

**IN THE COURT OF
APPEAL AT MOMBASA**

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E134 OF

2024 BETWEEN

MAZERAS KENYA (EPZ) LIMITED.....APPLICANT

AND

**KENYA REVENUE
AUTHORITY.....RESPONDENT/APPELLANT**

(Being an application to strike out the Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (Olga Sewe, J.) dated 6th November 2024

in

HC JR No. E033 of 2023)

RULING OF THE COURT

1. The application before us is the Notice of Motion dated 27th November 2024 filed by Mazeras Kenya (EPZ) Limited **(the applicant)** pursuant to **rule 86** of the **Court of Appeal Rules, 2022** seeking the following orders:
 - i. *that the Notice of Appeal herein be struck out for having been instituted out of time; and*
 - ii. *that the costs of this application be borne by the Respondent (appellant in the appeal).*
2. The grounds upon which the application is premised are contained in the affidavit of *Sailesh Dayalal Shah*, the applicant's Director. He deposed that the trial court

judgement was delivered on 6th November 2024 in the presence of counsel representing both parties; that Kenya Revenue Authority (***the respondent***), being aggrieved by the decision, was required to lodge a notice of appeal within 14 days, that is on or before 20th November 2024; that the respondent filed the Notice of Appeal on 21st November 2024 which date was outside the timelines provided for under ***rule 77(2)*** of this ***Court's Rules, 2022***; that the respondent did not seek this Court's leave to file the Notice of Appeal out of time; and that the same should be struck out for being incompetent and an abuse of the court process.

3. The respondent opposed the application by way of a replying affidavit sworn on 7th May 2025 by Nick Otieno Osoro, counsel in conduct of the matter on its (the respondent's) behalf. Counsel confirmed that indeed the respondent filed its Notice of Appeal and requested for a certified copy of the proceedings on 20th November 2024, which was within the timeframe allowed by the Court's Rules to do so; that the Notice of Appeal was served upon the applicant on 21st November 2024 pursuant to rule 79; that, consequently, the applicant has deliberately failed to give a truthful account of the chronology of events, and has therefore not come to Court with clean hands; that the present application is incompetent and an attempt to delay the proceedings; and that it ought to be dismissed with costs.
4. The application was canvassed on 13th May 2025 by way of

written submissions. Those of the applicant are dated 9th
May

2025 while those of the respondent are dated 7th May 2025. In attendance were learned counsel **Mr. Noorani** for the applicant and learned counsel **Ms. Nzomo** holding brief for **Mr. Osoro** for the respondent.

5. The applicant submitted that the 14 days period within which the respondent ought to have filed its Notice of Appeal lapsed on 20th November 2024; and that the respondent's Notice of Appeal could only be deemed as properly filed upon payment of the requisite court fees. Reference was made to **Paragraph 8(3)** of the **Court of Appeal (Electronic Case Management) Practice Directions, 2021** which provides that a document will not be deemed as duly filed until the requisite fee is paid; and the decision of this Court of **Arale vs. Independence Electoral and Boundaries Commission & 4 Others (2023) KECA 1045 (KLR)** for the proposition that, for a document to be deemed as duly filed, all mandatory steps that are required to be satisfied under the Court's Rules should be undertaken conjunctively; that the payment receipt which the respondent produced is dated 21st November 2024; and that, for this reason, it can only be concluded that this is the date on which the Notice of Appeal was filed.
6. The applicant urged us to take note of the fact that the respondent was yet to file an application seeking leave to file the Notice of Appeal out of time and, in this regard, reliance was placed on this Court's decision in **Nyaribari & Another vs. Kenya Alliance Insurance Company**

Limited (2022) KECA 696 (KLR) for the proposition
that a party who has

filed a notice of appeal out of time should seek extension of time from the Court to do the needful. We were thus urged to allow the application as prayed.

7. On its part, the respondent submitted that the Notice of Appeal was filed within time on 20th November 2024; that striking out a pleading is a draconian action which can only be resorted to in the plain and rarest of cases; that striking out a pleading is a matter of the Court's discretion; that, in this instance, the applicant has not demonstrated that there was delay in complying with rule 77; and that, as such, the application should be dismissed with costs.
8. We have considered the Motion, the grounds on which it is premised, the replying affidavit, the rival submissions and the law. The singular issue that stands for our determination is whether the application is merited.
9. It is common ground that the impugned judgement by the superior court was delivered on 6th November 2024. A party aggrieved by a decision of the court below initiates an appeal by first filing a Notice of appeal. It is a Notice of appeal which triggers the jurisdiction of this Court. In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others (2013) KECA 113 (KLR)**, the Supreme Court held that a notice of appeal is a primary document, and that it is a jurisdictional pre-requisite.
10. **Rule 77(1) and (2)** of this **Court's Rules, 2022** provides:

(1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

(2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged. (emphasis added)

11. Under **sub-rule (2)** cited above, a notice of appeal should be lodged *within 14 days from the date of the decision in respect of which appeal is lodged*. The impugned decision having been delivered on 6th November 2024, time started running on 7th November 2024. Pursuant to **sub-rule (2)**, the window for lodging a notice of appeal lapsed on 21st November 2024. The undisputed fact is that the Notice of Appeal was filed on 20th November 2024. The requisite court fees were paid on 21st November 2024 and the Notice of Appeal served on the same date. In effect the Notice of appeal was filed within the prescribed timeframe.

12. In response to questions raised by the Court, Mr. Noorani, counsel for the applicant, conceded that, indeed, the Notice of appeal was filed on time, but was quick to add that the payment receipt was issued out of time, more specifically outside the 14 days provided under rule 77(2), being on 22nd November 2024. He conceded that the 14 days under sub- rule (2) lapsed on 21st November 2024. Our perusal of the record attests that this submission is not factual as the receipt on record shows that payment

was made on 21st

November 2024. The date of service is not contested, being the same date of the filing of the Notice. We thus cannot belabour this issue any further.

13. The upshot of the foregoing is that the Notice of Appeal dated 20th November 2024 was duly filed and served within the required timelines as provided under **Rule 77(2)** and **79(1)** of this **Court's Rules, 2022**. Accordingly, the Notice of Motion dated 27th November 2024 fails and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 5th day of December, 2025.

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

*I certify that this is
the true copy of the
original*

Signed

DEPUTY

REGISTRAR