



**Ali v Grain Industries Limited (Civil Application E066 of 2023)
[2024] KECA 400 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 400 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E066 OF 2023
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA
APRIL 26, 2024**

BETWEEN

ISMAIL AHMED ALI APPLICANT

AND

GRAIN INDUSTRIES LIMITED RESPONDENT

(Being an Application to strike out the Memorandum of Appeal dated 9th January 2023 and the undated Record of Appeal in Mombasa Civil Appeal No. E043 of 2023 - Grain Industries Limited v Ismail Ahmed Ali, lodged on 21st March 2023 against the Judgment of Byram Ongaya, J. delivered on 13th May 2022 in ELRC No. 3 of 2020)

RULING

1. Ismail Ahmed Ali, the applicant, moved this Court by way of a notice of motion dated July 29, 2023 seeking orders to strike out the Memorandum and the Record of Appeal in Mombasa Civil Appeal No. E 043 of 2023 - *Grain Industries Limited v Ismail Ahmed Ali*. The Motion was supported by an affidavit sworn by the applicant on July 29, 2023.
2. It was averred that judgement in the Employment and Labour Relations Court (ELRC) case was delivered on May 13, 2022; that the notice of appeal against the judgment was lodged on May 27, 2022, but was served out of time on 9th June 2022; that the applicant served the respondent with a Notice of Address for Service on June 14, 2022; that, even though the respondent purported to apply for copies of the judgement and certified proceedings *vide* a letter dated May 26, 2022, that letter was neither copied nor served on the applicant or his advocate; that, in the circumstances, the certificate of delay dated March 8, 2023 obtained by the respondent indicating that the proceedings were prepared from May 26, 2022 to March 2, 2023, and that the said period ought to be excluded from the computation of time within which to file the Memorandum and Record of Appeal, was of no use; that, on June 30, 2023, the respondent served the applicant with the Record of Appeal stamped as lodged in court on



- 21st March 2023; that the memorandum and record of appeal ought to have been served by March 28, 2023, but was served 92 days out of time.
3. It was the applicant's position that the period between the date of the lodging of the notice of appeal on May 27, 2022 to the date of lodging of the Memorandum and Record of Appeal on March 21, 2023 was 10 months; and that, since the Memorandum and Record of Appeal were due for filing 60 days from the date of the Notice of Appeal, which ought to have been by July 27, 2022, there was a delay of 8 months in filing the Memorandum and Record of Appeal.
 4. The applicant faulted the respondent for not taking any step to regularize the record after filing the Notice of Appeal and lamented that the unexplained inordinate delay in filing and serving the Memorandum and Record of Appeal was prejudicial to the applicant. In his view, it was only fair, just and in the interest of expeditious administration of justice that this application be allowed.
 5. The Motion was opposed by a replying affidavit sworn by Mohammed Nabil, the respondent's legal officer, on August 11, 2023 in which it was averred that the delay in complying with the Rules of this Court was due to the fact that there was an application for stay of execution pending before the court below, which was not finalized until July 13, 2023; that the non-compliance pointed out by the applicant are not fatal since they were as a result of an oversight by the respondent's advocate; that the omissions were a curable technicality that could be dealt with by the overriding objective of the Court under article 159 of the *Constitution*; that such omissions ought not to be visited on the respondent; that, under the current constitutional dispensation, substantive justice ought to be administered without regard to technicalities of procedure which may be cured by an award of costs; that, since the respondent had complied with all the other requirements, it ought not to be construed as having no interest in the prosecution of the main appeal; and that, since the respondent had deposited the sum of Kshs 3,438,492 as security for due performance, the applicant stood to suffer no prejudice even if the appeal, which in the deponent's view was arguable, did not succeed.
 6. The respondent further averred that the applicant ought not to complain about want of service of the Memorandum and Record of Appeal since he did not comply with rule 81 by providing the Notice of Address for Service as required under rule 92 of the Rules. In the respondent's view, striking out of the appeal will result in further delays in finalizing the dispute herein as it is likely to go back to the drawing board by seeking leave to file the appeal out of time.
 7. In a further affidavit sworn by the respondent's advocate, Saeed Ali Saeed, on 11th September 2023, it was averred that the respondent lodged both the Notice of Appeal within time and the letter requesting for proceedings with the court below on May 27, 2022, within the prescribed period; that proceedings were supplied to the respondent on March 2, 2023, and that the Certificate of Delay certifying that a total of 180 days, from May 26, 2022 to March 2, 2023, was required to prepare and deliver the typed proceedings was issued on February 8, 2023; that the 60 days prescribed for filing the Record of Appeal started running on August 2, 2023 when the respondent was supplied with the proceedings in light of the excluded period; that, therefore, the Record of Appeal lodged on March 21, 2023 was filed within time; and that, in any case, this Court has discretion to excuse the failure to serve the letter requesting for proceedings in well deserving cases depending on the peculiar circumstances of the case which, in his view, the respondent had demonstrated in his replying affidavit.
 8. We heard the Motion on this Court's GoTo virtual platform on November 29, 2023 during which learned counsel Mr. Njenga appeared for the applicant while Mr. Masila appeared for the respondent. Both counsel relied on their written submissions.
 9. The submissions filed in support of the application were dated September 4, 2023 and were made by the firm of M/s. Jengo Associates. It was submitted that the respondent did not dispute that it filed



- a Notice of Appeal on May 27, 2022 and served the same on June 9, 2022; that that the respondent did not dispute that it never served the applicant with the letter requesting for proceedings; that it was not disputed that the Record of Appeal was filed 8 months late and served on the applicant 97 days after filing; and that there was unexplained inordinate delay, and yet no leave of the Court was sought to regularize the process.
10. In support of the submissions, the applicant relied on article 159(2) (d) of the *Constitution* and cited the case of *Taib & another v Wekesa & another (Suing as the Legal Representative of the Estate of George Eliam Wekesa)* Civil Application No. 41 of 2019 (2022) KECA 444 (KLR), highlighting the principle that the issue as to whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the court.
 11. The applicant also relied on the case of *Mistry Premji Ganji (Investment) Limited v Kenya National Highways Authority* (2019) eKLR, which underscored the necessity of serving the letter requesting for the proceedings. It was contended that, in the replying affidavit, the respondent did not deny its advocates stamp on the face of the Notice of the Address for Service.
 12. M/s. Masila & Saeed Advocates filed written submissions dated 14th September 2023 on behalf of the respondent, and in which the respondent reiterated the contents of the replying affidavit contending that this Court has unfettered discretion under rule 1(2) of this *Court's Rules*, sections 3A and 3B of the *Appellate Jurisdiction Act*, and article 159 of the *Constitution*, and on the authority of which the Court should excuse failure to serve rather than dismiss the appeal.
 13. According to the respondent, under rule 82 of the *Court's Rules*, the period from May 27, 2022 to February 8, 2023 when the proceedings were supplied would ordinarily be excluded in computation of time. To the respondent, what the Court should determine is whether the period in question should be excluded where the respondent complied with all other steps for filing the appeal but, for some reason or other, failed and/or forgot to serve the letter requesting for proceedings. The respondent reiterated that the failure was an inadvertent mistake of counsel, which ought not to be visited upon the client. It is also submitted that the applicant has not demonstrated that he will suffer any prejudice if the appeal proceeds for hearing on merits.
 14. The respondent relied on the case of *Taib & another v Wekesa & Another (Suing as the Legal Representative of the Estate of George Eliam Wekesa)* Civil Application No. 41 of 2019 (2022) KECA 444 (KLR), submitting that the court has the discretion to invoke the overriding principle in well deserving cases. He also cited the case of *Karl Wehner Claasen v Commissioner of Lands & 4 others* [2017] eKLR, where discretion was exercised to sustain an appeal despite failure to serve the letter requesting for proceedings; *Aron Kibiwot Chepris v Florence Chemonges* [2018] eKLR where it was held that non-service was a mere technicality; *Kenya Human Rights Commission v Nubian Rights Forum & 17 others* [2021] eKLR where a decision of the single Judge extending time for service was upheld by the full bench; *Samuel Kuria v Mbugua Kimani* [1997] eKLR where the single judge extended time within which to file the appeal; *Mavloni Co. Ltd v Peter Gicheru Mungai* [2013] eKLR where time was extended for the applicant who was in similar circumstances as the respondent herein; and *Ponangipalli Venkata Ramana Rao & Another v Dipit Premchand Chheda & 2 others* [2021] eKLR where a mistake by the advocate was found to be a reason for enlargement of time.
 15. The respondent urged us to sustain its appeal and dismiss this application.
 16. We have considered the Motion as well as the submissions made on behalf of the parties. Rule 77(1) & (2) of the *Rules* of this Court 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. Notice of appeal.
 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.
17. Rule 79 (1) of the Rules 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:
- 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.
18. In this case, it is not alleged that the Notice of Appeal was not filed within the prescribed fourteen (14) days of the decision sought to be appealed from. What is contended, a contention which the respondent concedes, is that the said Notice was not served within the prescribed period of 7 days.
19. Rule 84 (1) and (2) of the Rules provides that:
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.
20. It is clear that an appeal is required to be filed within 60 days of lodging of the Notice of Appeal. A party who fails to do so can only validate the appeal by seeking leave of the Court by way of extension of time under rule 4 of the Rules. The only exception is where the intending appellant had, within thirty days after the date of the decision against which it is desired to appeal, applied for a copy of the proceedings and copied the letter requesting for the proceedings to the intended respondent. In that event, in computing the time within which the appeal is to be instituted, the period certified by the registrar of the lower court as having been required for the preparation and delivery to the appellant of



such copy, is to be excluded. As was held by this Court in *Joseph Ngwele Nduswa v Ahmed Abubakar & another* Civil Appeal No. 287 of 1997 (UR)

“In the absence of a copy of the letter bespeaking copies of proceedings and judgement having been sent to the respondent to appeal within 30 days, the benefit of the proviso to rule 81(1) of the Court of Appeal Rules does not inure to the appellant.”

See also *Kenya Ironmongers Ltd. v Muhoroni Sugar Company Ltd.* Civil Application No. Nai. 148 of 2000 (UR).

21. In this case, the respondent does not dispute the allegation that it did not send a copy of the request for proceedings to the applicant. It takes the view that, in the circumstances of this case, that omission should not be fatal to the appeal.

22. This Court has made pronouncements on the noncompliance with the timelines prescribed under the Court of Appeal Rules. In that regard, we adopt the position taken by the Court in *Daniel Nkirimpa Monirei v Sayialele ole Koilel & 4 others* [2016] eKLR wherein it stated that:

“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet, as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77 (1) of the *Court of Appeal Rules* is couched in mandatory terms.”

23. In *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR, it was appreciated that the strict timelines:

“...is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.”

24. It is therefore clear that both the Notice of Appeal and the Record of Appeal were served out of time. The respondent’s response to the application in light of failure to take any remedial step cannot cure the omission. Its inaction is therefore inexcusable especially when this Court has consistently held that its rules of procedures are not for cosmetic value, but meant to aid the Court in exercise of its mandate under the Rules in not only an orderly but also in a predictable manner. [See *The Board of Trustees of Local Authorities Provident Fund & another v Kenya County Government Workers Union & 67 others* Nrb Civil Application No. E248 of 2020].

25. Rules 85 and 86 of the Rules read as follows:

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 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.”

26. It is trite that whether or not a Record of Appeal has been filed on time goes to the jurisdiction of the Court. In *Patrick Kiruja Kitbinji v Victor Mugira Marete* [2015] eKLR, this Court stated that whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the Court. Second, that the Court only has jurisdiction to entertain appeals filed within the requisite time and or appeals filed out of time, but with leave of the Court.
27. The respondent’s attempts to explain the reasons for the omission would only be relevant in an application for extension of time, but cannot cure the incompetence in issue. As was held in *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 Others*, (supra), any appeal filed out of time without leave is for striking out.
28. In conclusion, we find that the memorandum of appeal and record of appeal in Mombasa Civil Appeal No. E043 of 2023 is fatally defective. Accordingly, the notice of motion dated July 29, 2023 is hereby allowed and Mombasa Civil Appeal No. E043 of 2023 - *Grain Industries Limited v Ismail Ahmed Ali* is hereby struck out with costs to the applicant.
29. Orders accordingly

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

