



REPUBLIC OF KENYA



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

**Trans Nzoia Securities Ltd v Stuadae & another (Civil Application  
E040 of 2022) [2024] KECA 109 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 109 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E040 OF 2022  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**TRANS NZOIA SECURITIES LTD ..... APPLICANT**

**AND**

**ANN MUTHONI STUADTE ..... 1<sup>ST</sup> RESPONDENT**

**LEGAL REPRESENTATIVES OF THE ESTATE OF GEORGE BARBOUR  
(DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

*(An application for an order to strike out the Record of Appeal lodged on  
21st April, 2022 as well as the Notice of Appeal lodged on 9th February, 2022  
against the ruling of the High Court of Kenya at Mombasa (Njoki Mwangi,  
J.) delivered on 28th January 2022 in Mombasa HCCC No. E47 of 2021)*

**RULING**

1. By Notice of Motion dated 6<sup>th</sup> May 2022 brought pursuant to section 3A and 3B of the [Appellate Jurisdictions Act](#), rule 1(2), rules 42, 83 and 84 of the [Court of Appeal Rules](#), the applicant, Trans Nzoia Securities Ltd, seeks orders that the
2. Notice of appeal dated and lodged on February 9, 2022 and the Record of appeal dated and lodged in Court on April 21, 2022 against an order of the High Court in Mombasa HCCC Case No. E47 of 2021 filed by the 1<sup>st</sup> respondent be struck out. The motion is brought pursuant to the grounds on its face and supported by an affidavit of Andrew Barbour, a Shareholder and Director of the applicant, sworn on 6<sup>th</sup> May 2022, and in which he contends that, on February 16, 2022, the 1<sup>st</sup> respondent served the applicant with a Notice of appeal dated February 9, 2022 seeking to appeal against the High Court's Order of January 28, 2022; that no request was made for the certified typed proceedings, and neither was he served with a copy of a letter bespeaking a request for the proceedings within the prescribed period of 30 days; that the time for filing an appeal or record of appeal from the date Notice of appeal



was lodged lapsed on April 10, 2022, which was contrary to the requirements of rule 82 of the *Court of Appeal Rules, 2010*; that, by reason of rule 84, the 1<sup>st</sup> respondent is deemed to have withdrawn the Notice of appeal after failing to file the appeal within the requisite 60 days from the date the Notice of appeal was lodged.

3. It was further deponed that, though the Record of appeal was filed on 21<sup>st</sup> April 2022 and served on the applicant on April 27, 2022, this was outside the prescribed timeframe for filing and serving a Record of appeal; that, therefore, no appeal lies to this Court against the Order of the High Court because the appeal as filed is incompetent and a nullity, having been filed out of the stipulated period without leave of the Court; and that this was a fundamental misstep on the 1<sup>st</sup> respondent's part which has rendered the appeal incompetent.
4. It was finally deponed that the application has been timeously brought within 30 days of service of the Record of appeal, and that it is just and fair that the orders sought are granted to avert prejudice to the applicant and obviate waste of judicial resources and time in hearing the appeal.
5. When the application came up for hearing on a virtual platform, Mr. Litoro, learned counsel for the applicant, relied on their written submissions and submitted that the 1<sup>st</sup> respondent failed to request for typed proceedings and/or notify the applicant that a request had been made within 30 days from the date of filing the Notice of appeal; that the time for filing an appeal or record of appeal lapsed on April 10, 2022 and that, therefore, the time within which to serve the record of appeal lapsed on April 18, 2022 without service of any such appeal on the applicant or his advocates; and that, by the time the record of appeal was lodged and served on 21<sup>st</sup> and April 27, 2022, the 60 days period had already lapsed.
6. Counsel further submitted that, in the event the orders sought are not granted, the applicant will suffer grave prejudice as it will be exposed to substantial and irreparable loss of over an amount of Kshs. 25,500,000, the subject matter of the suit in the High Court, which amount the 1<sup>st</sup> respondent was ordered to deposit in court within 45 days from the date of the impugned Order, as security for the decree in the suit.
7. Learned counsel for the 2<sup>nd</sup> respondent, Mr. Obonyo, submitted that the 2<sup>nd</sup> respondent did not wish to participate in the application and thus left the matter for the Court's determination.
8. The 1<sup>st</sup> respondent did not file a replying affidavit. However, in a rebuttal to the motion, learned counsel for the 1<sup>st</sup> respondent, Mr. Mochere, submitted that the Notice of appeal was filed on 9<sup>th</sup> February 2022 and served upon the applicant on 16<sup>th</sup> February 2022; that this comprised 11 days, which should be excluded in accordance with section 57 of the *Interpretation and General Provisions Act*. Counsel submitted further that, for this reason, the appeal should not be struck out; that this Court has inherent power to extend time to dispense justice; that, in this particular case, the 1<sup>st</sup> respondent has approached the Court with a legitimate expectation to have the appeal heard and determined; that the applicant will not suffer any prejudice were this application to be dismissed; and that, on the contrary, dismissal will allow the parties to ventilate their grievances against the High Court decision.
9. As a brief background to the application, the applicant filed a suit against the respondents in the High Court. Simultaneously with the suit, the applicant filed an application under a certificate of urgency seeking, inter alia, orders that, pending the hearing and determination of the suit, the respondents be ordered to deposit in Court within 45 days from the date of this order the sum of Kshs. 25,500,000 to satisfy the resultant decree. In an order dated 28<sup>th</sup> January 2022, the trial judge allowed the application as prayed and ordered the 1<sup>st</sup> respondent to deposit the sum of Kshs. 25,500,000 in court.



10. Dissatisfied with the Order, the 1<sup>st</sup> respondent filed a Notice and Record of appeal in this Court. Hence this application, which seeks to strike out the Record of appeal for the reason that it is incompetent on account of having been filed out of the prescribed time. Rule 84 of the 2010 Rules of this Court deals with applications to strike out the notice and or the record of appeal. It states:

“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 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.

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. Beginning with the notice of appeal, rule 75 requires that it be filed within 14 days after the impugned decision has been rendered by the lower court. Thereafter, rule 77 requires that the notice be served on the respondent within 7 days. The appellant is also required to serve a copy of the request for certified proceedings on the respondent within 30 days from the date of the decision. The ruling was rendered on January 28, 2022, and the 1<sup>st</sup> respondent filed the Notice on February 9, 2022. Computation of the time between the date of the ruling and the date the Notice was filed shows that it was filed within the stipulated timeframe.

12. The applicant’s further complaint is that it was not served with a copy of the request bespeaking the proceedings contrary to the requirements of rule 82 which provides:

“

“(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –

- a. a memorandum of appeal, in quadruplicate;
- b. the record of appeal, in quadruplicate;
- 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 of 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.”

Without having served the letter of request on the applicant, the 1<sup>st</sup> respondent cannot invoke the proviso to rule 82 to have the time for preparation and delivery of the typed proceedings excluded from the time taken to file the record. As a consequence, the 1<sup>st</sup> respondent would have to file the record of appeal 60 days after the notice of appeal was filed, which should have been on April 10, 2022 while service on the applicant would have to be effected by 18<sup>th</sup> April 2022. Instead, the 1<sup>st</sup> respondent filed the record on April 21, 2022 and served it on the applicant on 27<sup>th</sup> April 2022, which was after the period for lodging and service of the record had lapsed.



13. However, counsel for the 1<sup>st</sup> respondent argued that, if the days were computed taking into account Sundays, Christmas, Good Friday and public holidays as specified under order 50 rule 2 of the *Civil Procedure Rules*, and the day when the record was to have been filed is excluded as allowed in section 57 of the *Interpretation and General Provisions Act*, then, without question, the record could be considered to have been filed within the prescribed period of 60 days, and that it ought not to be struck out.
14. But rule 3 is pertinent. It is concerned with the computation of time under the Court’s rules, and counsel need not have gone further to ascertain how time for the purposes of filing an appeal in this Court should be computed. That provision provides:

“Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions—

- a. a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;
- b. if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;
- c. where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
- d. where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; or
- e. unless the Court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.”

15. This Court, while considering the provisions of rule 3 of this Court Rules in the case of *Africa Oil Turkana Limited & 2 others vs. Edward Kings Onyancha Maina & 3 others* [2016] eKLR, held that:

“On the question that the applicants miscalculated the computation of the period for filing of the Notice of Appeal by including Saturdays and Sundays, rule 3 of this Court’s rules only exclude Sundays and public holidays, and only when they fall on the last day of the stipulated period.”

16. In the case of *KCB Bank Kenya Limited vs. Mwandoro* (Civil Application E044 of 2021) [2023] KECA 260 [KLR], this Court observed:

“It is clear from the foregoing provision that Sundays and public holidays are only “excluded days” where the last day for doing any act or thing falls on those days. In other words, the fact that there are Sundays and public holidays between the happening of the event and the last day does not constitute those days “excluded days”. There is however a rider that where the period prescribed does not exceed six days, the excluded days, i.e. Sundays and public holidays, are not to be reckoned in the computation of time.”



17. In other words, for the purposes of these rules, Sundays and public holidays do not constitute “excluded days” unless the last day for doing any act or thing falls on those days, or unless the Court otherwise directs that the period of the Christmas vacation shall not be reckoned in the computation of time.
18. Having computed the period for filing of the record, and taking into account the strictures of rule 3 as submitted by the applicant, the record of appeal ought to have been filed on 10<sup>th</sup> April 2022, which was a Sunday. In accordance with rule 3, that Sunday ought to be excluded so that time would have lapsed on 11<sup>th</sup> April 2022. Needless to say, it was filed on 21<sup>st</sup> April 2022, which was 10 days after the prescribed period lapsed. It therefore cannot be disputed that the record was filed out of time.
19. That being the position, we revert to rule 84 to consider whether the application to strike out in and of itself complied with the proviso to rule 84, which provides 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...” The record was served on 27<sup>th</sup> April 2022, and this application was filed on 6<sup>th</sup> May 2022. A computation of the date of service and the date of filing of the application would lead us to conclude that it complied with the proviso which has rendered the application to be competent.
20. Having established that the record of appeal lodged on 21<sup>st</sup> April 2021 was filed out of time, and that the application to strike out satisfied the requirements of rule 84, the applicant’s notice of motion dated 6<sup>th</sup> May 2022 is merited with the result that the record of appeal lodged on 21<sup>st</sup> April 2021 is hereby struck out with costs to the applicant.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> 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**

