



**Laburnnam Courts Limited v Diamond Trust Bank Limited (Civil Appeal (Application) E358 of 2020) [2025] KECA 1213 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1213 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E358 OF 2020  
J MOHAMMED, FA OCHIENG & AO MUCHELULE, JJA  
JULY 4, 2025**

**BETWEEN**

**LABURNNAM COURTS LIMITED ..... APPELLANT**

**AND**

**DIAMOND TRUST BANK LIMITED ..... RESPONDENT**

*(Being an application to strike out the notice of appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (M. Odero, J.) dated 5th June, 2016 in HCCC No. 139 of 2018)*

**RULING**

1. Before this Court is an application dated 20<sup>th</sup> October 2020, brought by the respondent to the appeal, Diamond Trust Bank Limited. The application is brought under Rules 84 and 87 of the [Court of Appeal Rules](#), 2010 (as amended). The application seeks the following orders:
  - a. That the appeal herein be struck out.
  - b. That the costs of this application and the appeal be provided for.
2. The application is premised on several grounds, primarily anchored on procedural non-compliance and statutory timelines, as follows:
  - a. The High Court delivered the ruling from which this appeal arises on 5<sup>th</sup> June 2020. The appellant lodged a notice of appeal against this ruling on 20<sup>th</sup> July 2020, well beyond the 14 days provided for under the law. The applicant contends that the application to strike out the notice of appeal is based on it having been filed and served out of time.
  - b. Subsequently, the appellant filed the record of appeal on 1<sup>st</sup> October 2020 and served it on the respondent on 8<sup>th</sup> October 2020.



- c. The respondent asserts that the appellant intentionally failed and/or neglected to attach documents that should have been part of the record of appeal, as required by law. This makes the record of appeal incomplete and, in the applicant's view, not a valid appeal.
  - d. Specific examples of allegedly missing documents from the record of appeal include:
    - i. Annexures to the application dated 8<sup>th</sup> November 2017 (Item No. 5 in the record of appeal). This application in *Civil Case No. 451 of 2017* sought an injunction against the bank concerning property L.R No.209/1063.
    - ii. Annexures to the application dated 6<sup>th</sup> April 2018 (Item No. 12 in the record of appeal).
    - iii. The bank's application dated 12<sup>th</sup> April 2018, which is referenced in the replying affidavit dated 28<sup>th</sup> June 2018 (Item No. 15 in the record of appeal).
    - iv. Two annexures ("TU-1" and "TU-2") referenced in the further replying affidavit dated 1<sup>st</sup> November 2018 (Item No. 19 in the record of appeal).
  - e. Furthermore, the respondent argues that the appellant attached documents that should not have been part of the record of appeal. An example given is the letter dated 10<sup>th</sup> May 2018 (Item No.14 on the record of appeal), which was allegedly not part of the court proceedings and is only intended to "taint the Honourable Court's mind".
  - f. The law permits striking out a notice or appeal if no appeal lies or if an essential step has not been taken within the prescribed time. The respondent contends that the appellant has failed to adhere to the required contents of a record of appeal, missing an essential step required for lodging appeals.
  - g. The respondent believes that the appellant's actions are an attempt to interfere with the court's discretion by failing to provide necessary documents and including irrelevant ones, thus limiting the court's ability to make an informed decision.
6. During the hearing of the application on 24<sup>th</sup> February 2025, Mr. Kisinga appeared for the respondent. He informed the court that the application was unopposed, as the appellant had neither filed written submissions nor appeared to contest the application. Given the lack of opposition, Mr. Kisinga relied on the supporting affidavit.
  7. We have carefully considered the application, the supporting affidavit thereof, and the law. The issues for determination are: whether the notice of appeal was filed and served out of time; and whether the record of appeal is fatally defective.
  8. The respondent's grounds for seeking the striking out of the appeal are primarily twofold, as articulated in the supporting affidavit and by counsel during the hearing: firstly, that the notice of appeal was filed and served out of time; and secondly, that the record of appeal filed by the appellant is deficient, lacking essential documents and including irrelevant ones, contrary to the Court's Rules.
  9. These omissions and inclusions are presented as a failure to adhere to the required contents of a record of appeal and thus a failure to take an essential step.
  10. Rule 77 of the Court of Appeal Rules provides that:
    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.
3. Each notice of appeal under sub-rule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall—
  - a. specify the part complained of;
  - b. the address for service of the appellant; and
  - c. the names and addresses of the persons intended to be served with copies of the notice.
11. The respondent alleged, and it remains uncontroverted, that the notice of appeal was lodged more than a month after the ruling; as the impugned ruling was delivered on 5<sup>th</sup> June 2020, whereas the notice was filed on 20<sup>th</sup> July 2020. The respondent contended that no extension of time under Rule 4 of the [Court of Appeal Rules](#) had been sought or granted.
12. Rule 79(1) of the [Court of Appeal Rules](#) provides that:

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:

Provided that the Court may, on application which may be made *ex parte*, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.
13. The respondent contended that the notice of appeal was not served upon them within the stipulated timelines.
14. Furthermore, Rule 86 empowers the court to strike out a notice or record of appeal:

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.
15. The respondent detailed the particulars of the defects in the record of appeal in the supporting affidavit, including the missing and improperly included documents. These assertions go to the root of the appeal.
16. Rule 89 of the [Court of Appeal Rules](#) is couched in mandatory terms, requiring the inclusion of specific documents crucial for the proper hearing and determination of an appeal. The rule provides that:



1. For the purposes of an appeal from a decision of a superior court in exercise of its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—
  - a. an index of the documents in the record with the numbers of the pages at which they appear;
  - b. a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by rule 79, that respondent's last known address and proof of service on him or her of the notice of appeal;
  - c. the pleadings;
  - d. the trial judge's notes of the hearing;
  - e. the transcript of any shorthand notes taken at the trial;
  - f. the affidavits read and documents put in evidence at the hearing or, if such documents are not in the English language, certified translations thereof;
  - g. the judgment or order;
  - h. the certified decree or order;
  - i. the order, if any, giving leave to appeal;
  - j. the notice of appeal; and
  - k. such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

Provided that the copies referred to in paragraphs (d), (e), and subpara (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.

2. For the purposes of an appeal from a decision of superior court in exercise of its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and the following documents relating to the appeal to the first appellate court—
  - a. the order, if any, giving leave to appeal;
  - b. the memorandum of appeal;
  - c. the record of proceedings; and
  - d. the certified decree or order.
3. A judge or registrar of the superior court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made informally.
4. The documents specified in sub-rule (1) shall be bound in the order in which they are set out and documents produced in evidence shall be put in order of the dates they bear or, where they are undated, the dates when they are believed to have been made, without regard to the



order in which they were produced in evidence: Provided that an affidavit filed in support of a chamber summons or notice of motion shall be bound immediately following the summons or notice, as the case may be.

5. Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 22 to appear on the appellant's behalf.
17. It is trite that pleadings form the foundation of the suit and are indispensable for understanding the context and issues that were raised before the trial court, and are now the subject of appeal. Therefore, it was essential for the appellant to include all the documents referred to by the trial court, as they are fundamental to the appeal process.
18. The rules of this Court set out clear timelines and requirements for the prosecution of appeals. Failure to comply with these rules, particularly concerning the timely filing of the notice of appeal and the preparation of a proper record of appeal, can be fatal to an appeal. The lack of opposition implies that the facts and grounds presented by the applicant are conceded or cannot be effectively challenged.
19. In the case of *Law Society of Kenya v Centre for Human Rights & Democracy & Others*, Petition 14 of 2013, the court emphasized on the mandatory nature of procedural rules; while in *Bwana Mohamed Bwana v Silvano Buko Bonayo & Others* [2015] eKLR, the court noted that the absence of essential documents renders an appeal incompetent.
20. While this Court has discretion in determining whether to strike out an appeal for non-compliance, this discretion must be exercised judiciously, considering the extent and impact of the defects. In the present case, the alleged omissions and inclusions are significant. The appellant also failed to follow the procedure on how to introduce new documents on appeal, and the option of filing a supplementary record to include the missing documents.
21. We note that this Court in *Tome & Another v Attorney General & 2 Others* [2021] KECA 150 (KLR) stated that:

“It is now a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out an appeal is discretionary and is exercised based on the peculiar circumstances of each case.”
22. However, based on the unchallenged evidence and grounds presented by the respondent, we are satisfied that the appeal process initiated by the appellant is defective due to procedural irregularities and delay, warranting the striking out of the appeal.
23. For the reasons set out above, the application to strike out the appeal is merited and is hereby allowed.
24. As costs follow the event, the costs of this application shall be borne by the appellant.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY, 2025.**

**JAMILA MOHAMMED**

**JUDGE OF APPEAL**

**F. OCHIENG**

**JUDGE OF APPEAL**

**A. O. MUCHELULE**



**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

