



Lebo & 331 others & 331 others v Kenya Power & Lighting Limited (Civil Appeal (Application) E033 of 2023) [2024] KECA 1518 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1518 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) E033 OF 2023
SG KAIRU, FA OCHIENG & WK KORIR, JJA
OCTOBER 25, 2024**

BETWEEN

CHRISTOPHER KIPKORIR LEBO & 331 OTHERS & 331 OTHERS & 331 OTHERS & 331 OTHERS & 331 OTHERS & 331 OTHERS & 331 OTHERS APPELLANT

AND

KENYA POWER & LIGHTING LIMITED RESPONDENT

(An application to strike out Civil Appeal No. E033 of 2023 arising from the Judgment of the High Court of Kenya at Eldoret (J. N. Abuodha, J.) dated 19th January 2023 in ELRC Case No. 17 OF 2019)

RULING

1. Before us is a Notice of Motion dated 22nd June 2023. The application is brought under Rules 86(b) and 89(1)(h) of the Court of Appeal Rules, 2022. The applicants pray for orders that:
 1. The appeal be struck out.
 2. The applicant be awarded the costs of the application and of the appeal.
2. The application is based on the following grounds:
 - a. The appeal has not been filed within the prescribed time.
 - b. As the notice of appeal was filed on 31st January 2023, the record of appeal ought to have been filed within 60 days by the 1st April 2023.
 - c. The record of appeal was filed on 23rd May 2023 which is outside the prescribed time.
 - d. The certificate of delay issued on 19th May 2023 was issued in error as there was no delay in availing the proceedings to the respondents.



- e. The record does not contain a certified copy of the decree.
3. In the supporting affidavit sworn by Ochieng Jude, the applicant's manager, legal services on 22nd June 2023, he reiterated the grounds on the face of the application, and then added that the respondents applied for proceedings on 31st January 2023 and the said proceedings were certified ready on 23rd March 2023.
 4. The respondents did not file a response to the application.
 5. When the application came up for hearing on 24th April 2024, Mr. Ochieng², learned counsel appeared for the applicant whereas Mr. Othuro, learned counsel appeared for the respondents. Counsel relied on their respective written submissions which they briefly highlighted.
 6. In support of the application, Mr. Ochieng submitted that the appeal was filed outside the prescribed time under Rule 84(1) of the Court of Appeal Rules. Counsel pointed out that the appeal was filed 52 days after the period allowed, the notice of appeal having been filed on 31st January 2023.
 7. Counsel submitted that a certificate of delay was a nullity and the proviso to Rule 84 was not applicable. He submitted that the certificate of delay was not necessary in the circumstances as the proceedings were provided within the prescribed time, on 23rd March 2023 and the respondents had seven days within the 60 days specified, to file and serve the record of appeal.
 8. Counsel submitted that since the record was filed late, the notice of appeal should be deemed as withdrawn.
 9. Counsel submitted further that the decree is a primary document. The failure by the respondents to procure the same before the appeal was filed, and its omission from the record renders the appeal incompetent. Counsel submitted that Article 159 of *the Constitution* cannot come to the aid of the respondents; who have not complied with statutory timelines.
 10. To buttress their submissions, the applicant in their written submissions referred us to the cases of:
 - a. Sheikh Ali Taib & Another v Selina Wekesa & 2 Others [2021] eKLR, where the court held that a certificate of delay only suffices to exclude any delay beyond the prescribed 60 days;
 - b. John Mutai Mwangi & 26 Others v Mwenje Ngure & 4 Others [2016] eKLR, where the court held that the filing of the record of appeal is required to be done within 60 days of the lodgement of the notice of appeal;
 - c. Banking Insurance & Finance Union v Murata Sacco Society Limited [2018] eKLR, where the court held that an intending appellant who is desirous of securing his rights must be seen to be diligent and the Court will not hesitate to strike out notices of appeal that have not been followed by the institution of appeals and have no reasonable prospects of being followed in the foreseeable future;
 - d. Mae Properties Limited v Joseph Kibe & Another [2017] eKLR, where the court held that the failure to institute an appeal within the appointed time renders such a notice of appeal to be deemed as withdrawn;
 - e. Chege v Suleiman [1988] KLR 194, where the court held that no competent appeal could be brought unless a decree or order was formally extracted as the basis for the appeal; and



- f. Beverly Wamburi King'ori v Kiprotich Arap Too [2009] eKLR, where the court struck out the notice and record of appeal after it was conceded that the record of appeal did not contain all the primary documents.
11. Opposing the application, Mr. Othuro submitted that time starts running from the date when the proceedings are ready for collection and in this case, that was on 23rd March 2023. Counsel was of the view that that is what is provided for under Rule 84.
 12. Counsel explained that the record of appeal was filed on 23rd May 2023, which was 61 days from the date when proceedings were ready. However, 22nd May 2023 was a Sunday and therefore it should be excluded from the computation. Counsel submitted that the appeal was filed within time.
 13. Counsel conceded that the decree ought to be incorporated into the record of appeal. Therefore, they have filed a supplementary record of appeal to incorporate the decree.
 14. Counsel submitted that pursuant to Article 159(2)(b) of *the Constitution*, the Court should hear the appeal on merit; and should not be captive to technicalities.
 15. In their written submissions, the respondents relied on the case of Kenya Ports Authority v Maur Abdalla Bwanamaka [2018] eKLR, where the court held that where an application for typed proceedings is made, the time taken to compile the proceedings is exempted in the computation of the 60 days.
 16. The respondents relied on the cases of Kenya Commercial Bank Limited v Mwandoro [2023] KECA 260 KLR and Trans Nzoia Securities Limited v Stuardte & Another [2024] KECA 109 KLR on computation of time.
 17. We have carefully considered the application, the affidavit in support thereof, submissions by the parties, the authorities cited, and the law. The issue for determination is whether the respondents' appeal ought to be struck out.
 18. Rule 86 of the Court of Appeal Rules provides 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-

 - a. that no appeal lies; or
 - b. 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.”
 19. The applicant contends that an essential step in the proceedings, being the filing of the record of appeal, was not done within the prescribed time and that a decree was not attached to the record.
 20. Rule 84 of the Court of Appeal Rules provides 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. a memorandum of appeal, in quadruplicate;



- b. the record of appeal, in quadruplicate;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

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 1st respondent.”
- 21. It is trite that time is of the essence. In the case of *Borderless Tracking Limited vs Thigah* [2022] KECA 38, this Court reiterated that the timelines provided by the Rules for the doing of certain things and taking certain steps are indispensable for the proper adjudication of the appeals, and the same command obedience.
- 22. In the instant application, the respondents applied for certified proceedings and once the proceedings were ready, they were issued with a certificate of delay. However, the applicant’s main contention is that there was no need for a certificate of delay since the proceedings were ready within the 60 days prescribed by law.
- 23. Rule 84 provides that the relevant documents for computing or excluding the time within which the appeal is to be instituted, are the application for a copy of the proceedings, and the certificate by the registrar indicating the time taken to prepare the proceedings.
- 24. In the case of *Michael Mwalo v Board of Trustees National Social Security Fund* [2014] eKLR this Court held that:

“ A certificate of delay is prima facie evidence that the court took the period it relates to prepare and deliver the proceedings. A certificate of delay has always been relied upon unless salient and cogent reasons are set out to challenge it.”
- 25. Similarly, in the case of *Mombasa Water Products Limited v Nic Bank Limited & 2 Others* [2022] KECA 523 (KLR), this Court stated thus:

“It is not in dispute that under Rule 82 of the Court of Appeal Rules, an appeal shall be instituted by lodging a memorandum of appeal and record of appeal in the appropriate registry within sixty days of the date when the notice of appeal was lodged, unless an application for a copy of the proceedings has been made to the trial Court, and a certificate of delay issued by the Registrar of the said Court indicating the period for preparation and delivery of the proceedings, which period is excluded from the computation of time.”
- 26. It follows, therefore, that the number of days certified in the certificate of delay as having been taken to prepare and certify the proceedings ought to be taken into account when computing the 60 days for instituting the appeal or filing the record of appeal. This Court in the case of the case of *Kenya Ports Authority v Maur Abdalla Bwanamaka*, (supra), held that where an application for typed proceedings is made, the time taken to compile the proceedings is exempted in the computation of the 60 days.



In the circumstances, we find that the time for filing the record started running on 23rd March 2023 when the proceedings were certified ready; and the appeal herein was filed within the prescribed time.

27. As regards, the omission of the decree from the record, the applicant contended that the decree extracted from the judgment resulting in the appeal herein had not been attached to the record of appeal. Rule 90 of this Court’s Rules provides that:

“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.”

28. The Supreme Court in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR stated that:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

29. The respondents in a bid to cure the omission of the decree from the record have since filed an application dated 25th March 2024, seeking to have their supplementary record of appeal deemed to have been duly filed. The said application is yet to be canvassed, and it would be wrong of us to pre-determine its fate.

30. Meanwhile, the appeal was filed in time, as we have already held.

We decline to strike it out when there exists a possibility that the court may allow the appellant to lodge the supplementary record of appeal.

31. Consequently, the application is rejected.

32. As regards costs, we order that each party will bear its own costs.

We so order because although the application has failed, it has awoken the respondent to the need to seek to remedy an otherwise incomplete record of appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

F. OCHIENG

.....
JUDGE OF APPEAL

W. KORIR



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

