Afrison Export Import Limited & another v Okoiti & 11 others (Civil Appeal (Application) 86 of 2017) [2024] KECA 1155 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1155 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 86 OF 2017

DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

AFRISON EXPORT IMPORT LIMITED .... 1ST APPLICANT

HUELANDS LIMITED .... 2ND APPLICANT

AND

OKIYA OMTATAH OKOITI .... 1ST RESPONDENT

NYAKINA WYCLIFE GISEBE .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT .... 4TH RESPONDENT

CABINET SECRETARY, MINISTRY OF FINANCE .... 5TH RESPONDENT

NATIONAL LAND COMMISSION .... 6TH RESPONDENT

CABINET SECRETARY, MINISTRY OF LLAND, HOUSING AND URBAN DEVELOPMENT .... 7TH RESPONDENT

TELKOM KENYA .... 8TH RESPONDENT

CONTINENTAL CREDIT FINANCE LIMITED (IN LIQUIDATION) .... 9TH RESPONDENT

OFFICIAL RECEIVER AND INERIM LIQUIDATOR .... 10TH RESPONDENT

NAIROBI CITY COUNTY .... 11TH RESPONDENT

RAFIKI ENTERPRISES LIMITED .... 12TH RESPONDENT

(Being an application to dismiss and/or strike out the Notice of Appeal dated 6th December 2016 and the Memorandum of Appeal/Record of Appeal in Civil Appeal No. 86 of 2017 dated 8th February 2017 and lodged in the registry of this Court on 31st March 2017)

RULING

1. Before this Court is a Notice of Motion dated 31st October 2017, which is brought under the provisions of Article 164 of the Constitution, sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and rules 1 (2), 43, 84, 87 (i), (h) & (j) of the Rules of this Court. The applicants seek two orders, namely; that this Court be pleased to dismiss and/or strike out the notice of appeal dated 6th December 2016 and the memorandum of appeal/record of appeal in respect of Civil Appeal No. 86 of 2017 dated 8th February 2017 and lodged on 31st March 2017 by the 1st and 2nd respondents; and that this Court be pleased to award the applicants the costs of the application and the appeal.

2. The background to this application as borne out of the face of the application and the affidavit in support sworn by Francis Mungai Mburu, a director of the 1st and 2nd applicants, is that the applicants filed High Court Civil Case No. 617 of 2012 (OS) against Continental Credit Finance Limited (In Liquidation) (the 9th respondent), the Official Receiver & Interim Liquidator (the 10th respondent), and the Attorney General, (the 3rd respondent), seeking, inter alia, a declaration that the Office of the President was indebted to the applicants to the tune of Kshs.6,450,000,000 and a further sum of Kshs.1,670,270,000 in respect of loss use of several properties belonging to the applicants. The High Court (Mabeya, J.) vide a judgment dated 12th February 2012 awarded the applicants a sum of Kshs.4,048,683,333. A decree reflecting this amount was issued by the Deputy Registrar of the High Court on 20th February 2013.

3. The parties in the suit before the High Court engaged in negotiations which saw the decretal sum reduced to Kshs.2,400,000,000 through a consent order that was made on 8th April 2013. A decree dated 12th April 2013 reflecting the terms of the consent order was subsequently extracted.

4. The applicants further stated that Okiya Omtatah Okoiti (the 1st respondent) and Nyakina Wyclife Gisebe (the 2nd respondent) lodged an appeal before this Court, to wit, Civil Appeal No. 86 of 2017 against the judgment and decree issued by Mabeya, J on 12th February 2013 and the subsequent decree of 20th February 2013, whereas the two were not parties to the suit before the High Court and in essence had no locus standi to institute the appeal. It is further contended that the 1st and 2nd respondents in total disregard of the rules of procedure and law joined seven new respondents in the said appeal who were not parties in the High Court suit and therefore, Civil Appeal No. 86 of 2017 is essentially a fresh suit originated in this Court by the 1st and 2nd respondents.

5. On the competence of the appeal, it is contended that the appeal is against the judgment of 12th February 2013 and the subsequent decree of 20th February 2013 but the said judgment and decree are non-existent and/or not valid in view of the consent order dated 8th April 2013 which varied the judgment dated 12th February 2013. The applicants contend that the appeal before this Court is technically against the consent order of 8th April 2013 and the subsequent decree of 12th April 2013 but no leave for extension of time to file and serve the notice of appeal, memorandum of appeal and record of appeal against the said order was sought and granted, nor was any notice of appeal lodged in court in respect of the said consent order and decree. Therefore, the appeal is incompetent and incurably defective.

6. The applicants aver that this Court does not have jurisdiction to hear the appeal on grounds that no valid notice of appeal was filed by the 1st and 2nd respondents and for this reason together with the fact that the 1st and 2nd respondents were not parties to the suit before the High Court, then this Court should dismiss and/or strike out the notice of appeal dated 6th December 2016 together with the record of appeal with costs to them.

7. The applicants through a further supplementary affidavit sworn by Francis Mburu Mungai aver that although Nambuye, JA vide a ruling and order dated 2nd December 2016 granted leave to the 1st and 2nd respondents to file a notice of appeal out of time, which they filed on 6th December 2016, they did not comply with the second limb of the said order which directed them to proceed according to the law in so far as the filing of the appeal was concerned. They reiterate that the record of appeal dated 8th February 2017 and lodged on 31st March 2017 was lodged out of time and without leave of this Court and therefore the appeal is incompetent and incurably defective and ought to be dismissed and/or struck out with costs.

8. The 1st and 2nd respondents oppose the application through a replying affidavit sworn by Nyakina Wycliffe Gisebe, the 2nd respondent. He averred that by entering into the consent order of 8th April 2013, the parties technically agreed to satisfy the judgment by paying a reduced decretal amount, hence the consent order and the decree did not amount to a new judgment but a satisfaction of the judgment of 12th February 2013 and the decree of 20th February 2013. On this basis therefore, the appeal is against the judgment and decree of 12th February 2013 and 20th February 2013 respectively, and all the consequential orders, including the subsequent consent order dated 8th April 2013, and the decree of 12th April 2013.

9. As regards the argument that the 1st and 2nd respondents were not parties to the High Court suit and therefore have no locus standi to bring the appeal before this Court, it is averred that a three judge bench of this Court in *Okiya Omtatah Okoiti and Another v. Afrison Export Import Limited and 8 Others*, Civil Application No. NAI 115 of 2016 (UR 92/2016) found that the 1st and 2nd respondents had proper standing to lodge the instant appeal in the public interest and as parties affected by the decision of the High Court.

10. As to the joinder of 7 new parties to the appeal who were not parties to the suit before the High Court, it is averred that this was done in strict compliance with the provisions of rule 77 (1) of the Rules of this Court, and that in any case, this Court had on its own motion in Okiya Omtatah Okoiti v. The Hon. Attorney General & 4 Others, Civil Application No. NAI 15 of 2015 (UR. 15/2015) compelled the 1st and 2nd respondents to comply with the provisions of rule 77(1) by reaching out to entities who were not parties to the suit before the High Court, but who could have been affected by the proceedings.

11. The 1st and 2nd respondents contend that contrary to the assertion by the applicants that their appeal is a fresh suit originated in this Court, it is a bona fide appeal which is properly before this Court. In this regard, they submitted that leave to file the appeal out of time was sought and granted by this Court in *Okiya Omtatah Okoiti and Another v. Afrison Export Import Limited and 8 Others*, Civil Application No. NAI 225 of 2016 (UR 117/2016); consequently the 1st and 2nd respondents filed the notice and record of appeal within the timelines stipulated in law; the issues of law and fact to be canvassed in the appeal are issues that were alive in the High Court; all parties to the appeal are directly affected by the proceedings, and it matters not that some of them were not parties to the High Court matter; and that there was no need to file a separate notice of appeal against the consequential consent order of 8th April 2013 and the decree of 12th April 2013 since the notice of appeal covered all consequential orders.

12. They therefore averred that the appeal is properly on record, and urged us to dismiss the application and hear the appeal on its merits.

13. At the hearing of this application, Mr. Nyamai, learned counsel appeared for the applicants, while Mr. Omtatah, the 1st respondent, was present in person. Mr. Bett, learned counsel was present for the 3rd, 4th, 5th and 7th respondents, while Mr. Muno held brief for Mr. Mbaabu for the 8th respondent. The 11th respondent was represented by Ms. Misiati, learned counsel, who was holding brief for Prof. Tom Ojienda, Senior Counsel.

14. My. Nyamai made oral highlights of his clients' written submissions dated 11th March 2024. The said submissions were a reiteration of the arguments contained in the motion and the affidavits in support, and we shall therefore not rehash them. Both Mr. Bett and Ms. Misiati supported the application and urged us to strike out the appeal. Mr. Muno elected not to make any submissions.

15. On his part, Mr. Omtatah contended that the application was time barred and therefore incompetent; that leave was granted by this Court to file the notice of appeal out of time; and that the record of appeal was filed pursuant to the said leave and within the stipulated timeline. He further submitted that the appeal was filed in public interest and pursuant to leave granted by this Court, and that the joinder of new parties was also with leave of this Court.

16. We have considered the application, the respective submissions as well as the applicable law. The first issue which we must determine is whether the 1st and 2nd respondents had any locus standi to challenge the impugned judgment on appeal in their own right, not having been parties to the proceedings giving rise to the said judgment.

17. It is a fact that the 1st and 2nd respondents were not parties to the proceedings before the High Court. In the ordinary course of things, they could not be said to have had any locus standi to institute an appeal before this Court. Upon this realization, the 1st and 2nd respondents brought a notice of motion dated 6th May 2016 in Civil Application No. NAI 115 of 2016, wherein they sought leave to file an intended appeal in the public interest against the judgment, order and decree of the High Court dated 12th February 2013 in HCCC No. 617 of 2012.

18. This Court (Githinji, Koome & Azangalala, JJ.A.), upon consideration of the various provisions of the *Constitution* such as Article 258, as well as case law such as the Supreme Court decision in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR, and the provisions of rule 75 of the *Rules of this Court, 2010,* found that the 1st and 2nd respondents qualified as persons who, in the public interest, to file an appeal and granted the application, and directed them to seek extension of time to file a notice of appeal before a single judge of this Court.

19. The filing of the appeal by the 1st and 2nd respondents was therefore with leave of this Court and in the public interest, and it is not correct for the applicants to allege that the 1st and 2nd respondents did not have any locus standi to file the appeal. By so alleging, the applicants are in essence challenging the decision of this Court dated 30th September 2016 where the said leave was granted.

20. Upon grant of leave to seek extension of time to file the notice of appeal, the 1st and 2nd respondents approached this Court vide Civil Application No. 225 of 2016 (UR 177 of 2016). They sought extension of time to file and serve a notice of appeal, memorandum and record of appeal out of time in an intended appeal from the judgment, orders and decree of the High Court of Kenya (Mabeya, J.) dated 12th February 2013 in Civil Case No. 617 of 2012. The application was granted by Nambuye, JA, who, vide a ruling dated 2nd December 2016 granted them 14 days from the date of the ruling to file and serve a notice of appeal. The 1st and 2nd respondents filed a notice of appeal on 6th December

2016 and served it upon the parties on 7th December 2016, which was within the timeline stipulated in the ruling by the Court.

21. The second limb of the orders by Nambuye, JA stipulated that upon filing and service of the notice of appeal, parties were to proceed according to law. What we interpret this to mean was that upon the filing and service of the notice of appeal, the 1st and 2nd respondents were to proceed pursuant to the relevant provisions of the Rules of this Court. The applicable provision in our view was rule 82 on institution of appeals. It provides in part as follows:

> "(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—
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> a. a memorandum of appeal, in quadruplicate;
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> b. the record of appeal, in quadruplicate;
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> c. the prescribed fee; and
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> d. security for the costs of the appeal:
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> 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.
>
> (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent."

22. The 1st and 2nd respondents had 60 days from 6th December 2 to file their memorandum and record of appeal. In other words, they were required to lodge their memorandum and record of appeal on or before 6th February 2017. Their memorandum and record of appeal dated 8th February 2017 was lodged in this Court on 31st March 2017. This is clearly outside the 60 days period computed from 6th December 2016. Even if we were to apply the provisions of rule 3 (e) of the Rules of this Court and exclude the period from 21st December 2016 to 12th January 2017, both days inclusive, when the Court was on Christmas recess, the last day for filing the memorandum and record of appeal was on 1st March 2017.

23. We are alive to the proviso to rule 82 (1) where the period taken to prepare typed proceedings is to be reckoned in computing the time within which the appeal is to be instituted. However, a party seeking to rely on the said proviso must have made the request for typed proceedings in writing and served it upon the other parties. The 1st and 2nd respondents have not in their response stated that the period taken by the High Court in preparing and delivering the typed proceedings was to be considered in computing the time within which the appeal was to be filed. We further note that no Certificate of Delay has been exhibited by the said respondents.

24. Therefore, the memorandum and record of appeal dated 8th February 2017 and lodged in this Court on 31st March 2017 were filed outside the period directed by Nambuye, JA and without fresh leave of this Court.

25. However, and without prejudice to the foregoing, the 1st and 2nd respondents contend that the instant application is time barred. This application is anchored on, inter alia the provisions of rule 84 of the Rules of this Court, 2010 which provided 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 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." [Emphasis added]

26. The notice of appeal lodged in this Court on 6th December 2016 was served on all parties on 7th December 2016. Therefore, the 30 days' period began to run on 7th December 2016, but this application was filed on 31st October 2017.

27. *In Esther Anyango Ochieng v. Transmara Sugar Company* [2020] eKLR, the Court considered a similar application as this one. Kiage, JA delivered himself as hereunder:

> " I have no doubt in my mind that the application to strike out the notice of appeal on the grounds that it was served out of time and that it was not followed by the filing of the record of appeal is incompetent. It is incompetent because, while it seeks to enforce timelines as against the respondent, it is itself violative of the proviso to Rule 84 which mandatorily requires that it be filed within 30 days. It was not so filed and leave to file it out of time not having been sought and given, the notice of motion should be for striking out. I can do no better than quote what this Court stated in *Salama Beach* (*Supra*):
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> > " This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court's Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out.
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> > That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the Joyce Bochere case (*supra*), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court's Rules. Similarly, in *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained

to file the application out of time. See also *Michael Mwalo v Board of Trustees of National Social Security Fund* [2014] eKLR."

28. We fully adopt the holding of the Court in *Esther Anyango Ochieng* (supra) and *Salama Beach Hotel Limited & 4 others v. Kenyariri & Associates Advocates & 4 others* [2016] eKLR. It follows, therefore, that the instant application is incompetent, having been filed outside the 30 days' period contemplated under the proviso to rule 84 and without leave of the Court. We hereby strike it out. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.