



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngarachu v Brookside Dairy Limited (Civil Application
E056 of 2023) [2024] KECA 162 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 162 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E056 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 23, 2024**

BETWEEN

EDWARD JOSEPH NGARACHU APPLICANT

AND

BROOKSIDE DAIRY LIMITED RESPONDENT

*(Being an application to strike out the Notice of Appeal from the
Judgment and Decree of the High Court of Kenya at Mombasa (P. J. O.
Otieno, J.) delivered on 26th February 2021 in H.C.C.C No. 3 of 2019)*

RULING

1. Before this Court is the applicant's Notice of Motion dated 4th July 2023 in which Edward Joseph Ngarachu prays that the respondent's notice of appeal dated 12th March 2021 be struck out on the grounds that the respondent, Brookside Dairy Limited, failed to lodge their memorandum and record of appeal within the prescribed period of 60 days from the date of filing the notice of appeal as required by rule 82 of the *Court of Appeal Rules*, 2010 (now rule 84 of the 2022 Rules); and that there has been unexplained inordinate delay on the part of the respondent in filing the memorandum and record of appeal. He urges us to strike out the respondent's notice of appeal with costs.
2. The applicant's Motion is supported by his annexed affidavit sworn on 4th July 2023 essentially deposing to the grounds set out on the face of the Motion. According to the applicant, it has been over two years since the impugned notice of appeal was lodged, and the respondent has taken no positive steps to file its record of appeal.
3. Opposing the Motion, the respondent filed its replying affidavit sworn on 27th September 2023 by Jacqueline Hinga, its Group Legal Officer. According to the deponent, the impugned judgment was delivered on 26th February 2021; that the respondent lodged its notice of appeal 7 days out of time on 19th March 2021; that they successfully applied for and obtained orders for extension of time to lodge



the notice on 28th October 2021; that counsel for the respondent applied for copies of the proceedings on 31st March 2021, but that the same are yet to be supplied by the trial court; that time stopped running from the date of the application aforesaid; and that, until the proceedings are supplied and the requisite certificate of delay issued as requested, the respondent cannot be faulted for inability to file the record of appeal. Annexed to Ms. Hinga’s replying affidavit is a bundle of 9 letters and email correspondence addressed to the Deputy Registrar of the trial court and copied to counsel for the applicant during the period between 12th March 2021 and 11th August 2023 in which counsel actively followed-up their application dated 31st March 2021 for copies of the proceedings to enable them file the record of appeal.

4. In addition to the foregoing, the respondent urges us to find that the applicant’s Motion offends the proviso to rule 86 of the Court of Appeal Rules, 2022 the same having been filed over two-and-a-half years from the date on which the record ought to have been filed. Rule 86 of this Court’s Rules and the proviso thereto read:

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 proceed 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.

5. We agree with the respondent. The applicant’s Motion is way out of time and is, on that score, incompetent. In any event, the respondent’s delay in filing its record of appeal is attributable to circumstances beyond its control. Having carefully considered the applicant’s Motion, the affidavits in support thereof and in reply thereto, and the Rules of this Court, we reach the inescapable conclusion that the Motion is incompetent and is hereby struck out with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF FEBRUARY, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

