



**Waititu v Kenya Tea Packers Limited & another (Civil Appeal (Application)
E040 of 2021) [2023] KECA 253 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 253 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E040 OF 2021
F SICHALE, LA ACHODE & WK KORIR, JJA
MARCH 17, 2023**

BETWEEN

STEPHEN MUNENE WAITITU APPLICANT

AND

KENYA TEA PACKERS LIMITED 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY LIMITED 2ND RESPONDENT

(An Application to strike out the Notice of Appeal, Record of Appeal and the Appeal in Nakuru Civil Appeal No. E039 of 2021 from the judgment and decree of the Employment and Labour Relations Court at Kericho (Mbaru, J) dated 2nd June 2020 IN ELRC Cause No. 35 OF 2019)

RULING

1. Stephen Munene Waititu (the applicant herein), has vide a motion dated June 24, 2021, brought pursuant to section 3 of the [Appellate Jurisdiction Act](#), rules 75 (2), 77 (1), 82 (1), 83,84 and 90 of the [Court of Appeal Rules](#), 2010 & all other enabling provisions of the law sought the following orders:
 1. That this Honourable Court be pleased to strike out the incompetent Notice of Appeal dated 15th June 2020 and the Record of Appeal dated April 14, 2021.
 2. That the costs of this application and incidentals therefrom be awarded to the applicants.”
2. The motion is supported by the grounds on the face of the motion and an affidavit sworn by Kahiga Watindi, learned counsel who has the conduct of this matter on behalf of the applicant who deponed, inter alia, that judgment in Kericho ELRC Cause No. 35 of 2019, decreeing an award of Kshs 366, 366.00, plus costs in favour of the applicant was delivered on 2nd June 2020. He further deponed that since delivery of the said judgment on 2nd June 2020, the applicant herein got wind of the respondents’ intention to appeal only after perusing the application dated 13th April 2021, for stay of execution which had an annexed Notice of Appeal and further that, the said Notice of Appeal was purportedly



filed on 17th June 2020, 1 day after the stipulated 14 days mandated by rule 75 of the [Court of Appeal Rules](#). He further deposed that if at all the said Notice of Appeal was properly filed, the same was filed outside the contemplated 14 days.

3. The motion was opposed vide a replying affidavit sworn on September 30, 2022, by Karisa Iha, learned counsel who has the conduct of this matter on behalf of the respondents. He deponed, inter alia, that the impugned judgment was delivered on June 2, 2020, whereupon they were given instructions on June 10, 2020, to appeal against the said judgment; that he proceeded to draw and file the Notice of Appeal on June 15, 2020 and immediately sent it online to Kericho ELRC registry for assessment and filing; that this was within the prescribed time and upon filing the notice and receiving the same in their offices, they served the same upon the applicant's advocates via email which is a legally recognized method of service. He further deponed that the instant motion offends rule 84 of the [Court of Appeal Rules](#).
4. It was submitted for the applicant that it was evidently clear that the Notice of Appeal filed by the respondents herein was lodged outside the prescribed time and that no explanation whatsoever had been given on why the Notice of Appeal and the Record of Appeal were lodged out of time and neither had the respondents sought leave to file the appeal out of time.
5. On the other hand, it was submitted for the respondents that it was now a well settled principle of law that striking out a pleading is a draconian act which may only be resorted to in plain outright instances and that the applicant was fully aware of the instant appeal and that circumstances that had led to any delays had been explained. Consequently, we were urged to deal with the appeal on merit.
6. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
7. The applicant has contended that the Notice of Appeal herein was purportedly filed on June 17, 2020, which was 1 day after the stipulated 14 days under rule 75 of the [Court of Appeal Rules](#). The respondents through their advocates on the other hand contend that the Notice of Appeal was drawn and filed on June 15, 2020 and immediately sent online to Kericho ELRC registry for assessment and filing which was within the prescribed time and upon filing and receiving the same in their office, they served the same upon the applicant's advocates via email which was a legally recognized method of service.
8. The applicant's motion is, inter alia, predicated upon rule 84 of the [Court of Appeal Rules](#) 2010 which provides:

84. Application to strike out notice of appeal or appeal

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 that no appeal lies or 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." (Emphasis supplied)

9. The applicant herein contends that he only became aware of the intended appeal on April 13, 2021, when his advocates were served with an application for stay of execution pending appeal which had a Notice of Appeal annexed to it.



10. On the other hand, the instant application is dated June 24, 2021, which is clearly way beyond the mandatory 30 days' period provided for by rule 84 of the *Court of Appeal Rules* 2010.
11. In the case of *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others* [2016] eKLR this Court differently constituted, stated as follows as regards applications brought under rule 84 out of time;

This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court's Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the *Joyce Bochere* case (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court's Rules. Similarly, in *William Mwangi Nguruki v. Barclays Bank of Kenya Ltd* [2014] eKLR, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v. Board of Trustees of National Social Security Fund* [2014] eKLR. It would thus appear that both the court and the litigants are strictly bound by the timelines set by the proviso to Rule 84. In this case, it is common ground that service of the purported notice of appeal was effected on 2nd July, 2015 while this application, seeking to strike it out, was filed in November 2015; four months after service of the notice. No leave was sought to file it out of time. In view of the aforesaid provisions of law and the authorities, the inescapable result is that the advocates application fails and must be dismissed."

12. From the circumstances of this case and the applicant's, motion dated June 24, 2021, having been brought outside the 30 days' mandatory period provided by
13. Rule 84 of the *Court of Appeal Rules* 2010 (supra), we have no alternative than to strike out the applicant's motion dated June 24, 2021.
14. Accordingly, the applicant's motion dated June 24, 2021, is hereby struck out with no order as to costs

It is so ordered.

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

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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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

