



Safaricom Plc v Kibo Capital Group Limited & another (Civil Appeal E133 of 2022) [2025] KEHC 4644 (KLR) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E133 OF 2022
BK NJOROGE, J
APRIL 10, 2025**

BETWEEN

SAFARICOM PLC APPELLANT

AND

KIBO CAPITAL GROUP LIMITED 1ST RESPONDENT

ONYANGO OCHIENG JASPER 2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 30th November 2023 and sought the following orders;
 - a. The Court to strike out the Respondent's Cross-Appeal dated 27th October 2023 and filed before the Court on 30th October 2023.
 - b. The costs of the Application be awarded to the Appellant.
2. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Isaac Njoroge Kibere who stated that the Cross Appeal is incurably defective and incompetent having been filed 1 year and 2 months after delivery of the judgment in the Industrial Property Tribunal (hereinafter the IP Tribunal). Therefore, the Court cannot assume Appellate jurisdiction in respect of the Cross Appeal as it is time barred.
3. In Response, the Respondent filed a Replying Affidavit dated 8th December 2023 sworn by Onyango Ochieng Jasper who stated that the law provides for filing of Cross Appeal but does not provide for the procedure to be followed. The law does not address the timelines within which a Cross Appeal should be filed. He added that the delay in filing the Cross Appeal was not inordinate.
4. The parties filed written submissions, which the Court has carefully considered and frames only one issue for determination:



- a. Whether the Cross Appeal should be struck out.

Analysis and determination

5. A brief background to this Application is that on 31st August 2022, the IP Tribunal delivered its judgment in IPT Case No.96 of 2021 whereby the IP Tribunal dismissed both the Respondents' infringement proceedings and the Appellant's revocation proceedings in respect of the Respondents' Utility Model Nos. 169, 163, 168, and 195
6. Being dissatisfied with the decision, the Appellant lodged its Memorandum of Appeal on 29th September 2022, partly challenging the judgment of the IP Tribunal. The matter was listed before this Court on the 28th August 2023 and subsequently on the 31st October 2023 for directions in respect of the main appeal.
7. On the 30th of October 2023, one day prior to the mention of 31st October 2023; the Respondents filed and served the Appellant with their Cross-Appeal against the judgment of the IP Tribunal.
8. It was the Applicant's submission that the Respondent's Cross Appeal is incompetent, incurably defective and bad in law for the reason that the same was filed outside the timelines prescribed by the law.
9. In response, it was the Respondent's submission that the law does not specify the timelines within which a Cross Appeal should be filed only stating that the same ought to be filed within reasonable time.
10. According to the Respondent, the Cross Appeal was filed within a reasonable time. This is because, at the time of the filing of the Cross Appeal, no directions had been issued by the Court on the disposal of the Appeal. Thus, the Appellant stands to suffer no prejudice if the Cross Appeal is admitted to the Court record.
11. The Court notes that the *Black's Law dictionary* 10th Ed. defines a Cross Appeal as

'An Appeal by the appellee usually heard at the same time as the appellant's appeal'.
12. Reference to Cross Appeals is pursuant to Order 42 rule 32 of the Civil Procedure Rules, which states as follow: -

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made or to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross- appeal.” (emphasis underlined).
13. This rule does not provide for any timelines within which a Cross Appeal is to be filed.
14. In *Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi* [2018] KEHC 4833 (KLR), the Court was of the view that a Cross Appeal has to be filed within a reasonable time, after the filing of the Appeal.

“The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside



the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time.”

15. In *Kindest Auctioneers v Orbit Chemicals Industries Limited* (Miscellaneous Appeal E038 of 2023) [2023] KEELC 21782 (KLR) (13 November 2023) (Ruling) the Court differently constituted followed the same position.
16. The Respondent relies on the case of *George Kianda & another v Judith Katumbi Kathenge & another* [2018] KEHC 2455 (KLR) to the effect that there are no laid down statutory timelines for filing a Cross Appeal.
17. By way of comparison Section 95 of the Court of Appeal Rules lays down the time of filing a Cross Appeal as follows: -
 95. Notice of cross- appeal
 - (1) A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of the contention and nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.
 - (2) A notice under subrule (1) shall state the names and addresses of the persons intended to be served with copies of the notice and lodged in four copies in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and record of appeal, or not less than thirty days before the hearing of the appeal, whichever is the later.
 - (3) A notice of cross-appeal shall be substantially in Form G as set out in the First Schedule and signed by or on behalf of the respondent. (emphasis underlined)
18. The Court of Appeal Rules are clear that the Cross Appeal has to be presented within Thirty (30) days after the service of the Memorandum and Record of Appeal or at least Thirty (30) days before the hearing of the Appeal. That is the procedure of the Court of Appeal.
19. The procedure before this Court is not strictly provided for.
20. The Court is of the view that as earlier stated by the other Courts of concurrent jurisdiction, a Cross Appeal has to be filed within a reasonable period of time. This is because the Act and the Rules do not state out a specific time line.
21. The Respondent submits that directions had not been given by the time the Cross Appeal was filed. Indeed, directions in this matter were given on 23/09/2024 when the Appeal was admitted.
22. The Court is not persuaded that it should strike out the Notice of Cross Appeal as no prejudice to the Appellant has been shown. Striking out the Cross Appeal at this stage would amount to locking out the Respondent from being heard. This is despite the Act and the Rules specifying no specific timelines for filing. Had the Cross Appeal been filed after directions had been given, that would have been outside the purview of what is a reasonable time period. For now the Court holds that it was still within reasonable time.
23. In light of the above the Motion is not merited and is dismissed. The Respondent is awarded the Costs thereof.



Determination

24. The Notice of Motion dated 30th November, 2023 is dismissed with Costs to the Respondent.

25. It is so ordered.

SIGNED, DATED and DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF APRIL 2025

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Miss Mululu holding brief for Mr. Karanu for the Appellant

N/A for Mrs. Opiyo for the Respondents

Court Assistant Mr. Luyai.

