Hindocha v Chena (Civil Appeal (Application) E015 of 2022)
[2024] KECA 819 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KECA 819 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL (APPLICATION) E015 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JULY 12, 2024

BETWEEN

PRADEEP HARISH HINDOCHA ..... APPLICANT

AND

CATHERINE MATEI CHENA ..... RESPONDENT

(An application for striking out an appeal against the Judgment and Decree of the High Court at Kitale (H.K. Chemitei, J.) delivered and dated 5th May, 2020 in P&A Cause No. 175 of 2008)

RULING

1. The applicant, Pradeep Harish Hindocha, has moved the Court through the notice of motion dated 21st September 2023 brought under rule 86 of the Court of Appeal Rules seeking the striking out of the appeal of the respondent, Catherine Matei Chena. From the affidavit sworn on the date of the application by the applicant's counsel, Peter Kiarie Ndarwa, the application is premised on the ground that while the notice of appeal is in respect to the ruling delivered 5th May 2020, the record of appeal relates to the judgment dated 11th June 2019. Further, that the record of appeal as filed is incomplete and has omitted certain vital documents including the impugned ruling, the replying affidavit and the summons dated 23rd December 2019. Additionally, the applicant's case is that he was not served with the record of appeal and only came to learn about it sometime in September 2023.

2. The respondent's counsel, Victor Kipkemboi, swore a replying affidavit on 28th February 2024 in opposition to the application. Therein, counsel averred that due to the changes in the law firm's management, counsel for the respondent erroneously filed a draft memorandum of appeal which referred to the wrong judgment. He deposed that the mistake was solely and genuinely of counsel and should not be visited upon the litigant. Counsel further opposes the application on the ground that the instant application was brought over 30 days after the filing and service of the notice of appeal, hence the same should be struck out.

3. When the matter came for hearing on 6th March 2024, learned counsel Mr. Kiarie appeared for the applicant while learned counsel

Mr. Kipkemboi appeared for the respondent. They made brief oral highlights of the filed submissions.

4. Through the submissions dated 8th January 2024, Mr. Kiarie reiterated the grounds upon which the application is based and urged that the record of appeal as filed was incompetent as it lacked several documents which the rules of the Court required to be included in the record. Counsel submitted that whereas the record of appeal is against a judgment dated 11th June 2019, there was no notice of appeal concerning the said judgment as the existing notice of appeal concerned a ruling dated 5th May 2020. According to counsel, the appeal is incompetent and is for striking out with costs as no leave was sought to file an appeal against the order. Counsel relied on *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators- Kenya Branch* [2019] KESC 11 (KLR) in support of the proposition that the *Civil Procedure Act* being an Act of general practice in civil matters cannot override any specific limitations by any other Act of Parliament limiting the right of appeal. Counsel adverted to *Bernard Gichobi Njira v Kanini Njira Kathendu & another* (Nyeri Civil Appeal No 24 of 2015) to advance the view that where no right of appeal lies, the leave of the appellate court must be sought before an appeal is admitted. Lastly, counsel referred to *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015], Nairobi Petition No 15 of 2014, to argue that an appeal is rendered incompetent once requisite documents are left out or if the appeal is filed in violation of the law. Counsel reiterated that they were not served with the record of appeal and urged for the striking out of the appeal with costs.

5. Mr. Kipkemboi relied on submissions dated 28th February 2024 and urged that this application should be dismissed because it was filed in breach of rule 86 of the *Court of Appeal Rules* which requires that an application for striking out a notice of appeal or appeal should be filed within 30 days from the date of service. In support of this argument, counsel relied on *Patriotic Guards Ltd v Safaricom Ltd* [2021] eKLR. Counsel submitted that since the errors and omissions in regard to the record of appeal are attributable to the respondent's previous counsel, they should be excused by the Court and not visited upon the respondent. Counsel relied on *D. Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority* [2017] eKLR in support of the proposition that the Court ought to overlook the omissions and render substantive justice to the respondent. In conclusion, counsel urged for the dismissal of the application.

6. As the application before us is one for striking out a record of appeal, the relevant provision is rule 86 of the *Court of Appeal Rules* which states that:

> " 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." (Emphasis ours)

7. From the wordings of the stated provision, it is clear that an application such as the one before us must be filed within 30 days from the date of service of the notice of appeal or the appeal that is sought to be struck out. Time therefore starts to run from the date of service of the notice of appeal or the

appeal. In the present application, the applicant contends that he was not served with the record of appeal and that he only got to learn of the filing of the record of appeal sometime in September 2023 when an enquiry was made at the Court's registry. Noting that the present application was filed on 21st September 2023, we have no basis for doubting that the application was brought within 30 days from the date the applicant learnt of the existence of the record of appeal. This conclusion is supported by the concession by the respondent that a draft record of appeal was erroneously served although the date of the alleged service is not disclosed. Indeed, the respondent's attempt to disclose the date of service is when reference is made to the year 2022 and is focused on the service of the notice of appeal.

8. Specific to the service of the record of appeal is rule 92(1) of the *Court of Appeal Rules* which provides that:

> " The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81."

9. In *Kaduda v Douglas* [1981] eKLR, the Court while allowing an application for striking out a record of appeal observed that:

> "The responsibility for effecting service is in each case placed upon the appellant by the relevant Rule. Mr Chalalu for the appellant has taken no steps before today to apply for extensions of time and so regularise these procedural defects."

10. It is clear that rule 92(1) requires service of a record of appeal before it is lodged or within 7 days of being lodged. In this case, there is no doubt that the respondent did not comply with this provision. The question then is what becomes the fate of a record of appeal not served as per rule 92(1). In our view, and as has previously been held in several decisions of this Court, the rule is couched in mandatory terms. An appellant must comply with the provision lest the appeal is rendered incompetent and fall prey to being struck out pursuant to the provisions of rule 86(b). The respondent having not served the applicant with a record of appeal within the requisite period, it follows then that he does have a competent appeal. Furthermore, we note that the respondent did not even attempt to explain the failure to serve, never mind that such explanation would have amounted to nothing without an order extending the period of service. Instead, counsel has entirely blamed the respondent's former advocate. That is not enough. It suffices to alert counsel to the poetic words of this Court in *Martin Kabaya v David Mungania Kiambi* [2015] eKLR that:

> " The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog."

11. Having reached the conclusion that the record of appeal is comatose and cries to be permanently put to rest, we do not deem it necessary to explore the applicant's other grounds that the record of appeal is incompetent for not containing all the requisite documents and for being filed without the leave of the Court.

12. Arising from the foregoing analysis, the only appropriate order is that the respondent's appeal must be struck out. Consequently, the notice of motion dated 21st September 2023 is allowed. There being no reason as to why we should not apply the general rule that costs follow the event, we award the costs of the motion to the applicant.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY 2024

F. OCHIENG

JUDGE OF APPEAL

L. ACHODE

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed

Deputy Registrar