IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & J. MOHAMMED-JJA)

CIVIL APPEAL (APPLICATION) NO. 382 OF 2017

BETWEEN

COSMOS LIMITED.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

(Appeal From The Judgment And/Or Order Of The High Court Of Kenya At Nairobi (G.V. Odunga, J) Dated 10th June, 2016 In Constitutional & JR Misc. Civil Appl. No.478 Of 2018)

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AS CONSOLIDATED WITH CIVIL APPEAL (APPLICATION) NO. 383 OF 2017

BETWEEN

COOPER (K) BRANDS LIMITED.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING OF THE COURT

On 10th June, 2016, **G.V. Odunga** J, delivered a Judgment in Constitutional and Judicial Review Division in Misc. Application No. 458 of 2013 that gave rise to three appeals namely; Civil Appeal No. 382 of 2017 **Kenya Revenue Authority versus Cosmos Limited; No. 383 of 2017 Kenya Revenue Authority versus Cooper (K) Brands Limited;** and **lastly, Kenya Revenue Authority versus Universal Corporation Limited.**

On 4th March, 2019 an order endorsed in Civil Appeal Number 382 of 2017 directed that since the three appeals are interrelated they should be listed for hearing on the same date and by the same bench. Following the above directions of the court, the three

appeals were accordingly listed for hearing before the same bench on 9th July, 2019.

When called out for hearing, learned counsel for the respective parties brought to our attention the pendence of interlocutory applications in appeal Numbers 382 of 2017 and 383 of 2017. The parties agreed by consent that the hearing of the interlocutory applications do precede the hearing of the appeals and were accordingly consolidated and heard together.

The application in Civil Appeal No. 382 of 2017 is dated and filed on 21st December, 2017. It seeks an order that the record of appeal lodged herein on 15th November, 2017 by the respondent be struck out and that the costs of the application and the appeal be awarded to the applicant. The application is supported by grounds on its body and a supporting affidavit together with annextures thereto.

The notice of motion in Civil Appeal No. 383 of 2017 was also simultaneously dated and filed on the same date of 21st December, 2017. It is also supported by grounds in its body and a supporting affidavit.

Due to the similarity in the reliefs sought, content of both the grounds and the supportive affidavits in both applications, we find it prudent to consider them as one.

In summary, it is the applicant's contention that the impugned Judgments in both appeals were delivered on 10th June, 2016. The respondent timeously filed notices of appeal in respect of each appeal on 22nd June, 2016, but failed to copy a letter bespeaking proceedings to the applicants as the opposite parties; that by reason of the respondent's failure to serve the applicants with a copy of the letter bespeaking proceedings, the respondent ought to have filed the two appeals within sixty days of the filing of the notice of appeal, pursuant to **rule 82 (1)** of the Court of Appeal Rules (CAR). The appeals were however lodged on 15th November, 2017 a period of over seventeen (17) months from the date of the filing of the notice of appeal and therefore outside the prescribed time line and without leave. The respondent cannot therefore avail itself of the proviso to **rule 82(1)** of the CAR as they did not copy the letter bespeaking proceedings to the applicants. The two appeals cannot lie without an order of the Court validating them which the respondent has not sought from the Court. On that account the applicants prayed for the notices of appeals to be struck out.

We have not traced any replying affidavit in opposition to the application in CA No. 382 of 2017. There is however, a replying affidavit deposed by **Pius Nyaga** on 22nd February, 2019 filed in opposition to the application in Civil Appeal No. 383 of 2017 together with annextures thereto. In summary, it is the respondent's deposition that the applicants commenced Judicial Review proceedings on 3rd January, 2014 culminating in the impugned Judgment entered on 10th June, 2016 against the respondent. The respondent being aggrieved with the impugned Judgment, applied for a typed copy of the proceedings on 17th June, 2016 and filed notices of appeal on 22nd June, 2016 in respect of each appeal; that an error was however discovered on the face of the record that caused the file to be placed before the learned Judge for correction of the error on 20th September, 2016; that owing to the movement of the court file from one place to another, the respondent did not obtain the typed proceedings within the sixty days stipulated for in the Rule. The respondent sent a reminder to the Deputy Registrar vide their letter dated 13th October, 2016 but served on the Deputy Registrar on 23rd November, 2016. It was not until the 4th of September, 2017 that the respondent received a letter from the Deputy Registrar dated 28th August, 2017 informing the respondent that typed proceedings were now ready for collection. These were paid for on 5th September, 2017 and collected on 6th September, 2017 while the certificate of delay was obtained on 13th September, 2017. The respondent prepared the record and lodged the same on 15th November, 2017.

It was further deposed that the letter of 17th June, 2016 bespeaking proceedings though copied to the applicants, was inadvertently not served on them and which the respondent would seek leave at an appropriate time to file a supplementary record of appeal including it. They concede the record of appeal was filed on 15th November, 2017 under the mistaken belief that the same had been filed in time; based on the computation of time as indicated in the certificate of delay; that the failure to serve the letter bespeaking proceedings on the applicants and the record of appeal in time, is a mistake of counsel which should not be visited on an innocent litigant especially when it is not disputed that, the respondent is a Government Agency charged with the duty of collecting government revenue.

It was also deposed that in view of the provision in **Article 201 (b) (1)** of the Constitution, it is in the greater public interest that the appeals be heard on their merit; that the orders sought by the applicant are drastic in nature which should only be granted in the gravest of cases on non-compliance.

The consolidated applications were canvased by way of written submissions filed by the applicant and orally highlighted by learned counsel for the applicant and oral submissions by learned counsel for the respondent. Learned counsel **Mr. Kiragu Kimani** appeared for both applicants, while learned counsel, **Mr. Pius Nyaga** leading **Miss Mburugu** and **Mr**. **Ochieng** appeared for the respondent.

Supporting both applications, **Mr. Kiragu** submitted that the applicant filed JR Misc. Application Number 478 of 2013 challenging the respondent's assessment of tax against them to the total tune of Kshs. 288,835,215.00 and Kshs. 161,833,529.00 respectively. Judgment was granted on 10th June, 2016. The respondent timeously filed the notices of appeal on 22nd June, 2016. They also timeously applied for a typed copy of the proceedings for appellate purposes on 17th June, 2016 but failed to serve a copy of the letter bespeaking proceedings on the applicants, a position admitted by the respondent at paragraph 17 of their replying affidavit. That by reason of the respondent's failure to serve the letter bespeaking proceedings on to the applicants, they ought to have filed their record of appeal within sixty (60) days of the date of the filing of the notices of appeal. It was not until the 15th of November, 2017 that both appeals were filed, a period of over seventeen (17) months since the delivery of the Judgment and without leave; that the respondent cannot therefore avail itself of the proviso to rule 82(1) for their failure to serve a copy of the letter bespeaking proceedings onto the opposite parties; that the respondent's failure to file the appeal within the sixty (60) days from the date of filing of the notices of appeal effectively means that the notices of appeal subject of the consolidated applications were deemed to have been withdrawn; and that to countenance an appeal filed more than seventeen (17) months without any explanation as to why leave was not sought to regularize them is to countenance an abuse of the court process.

To buttress the above submissions, **Mr. Kiragu** relied on the case of **Quick Lubes E.A. Limited versus Kenya Railways Corporation [2014] eKLR,** for the holding *inter alia,* firstly, that **Rule 83** gives the Court unfettered discretion to deem a notice of appeal as withdrawn if a party files a notice of appeal and then goes to slumber, by failing to initiate the other necessary processes to ensure that the appeal is filed and served. Secondly, that the rules were meant to stem abuse of the court process and also promote efficacy in terms of case management. That is why, the Court of Appeal Rules allow the Court to invoke **rule 83** *suo motu* if the respondent in the intended appeal does not move the Court in light of the above guiding principles.

Also relied upon is the case of **MC Foy versus United Africa Co. Ltd [1961] 3 ALL ER 1169, 1172(1)** and **Omega Enterprises (Kenya) Limited versus Kenya Tourist Development Corporation & 2 others [1998] eKLR** for the principle *inter alia*, that if an act is void, then it is in law a nullity.

Mr. Kiragu continued to submit further that **Rule 75(1)** of the CAR requires a party to give notice of appeal if they wish to appeal; that since **Rule 87(1**) stipulates that a notice of appeal must be included in a record of appeal, it should be taken to mean a valid notice of appeal and not a notice of appeal that ought to be deemed to have been withdrawn; that **Rule 82(1)** of the CAR required the respondent to institute the appeals by lodging the record of appeal within sixty days of the lodging of the notice of appeal; that since it is not disputed that the appellant lodged a notice of appeal on 22nd June, 2016, it ought to have lodged its appeals by 21st August, 2016.

Mr. Kiragu reiterated the earlier submissions that although the respondent exhibited a certificate of delay in the record of appeal, the same cannot be relied upon for their failure to comply with the prerequisite in the proviso to **rule 82(1)** of the CAR which required them to serve a copy of the letter bespeaking typed proceedings on the applicants.

Relying on the case of **Richard Kanyago & 2 others versus David Mukii Mereka [2001] eKLR**, counsel urged us to ignore the certificate of delay as inconsequential for the respondent's failure to comply with the above mentioned proviso, notwithstanding, that even if the same were to be relied upon, then the respondent's appeals should have been filed on 4th

November, 2017 and not 15th November, 2017.

Turning to the explanation given by the respondent for their default, **Mr. Kiragu** submitted that the respondent has not given any reason for its failure to comply with the time line set in the CAR, but merely proceeded on the basis that it has a right of appeal.

Relying on the case of **Edward Njane Nganga & another versus Damaris Wajiku Kamau & another, [2016], eKLR**, counsel submitted that sanctioning the respondent's default would occasion a grave injustice onto the applicants especially, when it is not disputed that the respondents right of appeal has to be balanced against the applicant's right to enjoy the fruits of their judgment. Lastly, that a plausible and satisfactory explanation for the delay is the key that unlocks the court's flow of discretionary favour, which threshold according to counsel, the respondent had failed to meet. There is therefore nothing on the record to warrant the court to withhold the relief sought by the applicants from the court.

On the totality of the above submissions**, Mr. Kiragu** urged us to allow both applications and strike out the notices of appeal filed in Appeal No. 382 of 2017 and 383 of 2017 respectively, the substratum of the consolidation applications.

In opposition to the joint applications, **Mr. Nyagah** relied on the replying affidavit and submitted that **Article 159 (2) (d**) of the Kenya Constitution 2010 donates a discretionary jurisdiction to the Court to admit the appeal out of time; that they concede that the application for typed proceedings was not served on the opposite parties. That in humility, they urge the Court to allow the appeals to be heard in the public interest; that the failure to comply with the prerequisite of service of the letter bespeaking typed proceedings on the opposite parties was a mistake of counsel which should not be visited on an innocent litigant and that striking out the notices of appeal will result in overburdening the State with the bill of costs.

Relying on the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others [2014**] **eKLR**, counsel submitted that rules of procedure are handmaidens of justice. It will not therefore be in the interest of justice to both parties if the notices of appeal were to be struck out.

On that account, **Mr. Nyagah** urged us to allow the two appeals to proceed to their merit hearing by declining to grant the reliefs sought in the consolidated application.

In reply to **Mr. Nyagah's** submissions, **Mr. Kiragu** submitted that time lines should not be brushed aside as doing so, will be an affront to the rule of law. Second, that costs will not be sufficient compensation for the inconvenience caused to the applicants in moving to defend incompetent appeals and also by seeking to have the incompetent notices of appeal deemed withdrawn.

Thirdly, that there is no basis upon which the Court can invoke the power in the **Nicholas Salat** case (supra) in favour of the respondent.

We have considered the record in light of the rival submissions advanced above by the respective parties to the joint applications in support of their opposing position herein. It is not in dispute that the impugned judgment was delivered on 10th June, 2016. The respondent was aggrieved and desired to appeal against the said judgement. The CAR lays out clear procedural steps that the respondent was required to take to realize its appellate rights. Among them is **rule 75 (1)** and **2** of the CAR which obligated the respondent to file a notice of appeal within fourteen days of the delivery of the judgment and cause it to be served on to the opposite parties within seven days. It is common ground that this procedure was timeously complied with.

Having complied with **Rule 75(1)** & **(2)** of the CAR, the respondent was obligated to file its appeals within sixty (60) days of the lodging of the notices of appeal subject to being capacitated with a typed copy of the proceedings within that period of time. In default of the above and which was the case herein, the respondent's appellate process could only lie under the proviso to **rule 82(1**)

of the CAR, in which case, if the typed copy of the proceedings was accessed outside the sixty (60) days period stipulated for in **rule 82(1)** of the CAR and which was the scenario herein.

The proviso to **rule 82(1)** is however only available to a party who applied for a copy of typed proceedings within thirty (30) days of the delivery of the judgment and caused a copy of the letter bespeaking proceedings to be served on the opposite party. Whereas, the respondent timeously applied for a typed copy of the proceedings on 17th June, 2016, they failed to copy that letter to the opposite party citing inadvertence on their part. The failure to comply with the prerequisite in the proviso to **rule 82(1)** is what disentitled the respondent the right to benefit from the computation of the period of time in the certificate of delay as the period of time within which to file the record of appeal outside the sixty (60) days stipulated for in rule 82(1). The above default is what exposed them to the consolidated applications.

The jurisdiction invoked is a discretionary one. The guiding principles in the exercise of this jurisdiction is that, it has to be exercised judiciously, that is with sound reason and not whim, caprice or sympathy. See **Githiaka versus Ndiriri [2004] 2 KLR 67**. The respondent concedes the default but has urged us to salvage its appellate process in both appeals on the grounds advanced above. In **Richard Ncharpi Leiyagu versus IEBC & 2 others [2013] eKLR,** it was stated that the right to be heard is not only constitutionally entrenched but it is also the cornerstone of the rule of law. In **Mbaki & others versus Macharia & another [2005] 2EA 206**, it was stated that the right to be heard is a valid right and a party seeking to exercise it should be accorded an opportunity to exercise it, unless if there is a good reason for withholding that right. In **National Enterprises Corporation versus Mukisa Food Limited,** Civil Appeal No. 42 of 1997, the Court of Appeal of Uganda stated that, unless and until the Court has pronounced a judgment upon the merits of a case or by consent of the parties, it has to revoke the expression of its coercive power where that has been obtained by failure to follow any of the rules of procedure. Lastly, the Tanzanian case of **Abbass Sharally and another versus Abdul Fazaiboy Civil Application No. 3 of 2003**, wherein, it was stated that the right of a party to be heard before adverse action or decision is taken against such a party is a basic right whose violation is tantamount to a breach of natural justice.

We have considered the above guiding principles in light of the rival submissions set out above and proceed to make the following final conclusion thereon.

1. The Supreme Court decision in **Nicholas Kiptoo Arap Korir versus Independent Electoral & Boundaries Commission & 7 others** (supra), set out several guiding principles on the exercise of discretion in favour of a party seeking to validate an appellate process. One of these is that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court.

Herein, all that we have on record is a replying affidavit and not an application for extension of time. No explanation was advanced by the respondent as to why they did not crossapply for extension of time to deem the appeal properly filed, a process they had undertaken to salvage the appellate process in a sister appeal No. 150 of 2017.

2. It was correctly submitted that the respondent is a Government Authority charged with the duty of collecting revenue by ensuring that tax payers meet their obligations under the law. Indeed, it was in the exercise of that mandate that the applicants successfully moved to the High Court to challenge its action resulting in the impugned Judgments. No provision of law was cited before us to suggest that the respondent enjoys any special privileges with regard to compliance with the rules of procedure when seeking to enforce its rights. It stands on equal footing like any other litigant before Court.

3. It was correctly submitted by the respondent that failure to serve the letter bespeaking proceedings onto the opposite party lay with the advocate. As to whether that default is excusable or not, depends on the circumstances of each case.

In **Owino Ger versus Marmanet Forest Co-Operative Credit Society Ltd, [1987] eKLR**, it was stated *inter alia*, that mistakes of advocates and clerks where demonstrated to exist may be sufficient basis for the exercise of discretion in favour of a deserving party. In C**FC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR,** the Court declined to visit mistakes of counsel on a litigant who had demonstrated clearly that he had given instructions to his advocate to take a procedural step in a matter in court. In **Lee G. Muthoga versus Habib Zuka Funeral (K) Ltd & another Civil Application No. Nai 236 of 2009**, the Court restated the principle that a litigant should not suffer because of his advocate's oversight. Lastly, in **Catherine Njuguini Kanya & 2 others versus Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009,** it was observed that litigants place a lot of trust in the good workmanship of their advocates and where they fail them the role of the court is to balance the interests of the parties before it without visiting the sins of an advocate on an innocent litigant.

All that the respondent has put forth for consideration with regard to their plea on this issue is a deposition in the replying affidavit and submissions in Court. No rule of law or procedure is cited to us to employ the above modes as basis for granting relief. The best approach should have been by way of a formal application as was the case in the sister appeal No. 150 of 2017 not subject of the consolidated applications.

Lastly, on the application of **Article 159 (2) (d)** of the constitution, the principle that guides the invocation of what has come to be popularly known as the non-technicality principle in court procedures have been crystalized by case law. The principles that guide its invocation have also been set out in numerous case law. We will highlight a few for purposes of the record. In the case of **Jaldesa Tuke Dabelo versus IEBC & Another** [2015] eKLR, the Court held *inter alia* that:

"Rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was not aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action".

In **Raila Odinga and 5 others versus IEBC & 3 Others** [2013] eKLR, the Supreme Court of Kenya stated that:

"The essence of Article 159 of the Constitution is that, a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case".

In **Lemaken Arata versus Harum Meita Lempaka & 2 others eKLR**, it was stated that:

"the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice".

Lastly in **Patricia Cherotich Sawe versus IEBC & 4 others [2015] eKLR,** it was stated that:

"Article 159 (2) (d) of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it."

Our appreciation of the above principle is that; they restate an age old principle that rules of procedures are not meant for cosmetic value. They are meant to be obeyed. Where noncompliance is pleaded whether on an account of flagrant disregard or inadvertence, the party seeking to be excused of such default, first of all has to expressly state so by way of an application for relief. Secondly, give basis as to why the Court's discretion should be exercised to excuse either the flagrant or inadvertent failure to comply with the rules, a burden the respondent has failed to discharge.

On the totality of the above assessment and reasoning, we find nothing on the record to persuade us to decline the exercise of our discretion to grant the relief sought. In the result, we find merit in the consolidated applications. They are accordingly allowed as prayed with costs to the applicant.

Dated and Delivered at Nairobi 20th this day of December, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.