



Kaaya Enterprises Ltd v Commissioner of Customs & Excise (Civil Appeal (Application) 204 of 2020) [2023] KECA 411 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KECA 411 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 204 OF 2020
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
APRIL 14, 2023**

BETWEEN

KAAYA ENTERPRISES LTD APPLICANT

AND

COMMISSIONER OF CUSTOMS & EXCISE RESPONDENT

(Being an application to strike out the record of appeal dated 15th May 2020)

RULING

1. Before us is a Notice of Motion dated December 9, 2021 and expressed to be brought under section 3 of the [Appellate Jurisdiction Act](#) and rules 84, 87 (1), and 88 of the [Court of Appeal Rules](#). The application seeks an order for the striking out of the record of appeal dated May 15, 2020.
2. The application is supported by a supporting affidavit of Tindi Khaemba, advocate for the applicant, sworn on December 9, 2021.
3. In a nutshell, the applicant states that the record of appeal should be struck out due to the following reasons: that judgment was delivered in favour of the applicant on May 29, 2019 and the respondent did not file the notice of appeal and the record of appeal within the time stipulated by the [Court of Appeal Rules](#);

that subsequently the respondent filed an application No. 53 of 2019 seeking orders for extension of time to file a notice of appeal and record of appeal out of time; that by a ruling dated April 3, 2020, Gatembu, J.A. allowed the application and the respondent was ordered to file and serve the memorandum and record of appeal within 45 days; that the last day for filing the memorandum and record of appeal was on May 18, 2020, but the respondent filed them on May 19, 2020 which was out of time.



4. Further grounds were that service of the record of appeal was done on October 1, 2020, which was 4 months and 13 days out of time; that the respondent did not seek an extension of time; and that the record of appeal is defective as it does not contain certified copies of the proceedings of the High Court, the exhibits tendered in evidence, the decree and judgment of the High Court.
5. The applicant filed written submissions dated December 1, 2022 which reiterate the averments in the supporting affidavit, and Mr. Tindi adopted the submissions at the hearing.
6. In response, Mr. Ibrahim for the respondent informed the Court that the respondent had filed a replying affidavit and written submissions on December 5, 2022. Firstly, the appellant submitted that this application for striking out had been filed out of the 30-day period that is mandatory under rule 83 of this *Court's Rules*, and therefore the application was fatally defective.
7. The respondent further submitted as follows: that it complied with the ruling of the single Judge dated April 3, 2020 since by the time that ruling was being delivered, it had already filed a notice of appeal on June 24, 2019 and served on the respondent on June 27, 2019; that in addition, it had written a letter dated June 24, 2019 to the deputy registrar requesting for certified copies of the proceedings and decree and up to date it had not received the proceedings; that the 45 days given by the court on April 3, 2020 ought to start running on the date it would be supplied with the proceedings and decree by the deputy registrar; that out of abundance of caution, it filed the memorandum of appeal on May 19, 2020 without the proceedings and the decree but due to the Covid - 19 pandemic, it was unable to serve the record of appeal on time and that the delay was excusable.
8. In a rejoinder, the applicant submitted that the fact that the respondent had not followed up on the proceedings from June 24, 2019 when it wrote to the deputy registrar and from April 3, 2020 when it was granted leave to file the record of appeal within 45 days of that ruling, was a demonstration that the respondent was not serious in pursuing the appeal.
9. We have carefully considered the application and the submissions by the parties.
We note that the parties accuse each other of non - compliance with the rules of this court, specifically rules 84 – 86, 87(1), and 88 of the *Court of Appeal Rules*, 2010.
10. We note that the parties had filed a consent dated October 6, 2020. The consent which is signed by the advocate for the applicant and the respondent states as follows:

“The appellant and the 1st respondent would be grateful if this honourable court would adopt this consent as orders of the court on the terms herein below:

1. That the warrants of attachment and sale of moveable properties dated September 23, 2020 together with the Proclamation Notice dated September 29, 2020 be and is hereby lifted unconditionally.
2. That there be a stay of execution from the Judgement dated May 25, 2019 pending hearing and determination of this Appeal.
3. That the appellant and the 1st respondent to engage in Alternative Dispute Resolution mechanism established by the Tax Dispute Resolution Division of the appellant on a without prejudice basis.
4. That the appellant to file and serve its submissions to the Appeal within 45 days from date of this consent.



5. That the 1st respondent to have corresponding leave to file and serve its submissions.”
11. It is also not in dispute that on May 19, 2020 the respondent filed a memorandum of appeal dated May 15, 2020 and the instant application seeking the striking out of that record of appeal was filed on December 9, 2021. The applicant is accusing the respondent of non-compliance with the rules of this Court. However, it is important that the question of whether the application is properly before us, be determined first. We note that rule 86 of the [Court of Appeal Rules](#) clearly states that no application to strike out a notice of appeal or record of appeal shall be filed after the expiry of 30 days from the date of service.
12. In [Tome & another v Attorney General & 2 others](#) [2021] KECA 150 [KLR] this the court held:
 - “ 13. It is now a settled principle that striking out a pleading is a draconian act, which may only be resorted to in plain and outright instances. The power of this court to strike out an appeal is discretionary and is exercised based on the peculiar circumstance of each case.
 14. Rule 84 is instructive on the basis upon which an application for striking out a Notice or Record of Appeal, and provides: "...provided that an application to strike out Notice of Appeal or an appeal shall not be brought after expiry of 30 days from the date of service of the notice or record of appeal.”
 15. This Court has held on several occasions that parties are bound by the mandatory proviso to Rule 84 that the failure to comply with the same renders an application filed thereunder defective. See Civil Application 35 of 2017 [Total Kenya Limited v Rueben Mulwa Kioko](#) [2018] eKLR.
 16. This Court in [Esther Onyango Ochieng v Transmara Sugar Company](#) [2020] eKLR quoting this Court’s decision in the case of [Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others](#) [2016] eKLR stated ‘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 the Court of Appeal Rules. An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal, or the filing of the appeal ought to be struck off. The failure to do so renders such an application fatally defective and liable to be struck out.
17. Similarly, in [William Mwangi Ngaruki v Barclays Bank of Kenya Ltd](#) [2014] eKLR , this 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.
 18. The instant application is dated June 18, 2019 and the 2nd respondent’s Notice of Appeal was filed on June 16, 2015 and served on July 23, 2015, well over the 30 days referred to under Rule 84, and obviously fails to meet the requirements under Rule 84”.



13. The court in *Esther Anyango Ochieng v Transmara Sugar Company* [2020] eKLR, held:

“Having given this matter due consideration, I have no doubt in my mind that the application to strike out the notice of appeal on the grounds that it was served out of time and that it was not followed by the filing of the record of appeal is incompetent. It is incompetent because, while it seeks to enforce timelines as against the respondent, it is itself violative of the proviso to Rule 84 which mandatorily requires that it be filed within 30 days. It was not so filed and leave to file it out of time not having been sought and given, the notice of motion should be for striking out. I can do no better than quote what this court stated in *Salamabeach* (supra);

“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.”

14. The application to strike out has been filed more than One (1) year and Six (6) months outside the mandatory 30-day period. It goes without saying that the application is fatally defective and is for dismissal for non-compliance with rule 86 of the *Court of Appeal Rules*. That being the case, we need not comment on the competency or otherwise of the record of appeal and leave that to the Bench that will hear and determine the appeal.
15. Accordingly, we dismiss the application and order that the costs shall abide the outcome of the appeal.

Delivered at Nairobi this 14th day of April, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

