



**Shengli Engineering Construction Group Limited v Kigano (Civil Appeal
(Application) E539 of 2021) [2024] KECA 1497 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1497 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E539 OF 2021
SG KAIRU, S OLE KANTAI & PM GACHOKA, JJA
OCTOBER 25, 2024**

BETWEEN

SHENGLI ENGINEERING CONSTRUCTION GROUP LIMITED . APPELLANT

AND

CLEMENT MUTURI KIGANO RESPONDENT

(Being an application to strike out an appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 24th September, 2020 in H.C.C.C. No. 212 of 2011)

RULING

1. In his application dated October 21, 2021, the applicant, Clement Muturi Kigano (the respondent in the appeal) has moved the Court under Rule 84 of the Court of Appeal Rules for an order that this appeal be struck out. The application is based on the grounds that the appeal was instituted out of time and is therefore incompetent.
2. The appeal stems from a judgment of the High Court at Nairobi delivered by Sergon, J. on 24th September 2020 awarding the applicant general damages for pain, suffering and loss of amenities in the amount of Kshs.8,000,000.00 and special damages of Kshs. 2,030,534.00 following a road traffic accident on 8th March 2011 along Nairobi Thika Highway in which the applicant sustained injuries.
3. Canvassing the application before us on 15th May 2024, Mr. Amuga, learned counsel for the applicant referred to the supporting affidavit sworn by the applicant, and the applicant's written submissions dated 7th May 2024. It is the applicant's case that while the Notice of Appeal was filed and served on time, and whereas the request by the appellant for typed proceedings from the High Court was within time, the period certified in the Certificate of Delay dated 9th August 2021 as having been necessary for the preparation of the typed proceedings was from 30th September 2020 to 15th July 2021. It is contended that the sixty (60) days within which the Memorandum and Record of Appeal should been filed as required under Rule 84 (previously Rule 82) lapsed by 13th September 2021.



4. In opposing the application, Mr. Inamdar, learned counsel for the appellant relied on Notice of Preliminary Objection dated 8th May 2024; the replying affidavit sworn by Job Achoki advocate of the firm of Daly & Inamdar Advocates; and the appellant's replying submissions dated 9th May 2024. The preliminary objection is that the application is incompetent as it was filed outside the 30 days stipulated under Rule 86 and should therefore be struck out.
5. On the merits, the appellant maintains that the appeal was filed within the stipulated time; that while it was to be filed by the 13th September 2021, the court's e-filing platform was inaccessible from 31st August 2021 through mid-September 2021; that on 6th September 2021 the Deputy Registrar issued directions on filing through the court email address with a rider that the documents were to be uploaded once the e-filing system was back up and running; that in accordance with those instructions, the appellant proceeded to file the appeal on 6th September 2021 at 15.39 hours through the court email address provided and the same was copied to the applicant's advocates. It was urged that the contention by the applicant that the appeal was filed out of time is misplaced.
6. We have considered the application, the affidavits, the submissions, and authorities cited. Rule 84(1) of the Court of Appeal Rules requires that an appeal shall be instituted within sixty days after the date when the notice of appeal was lodged. In this case, the Notice of Appeal was lodged on 30th September 2020. The proviso to that Rule provides for exclusion "of such time as may be certified by the registrar...as having been required for the preparation and delivery to the appellant" of a copy of the proceedings provided the application for the same is made within thirty days after the date of the decision against which the appeal is to be instituted. The applicant concedes that the request for a copy of the proceedings by the appellant was within the thirty days of the judgment delivered on 24th September 2020. The period certified as having been required for preparation of the copy of proceedings was from 30th September 2020 to 15th July 2021.
7. Of the sixty days within which the appellant was required to file the appeal, five days were taken up between the date of delivery of judgment on 24th September 2020 to 30th September 2020 when the appellant's letter applying for a copy of the proceedings was made. That left the appellant with 55 days. As the certified period from 30th September 2020 to 15th July 2021 is excluded, the remaining 55 days ran from 16th July 2021 to 8th September 2021. Hence, in our view, the last date on which the appeal should have been lodged was 8th September 2021.
8. There is evidence in the replying affidavit sworn by Job Achoki of the firm of Daly & Inamdar Advocates for the appellant of the frantic, but commendable and diligent efforts, that he made from 31st August 2021 to access the Court's e-filing platform to upload the Memorandum and Record of Appeal. Ultimately the same was filed, at the direction of the Court, by transmission of the same to the court email address (provided by the Court) on 6th September 2021 at 15.23 hours, which was within the 60 days. The Memorandum and Record of Appeal was transmitted to the applicant's advocates on the same day.
9. There is also evidence exhibited to the affidavit of Mr. Achoki that despite the Judiciary Public Notice informing court users of downtime in the Judiciary E-Filing System from 31st August 2021 to 1st September 2021, his attempts to access the Judiciary E-Filing System from 2nd September 2021 through to 6th September 2021 as demonstrated by his emails to the court on 2nd, and 3rd September 2021 were not successful. On 6th September 2021, the Deputy Registrar of the Court communicated to him that "in view of the challenges with the E-Filing System, you are granted leave to forward the document you intend to file to the official court email address" which address was provided, with a proviso that "when the system is back up and running" he would be required to upload the documents on the E-



Filing System. That appears to have happened on 17th September 2021 when it would appear payment for the same was made on the system.

10. Based on the foregoing, we are satisfied that the appeal was filed within time in accordance with Rule 84. Being of that view 2021, it is unnecessary to consider the preliminary objection.

11. In conclusion, the application dated October 29, 2021 fails and is dismissed with costs to the appellant.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, C.Arb. FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

