



**Said v Kingsway Tyres Ltd & another (Civil Appeal E086 of 2023)
[2025] KEHC 12070 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 12070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E086 OF 2023
F WANGARI, J
FEBRUARY 20, 2025**

BETWEEN

OMAR TS SAID APPLICANT

AND

KINGSWAY TYRES LTD 1ST RESPONDENT

TSS TRANSPORTERS LTD 2ND RESPONDENT

RULING

1. For ruling is the Notice of Motion Application dated 24/06/2024 seeking the following orders: -
 - a. The Appeal be struck out for having been filed out of time without leave; and
 - b. Costs of the appeal and this application be awarded to the 1st Respondent.
2. The grounds in support of the application are that through an application dated 04/05/2022 in Mombasa High Court Miscellaneous Application No. 67 of 2022, the Appellant sought for and was granted an order of extension of time to file an appeal against the decision of the subordinate court in Mombasa CMCC No. 168 of 2019 together with an order of stay pending hearing and determination of the intended appeal.
3. In its ruling delivered on 30/03/2023, the court declined to grant an order of security but instead ordered that the appeal be fast tracked and thereby proceeded to give mandatory strict orders that: -
 - i. The Applicant (Appellant herein) to file and serve the memorandum of appeal within fourteen (14) days from the date thereof;
 - ii. The Applicant to compile, file and serve a Record of Appeal within forty-five (45) days from the date thereof;



- iii. In default of either of the two (2) orders above, the application dated 04/05/2022 shall be dismissed with costs to the 1st Respondent.
4. The Appellant filed the Memorandum of Appeal on 12/04/2023 and served the same upon the 1st Respondent via email on 13/04/2023. A Record of Appeal was served upon the 1st Respondent on 22/05/2023, seven (7) days after the lapse of the time stipulated by court in Mombasa High Court Miscellaneous Application No. 67 of 2022. Not only did the Appellant serve the Record of Appeal out of time, the said Record has not been filed in court.
 5. Consequently, pursuant to the orders in Mombasa High Court Miscellaneous Application No. 67 of 2022, the appeal stands to have been filed out of time without leave of court therefore it should be struck out with costs. The application is further supported by the affidavit sworn by one Minar Maganlal Sanghavi, its director. The affidavit restates more or less the grounds in support and I see no useful reason to rehash the same.
 6. The application is opposed. Through a Replying Affidavit dated 23/07/2024 and sworn by the Appellant, he states the reasons for filing the Record out of time. He first concedes that the Record of Appeal was filed slightly out of time but the same was occasioned by the fact that certified copies of proceedings and judgement were only supplied on 16/05/2023 having made several follow-ups with the registry.
 7. The Appellant states that he did request the registry to issue him with a certificate of delay but the same was not done forcing him to file the record without the certificate of delay. He further conceded that the appeal was not filed through the e-filing platform due to the bulkiness of the record and it was during the e-filing transitional period. Despite having not filed through the e-filing platform, the Appellant contends that he availed the physical record of appeal and the same was accepted by the registry having satisfied itself of payment of requisite fees.
 8. The Appellant adds that though the Honourable Court had set the timelines to file all the requisite documents, the Honourable Court reserves its discretion to extend time depending on the explanation for the delay. It is his contention that there is already a Record of Appeal in the court and the prejudice he stands to suffer if the present application was to be allowed outweighs that of the 1st Respondent. He states that he risks being shut out from the seat of justice through actions which were completely out of his control.
 9. He states that he actively followed up the proceedings and the same were only availed one (1) day outside the time limits. He asks the court to exercise discretion in his favour and enlarge time so that the record of appeal can be deemed properly on record.
 10. Parties agreed to dispose off the application by way of written submissions. Both parties duly complied with the directions. The 1st Respondent's submissions are dated 11/10/2024 while those of the Appellant are dated 08/11/2024. In support of its position to strike out the appeal, the 1st Respondent placed reliance in the Supreme Court's decision of Nairobi Bottlers Limited v Ndung'u & Another [2023] KESC 96 [KLR].
 11. In his submissions, the Appellant cites Order 42 Rule 1 (1) of the Civil Procedure Rules, proviso (ii) of Order 42 Rule 13 (4) of the same rules as well as Order 50 Rule 5 thereof. Section 95 of the *Civil Procedure Act* which is in pari materia with Rule 5 of Order 50 is equally reproduced. The Appellant further relies on the Court of Appeal decisions in Tobias M. Wafubwa v Ben Butali [2017] eKLR and Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR to urge his position to disallow the application and proceed to the substantive appeal.



Analysis and Determination

12. I have duly considered the Notice of Motion application, the response thereto, parties' rival submissions and the authorities cited therein as well as the law and I accordingly find that the following are the issues for determination: -
 - a. Whether the application dated 24/06/2024 is merited;
 - b. If the answer to (a) above is answered positively, whether the Appellant's explanation for the delay is plausible; and
 - c. Who bears the costs?
13. On the first issue, I do not think it requires so much scrutiny in arriving at the answer as the same is answered by the Appellant at paragraph 5 of his affidavit. He concedes that indeed the Record of Appeal was filed out of time granted by this court. On 30/03/2023, this court delivered its ruling which set out the timelines within which the Appellant was to comply. There is no dispute that the Memorandum of Appeal was timeously filed.
14. However, it is equally not in doubt that the Record of Appeal was filed outside the period set which taking 01/04/2023 as when time started running for purposes of compliance, the last day to file the Record of Appeal ought to have been on 16/05/2023. It is equally a fact that the Record of Appeal has not been filed through e-filing platform to date.
15. This being the case, I find the application well founded. However, before the court expresses itself fully, it is important that it considers the explanation given by the Appellant. First, I note that the Appellant has annexed a letter dated 26/04/2023 and received by the Lower Court Civil Registry on the same date. The same was urgently seeking for typed and certified copies of the proceedings and judgement.
16. The second letter is dated 16/05/2023 and received by the court's registry on even date. It expresses regret that what had been earlier requested had not been furnished yet. In the same breath, it requested to be issued with a certificate of delay. A third letter of 17/05/2023 and received on same date is annexed. This confirmed receipt of the requested documents but sought for Plaintiff's initial pleadings before the amendment as well as 2nd Defendant's submissions. It also sought for a certificate of delay.
17. Having perused the above mentioned letters, I have no hesitation that these are not actions of an indolent litigant and I am persuaded that the Appellant was actively following for the proceedings and judgement. Despite having found the Appellant diligent, there is the issue of the Record of Appeal not having been filed through the e-filing platform. This is conceded by the Appellant and indeed, having checked the court's e-filing portal, there is no Record filed therein.
18. Before considering the reason for not filing the Record of Appeal through the e-filing portal, the 1st Respondent confirms that it was served with the Record on 22/05/2023 which is about six (6) days out of time. The court file equally has a Record which is dated 17/05/2023. I am inclined to believe that this Record was filed on or before it was served on 22/05/2023 because a party cannot serve that which it has not filed.
19. Though it is true that there is no Record of Appeal filed through the e-filing portal, there is a Record of Appeal in the court file and there is confirmation that indeed, it was served. I take judicial notice that a Record of Appeal in the e-filing era is not paid for. What only attracts payment is the Memorandum of Appeal. There is a Memorandum of Appeal filed through the e-filing portal and the requisite payments made.



20. So what is the Appellant’s reason not to have filed the Record through the e-filing portal? The answer is found at paragraph 7 of the replying affidavit. It is true that even to date, there are teething problems in the e-filing portal and I readily accept the Appellant’s reason. In the end, I find the Appellant’s explanation plausible and I am prepared to accept the same.
21. Before disposing off the matter, the authorities cited by both parties are binding on this court. However, each case must be determined on its own merits as there are no two cases which is a cut and paste of the other. Mativo, J (as he then was) in *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) held as follows: -
- “...Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches...”
22. Therefore, though am bound by the cited decisions, am alive to the fact that the rules that applies to the Court of Appeal and the Supreme Court while handling appeals are different to what applies to this court. I say so because a Record of Appeal is not a fatal omission before the High Court since appeals have even been determined without a formal Record of Appeal. What this court requires is the Trial Court’s file. All that a Record serves before this court is only for purposes of order and tidiness.
23. Lastly, I note that though the Record of Appeal was served upon the 1st Respondent on 22/05/2023. The present application was filed over one (1) year later after the appeal had been admitted in terms of Order 42 Rule 13 of the Civil Procedure Rules. The court record shows that this matter went before the Deputy Registrar who being satisfied referred this matter to this court on 02/22/2023. Therefore, though the Record of Appeal was filed out of time, the current application is belated.
24. There is already a Record of Appeal. It would be extremely prejudicial to drive away the Appellant from the seat of justice because that would be the case if I were to allow the application as prayed. In conclusion on this issue, I find that it would be a travesty of justice if I were to strike out the appeal. I therefore refrain from doing so.
25. On the issue of costs, since I have found the application well founded and the fact that this is the second time that the Appellant is before this court on the issue of timelines, I award the 1st Respondent costs of the Application. The same is capped at Kshs. 10,000/=.
26. Based on the foregone discourse, I proceed to make the followings orders: -
- a. The application dated 24th June, 2024 is disallowed for the reasons stated above;
 - b. The 1st Respondent is awarded costs of the application capped at Kshs. 10,000/=;
 - c. The costs to be paid within the next thirty (30) days;
 - d. The Appeal having been admitted, the same is now certified ready for hearing.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025.

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F. WANGARI

JUDGE

In the presence of: -

Mr. Kirui Advocate for the Appellant

N/A by the Respondents

Ms. Salwa, Court Assistant

