



REPUBLIC OF KENYA



KENYA LAW
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**Patel & 2 others v Maccu Motors Ltd (Civil Application 281 of 2019)
[2024] KECA 1135 (KLR) (6 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1135 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 281 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 6, 2024**

BETWEEN

BIKHABHAI MATHURBHAI PATEL 1ST APPLICANT

DR FRANK KAMUNDI MWONGERA 2ND APPLICANT

CYPRIAN IBURI NGARURO 3RD APPLICANT

AND

MACCU MOTORS LTD RESPONDENT

(Being an application to strike out the record of appeal from the Judgement of the Environment and Land Court at Meru (E.C. Cherono, J.) dated 3rd June, 2019 in ELC No 31 of 2018 formerly HCCC No.124 of 1997)

RULING

1. Bikhabbhai Mathurbhai Patel, Dr. Frank Kamundi Mwongera and Cyprian Iburi Ngaruro, the applicants herein, have brought a Notice of Motion dated 1st November, 2019 seeking orders that this appeal being Civil Appeal No. 281 of 2018 filed by Maccu Motors Limited, the respondent, be struck out with costs to the applicants.
2. The application is premised on the grounds that the Notice of Appeal dated 6th June 2019 was lodged on 7th June 2019 and that the Appeal herein was filed on 22nd October 2019 which was outside the sixty (60) days stipulated under Rule 84(1) of this Court's Rules. In addition, the applicants contend that the respondent failed to serve them with the letter it wrote to the Deputy Registrar requesting for the typed proceedings and the judgment of the Environment and Land Court (ELC), and as such it is not entitled to rely on the certificate of delay.
3. The respondent opposed the Motion through a replying affidavit sworn by Fredrick Mburugu, a director of the respondent. He contends that it is true that the Notice of Appeal was lodged at the



ELC on 7th June 2019 and that the sixty (60) days started running on 22nd August 2019 when the proceedings were obtained and that the time of preparing and typing of proceedings is excluded from computation of the sixty (60) days period. He contends that the Certificate of Delay was obtained pursuant to section 79G of the *Civil Procedure Act*.

4. The respondent further contends that the appeal was filed timeously and that indeed the letter seeking typed proceedings was served upon the applicants.
5. At the plenary hearing of the application on 11th December 2023, learned counsel Mr. J.M. Mwangi appeared for the applicants while Mr. Ondari appeared for the respondent. Both counsel adopted their respective written submissions and made brief oral highlights.
6. Counsel for the applicants submitted that the Record of Appeal dated 22nd October, 2019 filed by the respondent, was filed in contravention of Rules 84 (1) and (2) of the *Court of Appeal Rules* as the letter bespeaking typed proceedings was not served on the applicants' counsel. Counsel emphasised that the record was filed outside the sixty (60) days prescribed by the Court of Appeal Rules, and as the letter in question was not served on them, the respondent is precluded from relying on the proviso to Rule 84 of the *Court of Appeal Rules*. The applicants, therefore, urge the Court to strike out the Appeal.
7. In response, counsel for the respondent submitted that the Record of Appeal filed on 22nd October 2019 was filed within time because the days taken to type the proceedings are excluded from the sixty (60).days referred to in Rule 84 (supra). Mr. Ondari though claiming that the letter bespeaking the proceedings was served on counsel for the applicants, did not avail any evidence to that effect. Instead, he entreated the Court to invoke Article 159(2)(d) of *the Constitution* and treat the said non-compliance as mere technicality and dismiss this application.
8. Having considered the application, the grounds in support of the application, the rival affidavits, the cited authorities, the submissions of both counsel and the law, the only issue for determination is whether the applicants have satisfied the requirements for striking out the Record of Appeal.
9. The application is pegged on the former Rules 82, 83 and 84 of the *Court of Appeal Rules*. We start by observing that the Record of Appeal which the applicants want struck out was filed on 22nd October, 2019. This application was filed on 1st November 2019, or thereabouts and it was, therefore, in compliance with the current Rule 86 of the Court of Appeal Rules which requires such an application to be filed within 30 days of service of the said record.
10. Rule 84(1) of the *Court of Appeal Rules* is explicit and bears no repeating for purposes of this ruling, more so, because it is not contested here. The Record of Appeal must be filed within sixty
60. days after the filing of the Notice of Appeal. The framers of the rules were nonetheless cognizant of the fact that for reasons beyond an intending appellant's control delays can occur, particularly in the typing of proceedings. A window was created to allow parties who are unable to get the proceedings on time still access justice, hence the proviso to that rule. The proviso is not burdensome at all and all it requires is for a party who has filed a Notice of Appeal to copy and serve the other party with the letter sent to the registrar requesting to be supplied with copies of the proceedings. It is imperative that the said letter be copied and served on the respondent within thirty (30) days of the filing of the Notice of Appeal. It is not an innocuous technicality that can be cured by Article 159(2)(d) of *the Constitution*. It is anchored on the Court of Appeal Rules and commands its compliance. If that simple act is done, then the appellant can sit and wait for the proceedings to be prepared and when ready and availed to the appellant along with a certificate of delay, then the sixty (60) days start running.



11. There was no evidence placed before the Court to confirm that the letter requesting for the proceedings was copied and served on the applicants. If indeed such a letter existed, it would have been attached to the replying affidavit. The respondents should have invoked the relevant rules and applied for extension of time to enable them to comply. As the matter stands now, the record of appeal was filed out of time and without the leave of the Court. The same is for striking out.
12. Accordingly, this application is allowed and the Record of Appeal dated 22nd October 2019 is struck out with costs to the applicants.
13. It is so ordered.

DELIVERED AND DATED AT NYERI THIS 6TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

