



REPUBLIC OF KENYA



KENYA LAW
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**Maroko v Co-operative Bank of Kenya (Civil Application 266 of 2019)
[2024] KECA 1153 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1153 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 266 OF 2019
SG KAIRU, DK MUSINGA & M NGUGI, JJA
SEPTEMBER 20, 2024**

BETWEEN

ONESMUS OMWENGA MAROKO APPLICANT

AND

CO-OPERATIVE BANK OF KENYA RESPONDENT

(Being an application to strike out the Notice of Appeal dated 26th February, 2015 and Record of Appeal dated 23rd July, 2019 filed against the judgment of the Employment and Labour Relations Court (Nzioka wa Makau, J.) dated 10th February, 2015 in ELRC No. 449 of 2013)

RULING

1. In the application dated 1st August 2019, the applicant, Onesmus Omwenga Maroko, seeks orders to strike out the notice of appeal filed on 26th February 2015 and the record of appeal dated 23rd July 2019 and filed on 24th July 2019. The application is expressed to be brought under the Court of Appeal Civil Appeals and Application Practice Directions 2015, section 3A, Rule 74(2),76(1), and 80 of the [Appellate Jurisdiction Act](#).
2. The application is supported by an affidavit sworn by the applicant on 1st August 2019. He avers that the notice of appeal filed on 26th February 2015 indicating the respondent's intention to appeal against the judgement delivered on 10th February 2015 was filed out of the prescribed time without the leave of the Court and was not served within the prescribed timeline. He further avers that the respondent filed an application dated 31st March 2015 which was withdrawn on 26th June 2019 and directions given that the appeal be filed within 30 days or have the matter settled. It is the applicant's further averment that the record of appeal is fatally defective as the notice of appeal was filed out of time without the leave of the Court, and both the notice of appeal and record of appeal should therefore be struck out with costs.



3. In opposing the application, the respondent filed a replying affidavit sworn by Florence Njuguna, the respondent's Legal Manager, on 10th March 2020. Ms. Njuguna avers that the respondent filed a notice of appeal dated 26th February 2015 as well as an application for stay of execution, which was settled through a consent order issued on 27th June 2019 to have the application withdrawn. Ms. Njuguna further avers that the applicant did not raise the issue of the notice of appeal being filed out of time without leave or that the same was not served within the prescribed timeline. Further, that the respondent filed a record of appeal on 24th July 2019 and served a copy upon the applicant on 26th July 2019 within the timelines agreed to by the parties and adopted by the Court. She avers therefore that the present application for striking out the notice and record of appeal undermines the consent order and should be dismissed.
4. It is her averment further that there is no prejudice that has been suffered by the applicant and none has been shown to warrant the drastic action of striking out the appellant's notice of appeal after parties have consented to the filing of the record of appeal.
5. When the matter came up for hearing on 27th February 2024, the applicant was represented by learned counsel, Mr. Kariuki Njiri. There was no appearance for the respondent. None of the parties had filed written submissions.
6. In his oral submissions at the hearing, Mr. Njiri submitted that the notice of appeal filed on 26th February 2015 was never served upon the applicant, and that despite filing the said notice of appeal late and not serving it upon the applicant, the respondent did not address this issue when it sought leave to file a record of appeal out of time. Mr. Njiri submitted therefore that there is thus no valid notice of appeal and, consequently, no record of appeal.
7. We have considered the application, the affidavit in support and the affidavit in opposition thereto, as well as the submissions by counsel for the applicant. We note that the judgement that the respondent seeks to appeal from was delivered on 10th February 2015. The notice of appeal with respect thereto was filed on 26th February 2015 while the record of appeal was filed on 24th July 2019. The application before us is dated 1st August 2019, more than four years after the notice of appeal and three days after the record of appeal was filed.
8. It has been averred by the respondent and not controverted by the applicant that the record of appeal was filed pursuant to a consent order between the parties on 26th June 2019 allowing the respondent to file the record within 30 days of the consent. It was further averred by the respondent, and again not controverted by the applicant, that at the time of recording the consent, the applicant did not raise the question of the validity of the notice of appeal. Mr. Njiri conceded before us, albeit reluctantly, that the record of appeal had been filed pursuant to the consent between the parties.
9. The thrust of the applicant's application before us is that the respondent filed its notice of appeal late, without addressing the issue of late filing and service thereof; that there is therefore no appeal before the Court, and the Court should strike out the notice of appeal as well as the record of appeal. Mr. Njiri asserted that he had complied with the requirement to file the application for striking out within 30 days prescribed under the rules.
10. While the impugned judgment was delivered on 10th February 2015, the notice of appeal the subject of this application was filed on 26th February 2015, 16 days later. The record of appeal was filed on 24th July 2019 and the present application is dated 1st August of 2019, more than 4 years after the notice of appeal and 3 days after the record of appeal were filed. We note that the order allowing the respondent to file its record of appeal was reached following a consent entered into between the parties, and pursuant



to that order, the respondent lodged its record of appeal on 24th July 2019. The respondent avers that when the parties entered into the consent allowing it to file the consent, the applicant did not raise any issue pertaining to the validity of the notice of appeal. The applicant questions the validity of the notice of appeal and the record of appeal in this application, and his counsel, Mr. Njiri, sought to renege from the consent order. He was, however, hard pressed to explain entering into a consent for filing the record of appeal without the presumption arising that there was a valid notice of appeal, or that the applicant had waived any objection to its validity, and as a result, a record of appeal was filed, in terms of the consent between the parties, within 30 days of the consent.

11. The indisputable facts in this matter are that a notice of appeal was filed by the respondent, albeit one day late. A consent order was entered into with respect to the filing of the record of appeal, with no complaint being raised by the applicant with regard to the validity of the notice of appeal, or the lack of service thereof.
12. It appears to us that the applicant, having consented to the filing of the record of appeal and the same being filed within the timeliness in the consent between the parties, now seeks to go behind the consent and attack the validity of the notice of appeal. As he cannot properly do so in light of the provisions of rule 86 of the Rules of this Court (rule 84 of the 2010 Rules), he does so by attacking the record of appeal on the basis that it is not underpinned by a valid notice of appeal.
13. We take the view that, in the circumstances of this case, and in light of rule 86 and the jurisprudence that has emerged from this Court with respect thereto-see *William Mwangi Ngaruki v Barclays Bank of Kenya Ltd* [2014] eKLR and *Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others* [2016] eKLR, we are satisfied that the present application is without merit, and it is hereby dismissed.
14. We were informed during the hearing that the applicant is deceased and was substituted with his widow by an order issued by this Court on 6th February, 2023. In the circumstances, we shall not burden his estate with an order for costs.

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

D. K. MUSINGA (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

