Custody & Registrar Services Limited v Buckle & Buckle (Suing in their capacity as joint executors of the Estate of Anthony William Bentley-Buckle - Deceased) & another (Civil Appeal (Application) E340 of 2021) [2025] KECA 97 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 97 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E340 OF 2021

M NGUGI, JA

JANUARY 24, 2025

BETWEEN

CUSTODY & REGISTRAR SERVICES LIMITED ..... APPELLANT

AND

NICHOLAS BENTLEY-BUCKLE & DEBORAH MARY BENTLEY-BUCKLE (SUING IN THEIR CAPACITY AS JOINT EXECUTORS OF THE ESTATE OF ANTHONY WILLIAM BENTLEY-BUCKLE - DECEASED) .... 1ST RESPONDENT

SUNTRA INVESTMENT BANK LIMITED ..... 2ND RESPONDENT

(Being an application for leave to file application to strike out the Record of Appeal and the Appeal out of time and to strike out the Record of Appeal and the Appeal)

RULING

1. In the application dated 16th August, 2024, the 1st respondent/ applicants, Nicholas Bentley-Buckle & Deborah Mary Bentley-Buckle, suing in their capacity as the joint executors of the Estate of Anthony William Bentley-Buckle (deceased), seek two substantive orders from this Court. They seek, first, an enlargement of time and leave to file an application to strike out the record of appeal and the appeal out of time, and that their application to strike out be deemed as properly filed. In their second substantive prayer, they ask the Court, upon granting their prayer for extension of time, to strike out the record of appeal and the appeal itself.

2. Rule 55 of this Court's Rules, 2022, vests jurisdiction to hear and determine an application for extension of time in a single judge. Jurisdiction to hear and determine an application to strike out a record of appeal or appeal is, under rule 55(2), vested in a full bench of the Court. I will therefore confine myself to the prayer for extension of time.

3. The application is brought under section 3A and 3B of the *Appellate Jurisdiction Act* and rules 4 and 84 of the Court of Appeal Rules, 2010. The Rules applicable to the prayers sought in the omnibus application before me are rules 4 and 86 of the 2022 Rules, which revoked the 2010 Rules.

4. Rule 4 vests jurisdiction in the Court to extend time for the doing of any act prescribed under the Rules. Rule 86, extension of time with respect to which this application has been brought, provides as follows:

> 86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—
>
> a. that no appeal lies; or
>
> b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:
>
> Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be. (Emphasis added).

5. By filing this application, the applicants confirm that they did not comply with the proviso to rule 86. They had 30 days from the date of service of the record of appeal to file an application under on either of the two grounds prescribed under the rule: that no appeal lies, or that some essential step in the proceedings has not been taken, or has not been taken within the prescribed time.

6. The grounds forming the basis of the application are set out on its face at length, as well as in the affidavit in support sworn by the applicants' advocate, Collins Ochieng Oyomba, on 16th August 2024. The applicant's case is further elaborated upon in submissions dated 23rd September, 2024.

7. Mr. Oyomba avers that the judgment in Milimani Commercial Case No. 480 of 2014 from which this appeal arises was delivered on 30th May 2019. The 2nd respondent then filed Civil Appeal No. 322 of 2019. Thereafter, an application for review of the judgment was filed before the High Court, and an amended judgment was delivered on 17th December 2019. The 2nd respondent then filed Civil Appeal No. 231 of 2020 against the amended judgment. The applicants were served with both appeals and participated in both through their advocates on record.

8. It is averred further that the appellant also participated in the two appeals; filed documents in response to various applications filed therein; and attended Court through its advocates without indicating its intention to file yet another appeal against the decision of the High Court.

9. The applicants aver that when the appellant filed the instant appeal on 25th June, 2021 and served it upon the applicants through their advocates, the applicants mistakenly believed that the appellant had filed additional bundles of documents in one of the two appeals that already existed over the same High Court matter.

10. Acting on that belief, the applicants did not file a notice of address of service or any other document in response to the appeal; nor did they file an application to strike out the appeal as required under the law. The applicants aver that it was only when this appeal was mentioned in Court on 3rd July 2024 and case management directions were issued by the deputy registrar on 23rd July 2024 that their advocates realized that the respondent had its own stand-alone appeal that it was prosecuting. They

aver that they immediately filed a notice of address of service in the instant appeal and thereafter the instant application.

11. The applicants thus explain the delay in filing the application as being occasioned by the confusion resulting from a multiplicity of appeals from the same decision. They contend that the appeal is hopelessly defective and incompetent for violating the provisions of rule 77(1) of the Court of Appeal Rules, 2010; and that the notice of appeal upon which the appeal is anchored is defective and incompetent for various reasons, which they enumerate. They contend that after lodging the notice of appeal on 19th December, 2019, the appellant went into slumber up to 25th June, 2021 when it filed a memorandum of appeal and record of appeal, a period of more than one year from the date of filing the notice of appeal.

12. The applicants further question the certificate of delay produced by the appellant showing a delay of 703 days, contending that evidence on record shows that the typed proceeding in the matter were ready and available for collection way back on 12th June, 2020 and were used in filing Civil Appeal No 231 of 2020 on or about 12th June, 2020.

13. The appellant opposes the application through an affidavit sworn on 28th November 2024 by Kerry-Anne Makatiani and written submissions of the same date. The appellant notes the omnibus nature of the application and asks the Court to defer the application for striking out pending ruling on the application for extension of time. With regard to this prayer, the appellant avers that the delay in bringing the present application is for a period of 3 years and 3 months, which is inordinate and excessive by any standards. Further, that the explanation given for the delay should be rejected as all the documents served on the applicants with respect to the appeal and the clear case number indicated in the record of appeal ought to have disabused the applicants of the notion that the record of appeal related to any other appeal filed.

14. The 2nd respondent has filed submissions dated 6th December 2024. It indicates, however, that the submissions relate to a 'Motion dated 23rd September 2024'. There is no such motion before the Court, so it is possible that the 2nd respondent's counsel erred in indicating the date of the motion. However, the 2nd respondent's submissions echo those of the appellant and seek dismissal of the application.

15. I have considered the application, the affidavits in support and opposition thereto, and the submissions of the parties. The application is brought under rule 4 of this Court's Rules, which requires the exercise of the Court's discretion where a party has failed to comply with timelines prescribed under the Rules. In considering an application under rule 4, the Court is required to consider, among other factors, the period of delay and the reason for the delay-see Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR.

16. The application before me seeks extension of time with respects to an act prescribed under rule 86. Under this rule, a respondent to an appeal can file an application for striking out the notice of appeal or record of appeal on the basis that no appeal lies or that some essential step in the proceedings has not been taken, or has not been taken within the prescribed time. At the core of rule 86 is the proviso, which states, in negative mandatory terms, that such an application

> " shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be."

17. The present application has been brought some three years after service of the record of appeal. The reason advanced for the delay is that the applicants thought that the appellant was serving them with further documents in the two appeals previously filed by the 2nd respondent. Such an explanation, I

find, is totally untenable. Given that the appeal numbers were different, as were the appellants, and the document(s) indicated that what was being served was a record of appeal, it is difficult to understand how the applicants or their counsel could have assumed that the documents related to the two appeals already filed by the 2nd respondent. Unless the applicants are confessing to not having opened or read the documents for three years, until the matter came up for directions before the deputy registrar. Whatever the case, these are not reasons that would incline the Court towards exercising discretion in favour of the applicants.

18. A more fundamental concern, in my view, however, is whether an application under rule 4 can properly lie to extend the time limited under the proviso to rule 86. An applicant under rule 86 is charging its opponent of failure to meet the timelines prescribed under the Rules. To successfully maintain this lofty ground, such a party must act strictly in accordance with the Rules. It cannot approach the Court under rule 4, essentially saying: 'I have not complied with the Rules of the Court, but please exercise discretion in my favour so that I can charge my opponent with failing to comply with the same Rules." Such an application, in my view, is one that this Court should not countenance.

19. Accordingly, I find the application dated 16th August 2024 to be devoid of merit. It is hereby dismissed with costs to the appellant and 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.