IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK JJ.A)

CIVIL APPLICATION NO. 62 OF 2019

BETWEEN

ESTHER ANYANGO OCHIENG.....APPLICANT

AND

TRANSMARA SUGAR COMPANY.....RESPONDENT

(Application to strike Notice of Appeal dated 16th May, 2018 from the judgment of the Employment and Labour Relations Court of Kenya at Kisumu ***(M. Onyango, J)*** *dated* ***3rd May, 2018***

in

ELR NO. 198 OF 2018

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RULING OF KIAGE, JA.

The decision on the Notice of Motion dated 12th June, 2019 whereby the applicant **Esther Anyango Ochieng** seeks to strike out the notice of appeal dated 16th May, 2018 or have it deemed as withdrawn is testament to the importance of courage and tenacity on the part of advocates.

The application seemed at first blush to be quite irresistible: the respondent **Transmara Sugar Company** had incontestably *"failed to file the intended appeal/record of appeal within the prescribed period"* as stated in the grounds appearing on the face of the motion and repeated in the applicant's supporting affidavit; the notice of appeal was itself filed on 11th June, 2018 which was nearly 20 days beyond the 7-day period prescribed under **Rule 77(1)** of the **Court of Appeal Rules**; and the applicant, cognizant that she had not complied with the proviso to **Rule 84** which requires that a striking out application must be brought within 30 days from the date of service of the notice of appeal, had wisely invoked **Rule 83** under which this Court may, of its own motion or on application, order that the notice of appeal be deemed to have been withdrawn.

Those circumstances, quite irrespective of whatever reasons the respondent may have had for the delay, tilted this matter heavily on the side of grant of the motion and we had no qualms making known our initial thinking. **Mr. Karanja**, the respondent's learned counsel deftly defied the invitation to concede what appeared to be a forgone conclusion and respectfully, with quiet confidence, assured us that he could persuade us to save the notice of appeal from what appeared to be an inescapable fate. And so we heard both counsel substantively on the motion.

Mr. Ochuka, learned counsel for the applicant was confident that for the defaults and omissions I have set out earlier in this ruling, the notice of appeal was deserving of only one fate: it be struck out or, in the alternative, it be deemed to be withdrawn since as at the time the motion was filed, some 391 days after the notice of appeal was filed, the record of appeal had not been filed, which was way too much time beyond the 60 days prescribed by **Rule 82(1)** of the **Rules of Court**. He referred to a number of decisions of this Court on striking out of notices of appeal under **Rule 84** for failure of the intended appellant to file the record of appeal within time, including ***JUSTUS ALOO OGEKA & 6 OTHERS -vs- KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS & 2 OTHERS [2018] eKLR; ELIZABETH WANJIKU MUCHAI -vs- STANDARD LIMITED [2017] eKLR*** and ***HENRY NYAKOE OBUBA -vs- NATIONAL POLICE SERVICE COMMISSION & 2 OTHERS [2018] eKLR.***

Counsel also cited ***MAE PROPERTIES LIMITED -vs- JOSEPH KIBE & ANOTHER [2017] eKLR,*** where this Court (Waki, Kiage & M'Inoti, JJA) while dealing with an application to strike out a notice of appeal which, as here, was filed outside the 30-day limit in the **Rule 84** proviso, nevertheless resort to **Rule 83,** the deeming provision, and reasoned as follows;

"It is not in dispute that the notice of appeal was lodged at the High Court registry on 26th May, 2015. It is also not in dispute that by dint of Rule 82(1) of the Court of Appeal Rules 2010, the appeal should have been instituted within sixty days thereafter, but was not. It in fact had not been instituted as at the date of the filing of the motion some 15 months later. As at the hearing of the motion, more than two years had elapsed.

We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience.

Failure to comply with the timelines set invites sure consequences. In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;

'83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.'

We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.

Essentially this is a practical rule that is intended to rid our registry of merely speculative notices of appeal filed either in knee-jerk reaction to the decision of the court below, or filed in holding mode while the party considers whether or not to lodge a substantive appeal. Indeed, it is not uncommon and we take judicial notice of it, for such notices to be lodged *ex abundanti cautella* ***by counsel upon the pronouncement of decisions but to await instructions on whether or not to proceed full throttle with the appeal proper - with the attendant risks, prospects and consequences."***

The respondents answer to those submissions were essentially that the notice of motion was incompetent having been filed more than a year after service of the impugned notice of appeal which is way beyond the 30 days stipulated, and without leave, and should therefore be struck out for being incompetent. For this proposition, Mr. Karanja cited ***WILLIAM MWANGI NGURUKI -vs- BARCLAYS BANK OF KENYA LIMITED [2014] eKLR*** and ***SALAMA BEACH HOTEL LIMITED & 4 OTHERS -vs- KENYARIRI & ASSOCIATED ADVOCATES & 4 OTHERS [2016] eKLR.***

Having given this matter due consideration, I have no doubt in my mind that the application to strike out the notice of appeal on the grounds that it was served out of time and that it was not followed by the filing of the record of appeal is incompetent. It is incompetent because, while it seeks to enforce timelines as against the respondent, it is itself violative of the proviso to **Rule 84** which mandatorily requires that it be filed within 30 days. It was not so filed and leave to file it out of time not having been sought and given, the notice of motion should be for striking out. I can do no better than quote what this Court stated in ***SALAMA BEACH (Supra);***

"This Court has in the past had occasion to decide the fate of applications made under *Rule 84****, but which had been filed out of***

time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another [2016] eKLR****, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court's Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out.***

That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere case* ***(supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under*** *Rule 4* ***of this Court's Rules. Similarly, in*** *William Mwangi Nguruki v Barclays Bank of Kenya Ltd [2014] eKLR****, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also*** *Michael Mwalo v Board of Trustees of National Social Security Fund [2014] eKLR.*

The incompetence of the motion to strike out is not necessarily the end of the matter, however, given **Rule 83** which donates to the Court jurisdiction either of its own motion, or on being moved without stated timelines, to order that a notice of appeal not followed by the institution of the appeal within the appointed time, shall be deemed to have been withdrawn by the party who lodged the notice.

My thinking is that, given our reasoning in the **MAE PROPERTIES case** (supra), at the point considering whether or not to exercise our powers under **Rule 83,** a crucial point is whether or not a record of appeal may at that time have been filed. Where none has been filed, then the Court ought, without much ado, to deem the notice of appeal as having been withdrawn.

Where, however, as in the present case the appeal has in fact been instituted, can we in clear conscience, without a dalliance with the surreal, nevertheless pronounce that the appellant's notice of appeal is deemed to be withdrawn" I respectfully do not think so. I cannot shut my eyes to the fact that the appeal, the future filing of which was signified by the notice of appeal, in fact exists in verity. I would be engaging in smoke and mirrors and allowing the shadows to swallow the substance were I to essentially pretend that the respondent has no interest in filing an appeal that he has in fact filed. To so hold does not involve a validation of the said record of appeal and a cure for any defects it may have and which may well be the subject of attack. It only amounts to this: the existence of a record of appeal, which facially means that the appeal has been instituted, removes the said notice of appeal from the deeming purview of Rule 83. To deem, after all, is no more than to regard or consider something in a particular way that may not be the reality but only a legal fiction. And I cannot fictitiously consider the intent to appeal to be abandoned when the appeal itself has in fact and substance been instituted.

The inevitable result is that the motion before me is not only without merit , but, given that it was time-barred and sought a deeming order in the face, it turns out, of an appeal already instituted, it must be struck out for being incompetent consistent with the **SALAMA BEACH** ruling (supra).

Considering that it is the respondent's omissions and defaults that necessitated the stricken applicant, I would not reward it with costs and so make no order thereon.

As Makhandia, JA agrees, it is so ordered.

DATED and delivered at Kisumu this 31st day of January, 2020

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

RULING OF ASIKE-MAKHANDIA, JA

I have had the benefit of reading in draft the Ruling of Kiage, J.A, and agree with it entirely and the orders proposed therein. I have nothing useful to add.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL