recognition and for due execution of the orders of this Court, no party should be allowed to circumvent the course of justice under the guise of technicalities in the application of the law.

10. The respondent applied for stay of execution pending appeal and on 9th February 2012 the court granted a conditional stay allowing the respondent to proceed on appeal subject to a deposit of the decretal amount in a joint interest earning account held by both parties. This application was filed by the respondent and thus they had an interest in the ruling and cannot therefore be found to say that they are since waiting for the Notice of delivery of the ruling. Even if this were the case, there is a security deposit for which the respondent must have an interest for its release and or return to them in the event there is success in their appeal. But there is no appeal! No draft appeal or any form of memoranda to indicate the nature of appeal the respondent intends to file once typed proceedings are made available.

11. The respondent filed their Replying Affidavit on 10th October 2013 meaning they were able to access the court file and file this record. Nothing substantive seems to have been done with regard to their intended appeal despite this access to the court file. There is simply inaction on the part of the respondent with regard to application of time and utilisation of the stay granted to the respondent on 9th February 2012. Where this is allowed to progress unchecked, there will be great injustice to a party who has a judgement of this court.

In this case it is only fair and just to direct as follows;

- a. **The stay granted to the respondent on 9th February 2013 will remain in force for the next 15 days;**
- b. **The matter will be placed for mention on the 20th where the court shall give further directions herein;**
- c. **Each party will bear their own costs.**

Dated and delivered at Nairobi this 3rd Day of March 2014

M. Mbaru

JUDGE

In the presence of