



**KCB Bank Kenya Limited v Mwandoro (Civil Application
E044 of 2021) [2023] KECA 260 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 260 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E044 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MARCH 17, 2023**

BETWEEN

KCB BANK KENYA LIMITED APPLICANT

AND

JULIUS KIRIMO MWANDORO RESPONDENT

(Being an application to strike out an undated Notice of Appeal against the judgement and decree of the Employment and Labour Relations Court at Mombasa (B. Ongaya, J) delivered on 23rd April, 2021 In Mombasa ELRC Cause No. 38 of 2019)

RULING

1. The Applicant herein, named as KCB Bank Kenya Limited, moved this court by way of Notice of Motion dated June 4, 2021, seeking that:
 - a. The undated Notice of Appeal filed on May 10, 2021 in Mombasa ELRC Cause No 38 of 2019 be struck out.
 - b. The costs of the application be awarded to the Applicant.
2. At the virtual hearing of this application on October 24, 2022, Learned Counsel Mr Kongere appeared for the Applicant while Mr Nyange appeared for the Respondent. The application was argued by way of written submissions which were orally highlighted by counsel.
3. The motion was supported by an affidavit sworn by Bonnie Okumu, the applicant's Director-Legal Services. According to the applicant, following the dismissal of the Respondents suit on April 23, 2021, the Respondent filed an undated Notice of Appeal on May 10, 2021 and served it on the applicant's advocates on the same day. It was however averred that the said Notice ought to have been filed within 14 days which expired on May 7, 2021 hence the said Notice was filed 2 days out of time, without leave and ought to be struck out with costs.



4. In support of the application, the Applicant referred to the case of [*Longinus Oroni Murunga v David Masika Mafumbo*](#) [2017] eKLR. To the Applicant, pursuant to Order 50 rule 2 CPR as read with Section 57(d) of the [*Interpretation and General Provisions Act*](#) and Rule 3(d) of the [*Court of Appeal Rules*](#), in computing time, Sundays and public holidays are only excluded where the last day of the stipulated period falls on those days. In this case it was submitted that the time for filing a Notice of Appeal is in excess of six (6) days and the last day fell on a Friday and was therefore not excluded. This Court was urged to follow [*Africa Oil Turkana Limited & 2 Others v Edward Kings Onyancha Maina & 3 Others*](#) [2016] eKLR and to hold that Article 159(2)(d) cannot be invoked to oust mandatory rules of procedure. It was further submitted, based on [*Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others*](#) [2014] eKLR that unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal as well. In the Applicant's view, the Applicant need not show any prejudice before the court can be divested of jurisdiction. It was therefore submitted that Civil Appeal No. E045 of 2021 whose foundation is the said Notice of Appeal must similarly be struck out on the authority of the case of [*Wilfrida Arnodah Itolondo v Attorney General & 9 Others*](#) [2021] eKLR.
5. In response to the application, it was averred by the Respondent that the Notice of Appeal having been filed within time, there was no need to seek leave of court to have the same filed out of time. In his view, public holidays and Sundays are excluded in computation of time and since May 1, 2021 was a public holiday and fell within the period of computation as well as Sundays, it is not correct that the Notice of Appeal was filed out of time by two (2) days as alleged by the Applicant herein. In any case he averred that no prejudice was alleged to have been occasioned to the Applicant by the alleged delay. He contended that it would serve no useful purpose striking out the Notice of Appeal since the record of appeal has already been filed and served within time.
6. It was submitted on behalf of the Respondent that in computing time, Sundays and public holidays are excluded and in this case, in the intervening period there were excluded days. According to the Respondent, May 7, 2021 referred to by the Applicant as a Friday ought to have been May 9, 2021 which was a Sunday. It was further submitted that rule 3(d) of the Court of Appeal Rules only applies where an act or proceeding is to be done within six (6) days in which event, computation of time is inclusive of public holidays and Sundays. However, where an act or proceedings are to be done within more six (6) days, the excluded days apply. In this case it was submitted that since the Notice of Appeal is supposed to be filed within fourteen (14) days, the excluded days are thus applied in computing time. In this regard reference was made to the case of [*Kenya Ports Authority vs Maur Abdalla*](#) Civil Application No 49 of 2018.
7. Without admitting that the Notice of Appeal was filed out of time, it was nevertheless submitted, while noting that the purported delay was only 2 days, that striking out is a draconian act which ought to be exercised sparingly. The Court was thus urged to exercise its discretionary powers taking into account the fact that the Record of Appeal had since been filed and served. In this regard reference was made to [*Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others*](#) [2013] eKLR and [*Esther Anyango Ochieng vs Transmara Sugar Co Ltd*](#) Civil Application 62 of 2019.
8. We have considered the application, the affidavits in support of and in opposition thereto as well as the submissions made. The issue before us is whether or not the Notice of Appeal was filed within time. It is not in dispute that the decision sought to be appealed against was made on April 23, 2021 while Notice of Appeal was filed and served on May 10, 2021.



9. Rule 3 of the *Court of Appeal Rules, 2022* provides as follows:

Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be computed in accordance with the following provisions—

- a. the period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;
 - b. if the last day of the period is a Sunday or a public holiday (in this rule referred to as “excluded days”), the period shall include the next following day, not being an excluded day;
 - c. where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
 - d. where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; and
 - e. unless the Court otherwise directs, the period of the Christmas recess shall not be reckoned in the computation of time.
10. It is clear from the foregoing provision that Sundays and public holidays are only “excluded days” where the last day for doing any act or thing falls on those days. In other words, the fact that there are Sundays and public holidays between the happening of the event and the last day does not constitute those days “excluded days”. There is however a rider that where the period prescribed does not exceed six days, the excluded days, i.e. Sundays and public holidays, are not to be reckoned in the computation of time. This Court has had occasion to explain the said provision in *Longinus Oroni Murunga v David Masika Mafumbo* (supra) where it expressed itself, inter alia, as follows:

“The excluded days are stipulated by provisions of order 50 which in sub-rule (2) excludes, inter alia, Sundays and public holidays, from computation of time only when the period for doing an act is less than six days. That means that had the High Court granted the appellant less than six days within which to file an application for judicial review, Sundays and public holidays would be excluded. The requirement by order 50 rule 2 CPR that Sundays and public holidays are not excluded in the computation of time where the time allowed for taking action is more than six days is a general provision in the laws dealing with computation of time. Section 57(d) of the *Interpretation and General Provisions Act* has an identical provision. So is Rule 3(d) of the *Court of Appeal Rules* and Article 259(6) of the *Constitution*.”

11. In this case, since the prescribed days were 14 days, any Sundays or public holidays falling in between were not excluded days and ought to be reckoned in the computation of time. From our computation of time, excluding the day of the happening of the event which was April 23, 2021, the last day was May 7, 2021 which was a Friday and not May 9, 2021 as purported by the Respondent. The Respondent’s computation, based as it was, on the misconception that the public holiday and the Sundays that fell in between were excluded, with due respect, was incorrect. Accordingly, the filing of the Notice of Appeal on May 10, 2021 was out of time.
12. We cannot overemphasise the importance of complying with the prescribed timelines in judicial process. We reiterate that there is an unqualified discretion conferred on the court to strike out documents, proceedings, intended appeals or appeals which do not comply with the rules of the court.



This discretion, like any other judicial discretion must, however, be judicially exercised, guided by the Constitution and overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act. The said sections impose a duty on this court to ensure that the manner of interpretation of the law or exercise of discretion is consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. See *City Chemist (Nbi) & Ano vs Oriental Commercial Bank Ltd* Civil Application No NAI 302 of 2008 (UR 199/2008).

13. However, we must point out that the court can invoke the overriding principle only in well deserving cases, depending on the peculiar circumstances, as the overriding principle is not a panacea for all ills and in every situation. Its invocation is only justified upon a proper basis being laid and the court in exercising its discretion must do so judiciously and with proper and explicable foundation. See *Murandula Suresh Kantaria vs Suresh Nanalal Kantaria* Civil Appeal No 277 of 2005.
14. The question before us is therefore whether we would, in the circumstances of this case, be facilitating the just, expeditious, proportionate and affordable resolution of the already filed appeal by invoking the coercive powers of striking out as prescribed by the rules. Faced with a similar application this court in *Deepak Chamanlal Kamani & another v Kenya Anti- Corruption Commission & 3 others* [2010] eKLR reasoned as follows:

“What will happen, for example, if we were to strike out the appeal” The common experience of the Court is and has always been that whenever an appeal is struck out, the losing party invariably invokes the jurisdiction of the Court under rule 4 of the rules under which the Court can enlarge time within which to file a fresh notice of appeal and a fresh record of appeal. That invariably increases the costs of the litigation. In addition to increasing the costs, since the parties are starting all over again, the time within which an appeal would take to be eventually determined on merit is unnecessarily lengthened. In a case where the party whose appeal has been struck out does not start afresh his appeal would not have been determined on merit at all, and, therefore, it cannot really be said that a just determination has been made in the case. These are the situations which Parliament must have intended to remedy by incorporating the overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act. Similar provisions have been incorporated in the Civil Procedure Act to cover litigation in the High Court and in the subordinate courts.”

15. In this case the non-compliance seems to have been due to the counsel’s misunderstanding of the provisions relating to computation of time. We say seem because in this application we are not being called upon to extend time hence we cannot make a conclusive finding in that regard. The delay, according to the applicant, is only two days and the record of appeal has been filed and served. No prejudice has been alleged to have been occasioned to the Applicant. Further, the instant application does not expressly seek the striking out of the record of appeal. We think that in the circumstances of this appeal, it would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal if we were to accede to the application. It is our view that there is an alternative available to striking out. This Court has had occasion to deal with similar circumstances in *Taib & Another v Wekesa & Another ((Suing as The Legal Representative of the Estate of George Ellam Wekesa))* (Civil Application 41 of 2019) [2022] KECA 444 (KLR) (18 March 2022) (Ruling) where it expressed itself, inter alia, as follows:

“As a result, the undeniable fate of an appeal filed out of time without leave of the court is to be struck out. However, in the interest of justice we hereby suspend the order of striking out the Record of Appeal for a period of 45 days from the date hereof. Within that period



the Respondents shall file and serve the requisite application for the extension of time under Rule 4 of this court’s rules and in default the appeal will stand struck out with costs to the applicants.”

16. In the premises, the order that commend itself to us and which we hereby make is that while the application dated June 4, 2021 is merited and while we grant the same and strike out the Notice of Motion, we suspend the effective date of the order striking out the Notice of Appeal for a period of 14 days from the date hereof. Within that period the Respondent shall be at liberty to file and serve the requisite application for the extension of time under Rule 4 of this court’s rules. If such an application is made within the said period, the order of striking wait will await the outcome of the said application. However, in default of making the said application within the said period, the notice of appeal filed on May 10, 2021 in Mombasa ELRC Cause No 38 of 2019 shall stand struck out. Either way, the costs of this application are awarded to the applicant.

17. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

