



REPUBLIC OF KENYA



KENYA LAW
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Ufanisi Freighters (K) Limited v I & M Bank Limited & 3 others (Civil Application E033 of 2023) [2025] KECA 296 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 296 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E033 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

UFANISI FREIGHTERS (K) LIMITED APPLICANT

AND

I & M BANK LIMITED 1ST RESPONDENT

PREMIER FLOUR MILLS LTD 2ND RESPONDENT

ATTA (KENYA) LIMITED 3RD RESPONDENT

MILLING CORPORATION KENYA (2009) 4TH RESPONDENT

(Being an application to strike out an intended Notice of Appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (F. Wangari, J) delivered on 2nd March 2023 in Mombasa Civil Appeal No. E144 of 2021)

RULING

1. Before us is a Notice of Motion dated 29th April 2023 filed by Ufanisi Freighters (K) Limited (the applicant) under the provisions of sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 79(1), 84 and 86 of the Court of Appeal Rules, 2022. The applicant seeks the following orders:

- “a) That this court be pleased to strike out the Notice of Appeal lodged by the 1st respondent on 3rd March 2023 and served on the 13th April 2023 as the 1st respondent has not undertaken the essential steps of serving the said Notice of Appeal and letter requesting the proceedings within the prescribed time;
- b) That costs of, and incidental to, this application be borne by the respondents.”



2. The application is supported by the affidavit deposed on even date by Ms. Pauline Osino, counsel having the conduct of the matter on behalf of the applicant. Learned counsel deposed that the 1st respondent filed an appeal in Mombasa HCCA No. 144 of 2021 - I & M Bank Limited vs. Ufanisi Freighters (K) Limited & 2 Others against the applicant; and that judgement in the appeal was delivered on 2nd March 2023 dismissing the appeal with costs.
3. Aggrieved, the 1st respondent lodged an appeal to this Court by filing a notice of appeal and a letter requesting for proceedings on 3rd March 2023; that the 1st respondent served the applicant with the Notice of Appeal and the letter requesting for proceedings via email on 13th April 2023; that the 1st respondent failed to serve the applicant with the Notice of Appeal and the letter requesting for proceedings within the stipulated statutory period of 7 and 30 days respectively; and that, by failing to serve within time, the 1st respondent failed to take essential steps and, therefore, the Notice of Appeal ought to be struck out with costs to the applicant.
4. Opposing the application, learned counsel for the 1st respondent, Mr. Prestone Wawire filed a replying affidavit dated 18th May 2023. The 1st respondent confirmed that it filed the Notice of Appeal dated 3rd March 2023 and the letter bespeaking the proceedings; that, however, it encountered numerous delays at the Court's registry, namely, in having the letter requesting for proceedings and Notice of Appeal signed by the Deputy Registrar, and that the same only materialised on 13th April 2023; and that this is the date on which the documents were served upon the applicant, 2nd, 3rd and 4th respondents.
5. The 1st respondent stated that it is yet to obtain the typed proceedings from the High Court, but that it filed the Record of Appeal within 48 days of lodging the Notice of Appeal dated 3rd March 2023; and that there is no prejudice which will be suffered by any party if the appeal is deemed as properly filed since the delay in service of the Notice of Appeal was occasioned by administrative hiccups in the High Court.
6. Counsel went on to depose that he has filed and served an application, being Civil Appeal (Application) No. E059 of 2023 seeking extension of time to serve the Notice of Appeal and for the same to be deemed as duly filed. It was deposed that the Memorandum of Appeal raises arguable grounds which need to be determined on merit in the appeal.
7. We heard this application virtually on 16th October 2024. Learned counsel Ms. Osino appeared for the applicant. She relied on written submissions dated 3rd May 2023. Highlighting the submissions, counsel contended that it was not disputed that the Notice of Appeal and the letter requesting for proceedings were served out of time on 13th April 2023; that this was contrary to rule 79(1) of the Court of Appeal Rules which requires a notice of appeal to be served within 7 days of filing; and that, the Notice of Appeal having been filed on 3rd March 2023, the 7 days lapsed on 10th March 2023.
8. Counsel also submitted that rule 84 (1) of the Court of Appeal Rules requires that the letter bespeaking the proceedings be filed and served upon the other party within 30 days. On the assertion by the 1st respondent that there was delay in signing the Notice of Appeal by the Deputy Registrar, counsel asked us to consider and find that the Notice of Appeal was signed by the Deputy Registrar on 3rd March 2023, and that the letter requesting for proceedings was stamped by the Court on 9th March 2023. Hence, there was no delay in signing the two documents.
9. Counsel submitted that the fact that the Notice of Appeal was filed out of time rendered it incompetent. In this regard, reference was made to this Court's decision in Martin Kabaya vs. David Mungania Kiambi (2015) KECA 526 (KLR) for the proposition that a party must apply to extend time where the notice of appeal is filed out of time. She emphasized the need to adhere to the Court's



Rules for purposes of fast tracking expeditious disposal of appeals, which cascades to a reduction of case backlog; that the Rules are couched in mandatory terms; and that the Court can only come to the aid of a party if plausible reasons that occasioned the delay are proffered; and that, in this case, no plausible reasons have been given by the 1st respondent, and, as such, failure to serve the Notice of Appeal is a fatal defect that is not curable at this juncture.

10. On behalf of the 1st respondent, learned counsel Mr. Otieno, in highlighting written submissions dated 11th May 2023 submitted that the overriding objectives of Article 159 of *the Constitution* and sections 3A and 3B of the *Appellate Jurisdiction Act* is to sustain suits. Counsel referred to the decision of this Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission, Wilfred Rottich Lesan, Robert Siolei, Returning Officer, Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo (2013) KECA 113 (KLR) for the proposition that the failure to serve an appeal within time is not fatal so long as there is no inordinate delay in service; and that, in such instances, a court should sustain a suit.
11. To the counsel, the delay in this case is explainable, the same being attributed to failure to sign a copy of the letter bespeaking proceedings and sealing, signing and stamping the Notice of Appeal by the Deputy Registrar. Counsel pleaded that we consider that the 1st respondent has timeously filed an application for extension of time to serve the Notice of Appeal and the letter bespeaking proceedings in Mombasa Civil Appeal No. E059 of 2023.
12. We have considered the application, the respective affidavits in support of, and in opposition to, the application, the submissions by both counsel and the law. The Judgement which the 1st respondent sought to appeal against emanated from the decision of F. Wangari, J. dated and delivered on 2nd March 2023. Rule 77(2) of this Court's Rules makes it mandatory that a person who desires to appeal against a decision should lodge the Notice of Appeal within 14 days from the date of the impugned decision. The 1st respondent was well within time, and it is not disputed that the Notice of Appeal was lodged on 3rd March 2023, a day after the impugned judgement.
13. An appellant is further required under rule 79(1) to serve the Notice of Appeal upon the parties who are directly affected by the appeal within 7 days after lodging the Notice of Appeal. The rule provides:

An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal.
14. The appellant has another obligation under the proviso to rule 84(1), to serve a copy of the letter requesting for the proceedings in the superior court within 30 days in the following terms:
 1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged-
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be



excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.
3. The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.
15. From the submissions made on behalf of the 1st respondent, Mr. Otieno did not deny the fact that service of the Notice of Appeal and the letter bespeaking the proceedings was not done within the stipulated time set out by this Court's Rules. The 1st respondent instead shifted the blame to the superior court's Deputy Registrar for failing to sign the Notice of Appeal and receive the letter bespeaking the proceedings on time.
16. We have perused the Notice of Appeal and the letter bespeaking the proceedings, which are on record. It is clear to us that the Notice of Appeal was signed on 3rd March 2023. There is nothing demonstrated by the 1st respondent to suggest that the Notice of Appeal was signed by the Deputy Registrar on any other date later than 3rd March 2023. The same case applies to the letter requesting for typed proceedings which, as pointed to us, was received on even date in the superior court's registry.
17. The Notice of Appeal and the letter requesting the proceedings were served upon the applicant on 13th April 2023, which is 42 days outside the time when they were lodged in the superior court. This delay remained unexplained by the 1st respondent. Even so, counsel acknowledged the delay and urged us to find that the delay did not prejudice any party.
18. Rules 79(1) and 84(1) are couched in mandatory terms by use of the word 'shall.' Therefore, a party must comply with the mandatory procedure stipulated therein.
19. Counsel for the 1st respondent told us that he has filed an application in Civil Appeal E059 of 2023 seeking extension of time to file the Notice of Appeal so that the same can be deemed as properly filed. However, Ms. Osino, counsel for the applicant, stated that she was compelled to file a separate application, being the instant one since she has not been served with the appeal and that, in any event, the application seeking extension of time was filed on 11th May 2023 after the instant application.
20. We find it difficult to see through the optics of good faith on the 1st respondent's part and the seriousness it wishes to invest in prosecuting its appeal. And, for this reason, we agree with Ms. Osino's sentiments that the delay occasioned by failing to serve the Notice of Appeal and the letter bespeaking the proceedings as required by this Court's Rules has not been sufficiently explained by the 1st respondent. Accordingly, we reach the inescapable conclusion that this Court's discretion cannot be exercised in its favour.
21. In conclusion, we find merit in the Notice of Motion dated 29th April 2023 and hereby order that the Notice of Appeal dated 3rd March 2023 be and is hereby struck out. Costs of this application shall be borne by the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

A.K MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

