



**BOS Shipping (East Africa) Limited v Texas Alarms (K) Limited (Civil Application E015 of 2024) [2025] KECA 1135 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1135 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E015 OF 2024  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JUNE 20, 2025**

**BETWEEN**

**BOS SHIPPING (EAST AFRICA) LIMITED ..... APPLICANT**

**AND**

**TEXAS ALARMS (K) LIMITED ..... RESPONDENT**

*(An Application to strike out the Notice of Appeal dated 15th December 2023 from the Judgment of the Environment and Land Court (S. M. Kibunja, J.) delivered on 22nd November 2023 in ELC No. 121 of 2019)*

**RULING**

1. The Notice of Motion dated 6<sup>th</sup> March 2024 filed by the Applicant, Bos Shipping (East Africa) Limited, is brought pursuant to Rule 86 of the Court of Appeal Rules, 2022 seeking orders that the Notice of Appeal dated 15<sup>th</sup> December 2023 filed by the Respondent, Texas Alarms (K) Limited, and served on the Applicant on 9<sup>th</sup> February 2024, be struck out, and that the costs of this application be borne by the Respondent.
2. The Applicant's motion is brought on grounds that the Notice of Appeal dated 15<sup>th</sup> December 2023 was filed and served out of time. The Application is supported by the affidavit of the Ayoob Mohamed Bashir, director of the Applicant, in which he deposes: that the Respondent filed its Notice of Appeal against the Judgment on 15<sup>th</sup> December 2023; that, in accordance with the rules of this Court, the last day to file a Notice of appeal was 6<sup>th</sup> December 2023 and that, therefore, the Notice of Appeal was filed 9 days late without leave of this Court.
3. It was further deponed that the Respondent's advocates, Tindika & Company Advocates, served the Notice of Appeal via email on 9<sup>th</sup> February 2024, notwithstanding that it ought to have been served within 7 days after filing; that, therefore, the Notice of Appeal was not only filed out of time, but was also served out of time. It was further deponed that the Respondent has not sought leave of the Court



to either file the Notice of Appeal or serve it out of time, and for this reason, the Notice of Appeal should be struck out for having been filed and served out of time without leave of the Court.

4. The Applicant filed written submissions and, when the application came up for hearing on a virtual platform, learned counsel Mr. Oluga appeared for the Applicant. Counsel informed the Court that he would rely on the written submissions in their entirety, which submissions largely reiterated the contents of the motion and of the affidavit in support. Notably, there were no submissions filed by the Respondent, and neither did they attend Court despite having been served with the hearing notice.
5. As a brief background to the motion, the Applicant filed a suit against the Respondent and one Abdullah Abdul Rehman, seeking: a declaration that plot No. MN/1/890, CR No. 9291/1, Mombasa Municipality (the subject property) delineated on Survey Plan No. 39643 stands on a different ground position from plot No. MN/1/9779; a declaration that its plot No. MN/1/890 and the premises the Respondents occupies is situated in the correct and lawful position; a mandatory injunction compelling the removal or eviction of the Respondents from the Applicant's property; a mandatory and permanent injunction restraining the Respondents whether by themselves, their servants and or agents whatsoever howsoever from interfering with the Applicant's property and the access to the subject property; special damages, interest and costs.
6. It was the Applicant's case that it was the registered proprietor of the subject property and that, on or about 25<sup>th</sup> March 2019 at about 6.30pm, the Respondent posted security guards on the subject property, claiming that it was its plot. They evicted the Applicant and its employees and prevented them from accessing the property, thereby depriving it of full use and enjoyment of the property occasioning it loss and suffering.
7. The Respondent opposed the suit in defence and claimed ownership of the subject property through adverse possession.
8. The trial Judge, upon considering the evidence, held that the subject property belonged to the Applicant, and that no evidence was tendered in support of the Respondent's claim for adverse possession. The court proceeded to enter judgment against the Respondent and granted the orders sought in the Plaint. It is the Respondent's Notice of Appeal from the Judgment upon which this application is predicated.
9. We have considered the Notice of motion and the Applicant's submissions. What is before us is an application seeking to strike out the Notice of appeal dated 15<sup>th</sup> December 2023.
10. Rule 86 of this Court's rules provides:

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 that some essential step in the proceedings has not been taken or
  - b. 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 from the date of service of the notice of appeal or record of appeal as the case may be.”
11. It is now settled principle that the power of this Court to strike out an appeal is discretionary, and is exercised based on the peculiar circumstances of each case. See *Standard Ltd & another vs Onchieku* (Civil Application 134 of 2019) [2023] KECA 1275 (KLR).



12. In the case of *Mukenya Ndunda vs Crater Automobiles Limited* [2015] eKLR, this Court observed:

The power to strike out an appeal or notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”

The above cited authorities are clear that this Court is empowered to strike out a notice of appeal or a record of appeal for want of form or failure to follow the rules of procedure. But, prior to so doing, the proviso to Rule 86 is of pertinence. It expressly states that the power to strike out a notice or an appeal shall not be brought “...after the expiry of thirty days from the date of service of the notice of appeal or record of appeal...”

13. The Respondent filed its Notice of Appeal on 15<sup>th</sup> December 2023, the last day to file notice of appeal against the Judgment was 6<sup>th</sup> December 2023 which is 14 days from 22<sup>nd</sup> November 2023 when the Judgement was delivered. The Notice of appeal was therefore filed 9 days late. It was served on the Applicant on 9<sup>th</sup> February 2024 instead of 22<sup>nd</sup> December 2023, which would have been 7 days after the Notice of appeal was filed. Based on this computation, there is no doubt that the Notice of appeal was filed and served out of time contrary to the requirements of Rules 77(2) and 79 of the Court of Appeal Rules. Given that service of the Notice of Appeal was on 9<sup>th</sup> February 2024, and this application is dated 6<sup>th</sup> March 2024, it would mean that the application was filed within the prescribed 30 days period following service of the Notice of appeal on the Applicant.

14. As a consequence, the Notice of appeal having been filed and served outside the period specified by the rules, we are satisfied that the Applicant’s motion is warranted. We also take cognisance that the Respondent has failed to undertake any preemptory steps to regularize the appeal prior to the filing and determination of this motion.

15. Accordingly, the Notice of motion dated 6<sup>th</sup> March 2024 is merited and is allowed, with the result that the Notice of Appeal filed on 15<sup>th</sup> December, 2024 and served on 9<sup>th</sup> February 2024 is hereby struck out with costs to the Applicant.

It is so ordered.

**DATED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF JUNE, 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 a True copy of the original

Signed



**DEPUTY REGISTRAR**

