



**Royal Balloon Limited v County Government of Narok (Civil Application
164 of 2019) [2024] KECA 1145 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1145 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 164 OF 2019
DK MUSINGA, MSA MAKHANDIA & A ALI-ARONI, JJA
SEPTEMBER 20, 2024**

BETWEEN

ROYAL BALLOON LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF NAROK RESPONDENT

(An application to strike out a Notice of Appeal from the ruling of the High Court of Kenya at Narok (J. M. Bwononga, J.) dated 25th October 2018 in HC Misc. App. No. 1 of 2018)

RULING

1. Before us is an application dated 4th June 2019 brought under, sections 3A and 3B of the *Appellate Jurisdiction Act*, rules 77(1) 82 (2), 83 and 84 of this Court’s Rules and all other enabling provisions of the law. The application in the main seeks that the notice of appeal lodged by the respondent in NKR HCMCA No.1 of 2018 dated 17th April 2019 be struck out.
2. The application is premised on the grounds that the High Court in Narok delivered a ruling in a judicial review application in favour of the applicant to the effect that an order of certiorari do issue to remove to the court, for quashing the decision of the respondent contained in its letter dated 5th December 2017, rescinding its earlier approval on 24th October 2016, for its business of operating Hot Air Balloons, and an order of certiorari to remove to the court, for quashing the decision of the respondent contained in its letter dated 7th December 2017, prohibiting the applicant from undertaking any new developments within Maasai Mara National Park and also operating in the said Park until the management plan has been implemented.
3. Aggrieved by the judgment and decree, the respondent filed a notice of appeal dated 17th April 2019, on the 6th May 2019 and served it on the applicant on the same day. However, no letter bespeaking proceedings was served on the applicant nor filed in the Narok High Court Registry. Since then, the respondent had not taken any steps to prosecute the appeal. Accordingly, the applicant stated, it is only



proper that the notice of appeal be deemed as withdrawn under rule 83 of this Court's Rules. That in any event, the notice of appeal itself was filed out of time without leave of Court.

4. The Motion was further supported by the affidavit of Kanyoko Lewis dated 4th June 2019 in which he reiterated and expounded on the foregoing. Suffice to add that there was no leave that was sought and obtained to extend time within which to file the appeal. He maintained that the prescribed time for instituting the appeal had since lapsed hence the notice of appeal by operation of the law ought to be deemed as withdrawn.
5. During case management, parties were directed to file written submissions before the interpartes hearing of the application on 28th May 2024. However, on the said date, only Mr. Amutalala, learned counsel for the respondent was present. There was no appearance for the applicant, though served with the hearing notice. Mr. Amutalala conceded that he had not filed any replying affidavit or submissions to the application. He nonetheless wished the court to consider the application as it was and render a ruling, his non-input notwithstanding.
6. We have considered the application and the affidavit sworn in support thereof and the law. Our invitation to intervene on behalf of the applicant has been invoked substantively under rules 77, 82 (1) & (2), 83, and 84 of this Court's Rules. Rule 77(1) provides as follows:

“77(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof 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 lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.”

Under Rule 82, the institution of appeals is provided for on terms inter alia that:

“(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 -

a.

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.”

Rule 83 of the Court's Rules that:

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served”.

7. The applicant's contention that the respondent filed the notice of appeal out of time has not been controverted at all by the respondent. Accordingly, the respondent has not satisfied the prerequisite



of rule 75, thereby making the notice of appeal a ripe candidate for striking out on account of incompetence. Rule 84 of the Court Rules provides 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.”

8. The notice of appeal is in respect of the judgment and decree delivered on 25th October 2018. The notice of appeal dated 17th April 2019 was lodged in Court on 30th April 2019. From our computation, the notice of appeal was obviously filed way out of time. A party who desires to appeal to this Court against a judgment or decision of the High Court is required by rule 75 of this Court’s Rules to lodge a notice of appeal within fourteen days from the date of the decision. Under rule 77 of this Court’s Rules, this party must serve that lodged notice of appeal on the adverse party within seven days of lodging it. On both fronts therefore, the notice of appeal was filed and served late. Our attention has not been drawn to any application seeking extension of time within which to file and serve the notice of appeal and or the appeal filed by the respondent.
9. Further, there is nothing to show that the respondent had written a letter bespeaking proceedings, which would give it some leeway on the computation of time by benefitting from the proviso to the rule. In *Benedict Mwazighe & Another vs. Gasper Walele & 2 Others* [2011] eKLR, the Court expressed itself on this very matter as follows:

“It is clear that the appeal which is yet to be filed will be hopelessly out of time. That situation could have been salvaged if there was proof that the respondent had, within thirty (30) days from the date of the delivery of judgment, written a letter to the Deputy Registrar, bespeaking the copies of the proceedings and judgment and if such a copy of such letter had been sent to the applicant. ... If after sixty days from that date the memorandum and record were not filed, then only compliance with the proviso to rule 81 (2) as spelt out above could have helped the situation. That rule is the same in the new Rules except it is now rule 82 and the letter is now required to be “served” upon the respondent instead of being ‘sent’ to the respondent and rule 112 is now rule 115. Since the respondent failed to comply with it, nothing would salvage the appeal. Hence the notice of appeal no longer serves any useful purpose.”
10. It is obvious that there have been serious procedural lapses and omissions on the part of the respondent and or his counsel in the prosecution of its intended appeal. The applicant is well within its rights to ask therefore, for the notice of appeal to be either struck out or deemed as withdrawn, the substantive appeal having not been filed within 60 days of the filing of the notice of appeal.
11. We however choose to strike out the notice of appeal on account of incompetence, having been filed outside the stipulated period of time and without leave of the Court. It is so ordered. Each party shall bear its own costs.

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

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

