



**Mwangi v Vastu Company Limited (Civil Appeal E886 of 2023)  
[2024] KECA 1234 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1234 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E886 OF 2023  
S OLE KANTAI, F TUIYOTT & JM MATIVO, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**DANIEL MWANGI ..... APPLICANT**

**AND**

**VASTU COMPANY LIMITED ..... RESPONDENT**

*(Being an application to strike out the Notice of Appeal dated 17th June 2023 and lodged on 13th November 2023 and the Record of Appeal dated 10th November 2023)*

**RULING**

1. We are moved by Daniel Mwangi (the applicant) through a notice of motion dated 13<sup>th</sup> December 2023 to strike out the notice of appeal lodged on 13<sup>th</sup> September 2023 and record of appeal dated 10<sup>th</sup> November 2023 filed by Vastu Company Limited (the respondent to the motion and appellant in the appeal) as being incompetent, bad in law and abuse of court process.
2. In an affidavit sworn on the same day as the motion, the applicant deposes that his advocates on record were served with a record of appeal on 16<sup>th</sup> November 2023 which reveals two defects: the record of appeal was lodged in the registry on 13<sup>th</sup> September 2023 and therefore out of time; and the record of appeal does not include the decree from the subordinate court.
3. The application is resisted by the respondent who filed a replying affidavit by Pramodrai Patel sworn on 4<sup>th</sup> March 2024. Patel is a director of the respondent company.
4. The respondent is aggrieved by the decision of Justice Sergon delivered on 17<sup>th</sup> June 2022 and evincing an intention to challenge it filed a notice of appeal on the same day, 17<sup>th</sup> June 2022, a copy of which, it alleges, was served upon the applicant's counsel. Shown to court is a notice of appeal and a receipt as evidence of payment. The latter is not without contestation and is at the heart of this controversy.



5. Regarding the decree missing from the record of appeal, the respondent avers that the oversight is curable by way of filing a supplementary record to include it and it is not fatal as to warrant the striking out of the record.
6. At plenary hearing only Mr. Pareno learned counsel representing the respondent appeared before us. However, we have the benefit of the applicant's written submissions dated 7<sup>th</sup> march 2024 which we have considered alongside those of the respondent which were briefly highlighted by counsel.
7. The judgment by the High Court sought to be challenged in appeal was delivered on 17<sup>th</sup> June 2022. By the requirement of Rule 77 of the *Court of Appeal Rules*, 2022, a person who desires to appeal to this Court in a civil case and related matter will give notice in writing which shall be lodged with the registrar of the superior court within 14 days of the decision.  
By dint of Rule 79(1) an intended appellant shall, before or within seven days after lodging the notice of appeal, serve copies of the notice on all parties directly affected by the appeal.
8. The respondent states that it complied with the two rules above by lodging a notice of appeal dated 17<sup>th</sup> June 2022 in the registry of the High Court and serving the applicant's advocate with a copy of it on the same day. This, however, is not as straightforward because in the record of appeal served upon the applicant's counsel, the notice of appeal is shown as having been lodged in that registry on 13<sup>th</sup> September 2023.
9. The respondent sought to extricate itself from that anomaly. It explains that it indeed paid for the notice of appeal on 17<sup>th</sup> June 2022. In this regard we have a receipt for Kshs.1,550/= issued by the Judiciary in acknowledgement for payment from Solonka & Company Advocates. The gravamen of the respondent's argument is that it should not be punished for a mistake by the High Court in the late dating of the lodgment.
10. Counsel for the applicant was quick to notice that the receipt was apparently for payment for "any appeal or review from subordinate courts and tribunals" and asserts that the receipt is not an alternative to filing a notice of appeal. Further, it is not for this Court to sympathize with the negligence, mistake or incompetence of a litigant.
11. That is the view we take. It does seem probable that the respondent's counsel indeed paid for the notice of appeal on 17<sup>th</sup> June 2020 because there is a receipt for Kshs.1,550/= paid by Solonka & Company Advocates who were counsel on record for the appellant. That is buttressed by the fact that on the same day counsel served a copy of the notice of appeal upon counsel on record for the applicant. Service of this notice was not disputed. In the circumstances, as the notice of appeal was paid for on time, we do not think it fair to punish the respondent merely because the date for lodging of the notice was indicated as a date other than when it was paid for.
12. On the second limb, we observe that the intended appeal is a second appeal. Part of the documents required to be included in the record of appeal where this Court is hearing a second appeal is the certified decree or order relating to that appeal to the first appellate court (Rule 89(2)). By failing to include a copy of the decree from the subordinate court, the respondent run afoul of this Rule. The question is whether we should strike out the record because of that omission.
13. We think not because Rule 90 grants an intended appellant who omits certain documents from the record to make amends. The Rule reads:-

“Where a document referred to in rule 89(1) and



(2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94 (3) and, thereafter, with leave of the deputy registrar on application.”

14. The application for striking out was, as it should have been, filed so soon after the record of appeal was filed and served. The respondent may not have noticed the omission of the decree and would not have had opportunity to seek the amends available in Rule 90. We think that in the circumstances we must decline the prayer for striking out so as to give the respondent an opportunity to move the deputy registrar under Rule 90. In doing so we have no doubt that substantial justice favours the hearing of an appeal on merit particularly where an omission by one of the parties is curable. Second, it has not been demonstrated that the applicant will suffer any prejudice if the proposed route is taken.

15. In the end, we dismiss the notice of motion dated 13<sup>th</sup> December 2023 in its entirety but with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

