



**Kenya National Capital Corporation Limited v Galot & 5 others (Civil Appeal (Application) E700 of 2022) [2023] KECA 958 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 958 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E700 OF 2022  
A ALI-ARONI, LA ACHODE & PM GACHOKA, JJA  
JULY 28, 2023**

**BETWEEN**

**KENYA NATIONAL CAPITAL CORPORATION LIMITED ..... APPELLANT**

**AND**

**MOHAN GALOT ..... 1<sup>ST</sup> RESPONDENT**

**L. P GALOT ..... 2<sup>ND</sup> RESPONDENT**

**S. P GALOT ..... 3<sup>RD</sup> RESPONDENT**

**G. P GALOT ..... 4<sup>TH</sup> RESPONDENT**

**GALOT INDUSTRIES LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**KING WOOLEN MILLS LIMITED ..... 6<sup>TH</sup> RESPONDENT**

*(Being an application to strike out the record of appeal dated 13th October 2022)*

**RULING**

1. Before us is a Notice of Motion dated October 28, 2021 and expressed to be brought under rules 42, 43, 77, 84, 87, and 90 of the *Court of Appeal Rules*. The application seeks an order for the striking out of the record of appeal and in the alternative, striking out of pages 419 to 681 of the undated supplementary record of appeal.
2. The application is supported by a supporting affidavit of Mohan Galot, sworn on October 28, 2022.
3. In a nutshell, the applicant states that the record of appeal should be struck out due to the following reasons: that the record of appeal was filed and served out of time; having been filed after the expiry of 60 days within which an appeal should be filed; that the record of appeal was served on the respondents on October 21, 2022; that judgment was delivered on July 28, 2022 and that the last day for lodging an appeal by the appellant/ respondent was on or before 28<sup>th</sup> day of September 2022; that no leave was



- obtained prior to filing the record of appeal out of time; that the record of appeal as drawn, filed and served is incompetent as it contains at pages 419 to 681, pleadings that were never filed before the High Court and which do not form part of the record of the High Court, thus does not comply with the provisions of rule 87 of the Court of Appeal Rules.
4. The application is supported by the 2<sup>nd</sup> to the 6<sup>th</sup> applicants. The 5<sup>th</sup> and 6<sup>th</sup> applicants have filed grounds in support of the application dated March 7, 2023. The grounds can be summarized as follows: that the notice of appeal is deemed as withdrawn on account of failure to lodge the record of appeal within time; that the record of appeal is incompetent; that the record of appeal has been compiled in violation of rule 89 of the Court of Appeal Rules, 2022 and that the record of the appeal being incompetent is an abuse of court process and should be struck out.
  5. However, the application is opposed by the respondent. Learned counsel, Kangethe George Joseph, for the respondent, has sworn a replying affidavit sworn on February 4, 2023. He depones that the application is an abuse of the court process, frivolous and vexatious and is misconceived and misguided; that the record of appeal is dated October 13, 2022 as the court record shall affirm; and that the applicant has not complied with the mandatory requirement of rule 81 of the Court of Appeal rules, hence not competent to file the instant application.
  6. He further depones that the supplementary record of appeal demonstrates that on July 28, 2022, a written request for the proceedings was made and served on all respondents on the same day, by electronic service and that on November 2, 2022; the certificate of delay was issued and upon receipt of it; the respondent filed its supplementary record of appeal dated November 4, 2022 and served it upon all respondents on November 18, 2022.
  7. The matter came up for hearing on the Go to virtual platform with Ms. Maumo and Mrs. Awiti appearing for the 1<sup>st</sup> applicant, Mr. Kaka holding brief for Mr. Kenyatta appearing for the 2<sup>nd</sup> applicant, and also appearing for the 4<sup>th</sup> applicant Mr. Tiago appearing for both the 5<sup>th</sup> and 6<sup>th</sup> applicant. On the part of respondent, it was represented by Mr Kangethe George Joseph.
  8. The 1<sup>st</sup> applicant filed written submissions dated March 3, 2023. which reiterates the averments in the supporting affidavit of Mohan Galot. The 5<sup>th</sup> and 6<sup>th</sup> applicants have filed submissions dated March 7, 2023 which largely reiterate their grounds in support of the application and which they relied on during the highlighting of the submissions.
  9. In response, the respondent, Mr. Kangethe's submissions can be summarized as follows: that the applicant is not competent to have filed the instant application as he did not file a notice for the address of service; that the appeal was not filed out of time as there was a certificate of delay; and that the certificate of delay is part and parcel of the record of appeal as it is included in the supplementary appeal which he filed and served on all parties. On whether the respondent's evidence should be expunged, he submitted that the evidence in those documents form the core of the appellant's appeal and that was the reason, the applicants were keen on having it excluded; that the respondent was denied an opportunity to present those documents before the High Court and therefore is entitled under rule 89 (k) which provides for "any other document that may assist the Court in the proper determination of the matter". Upon questioning by the Court, Mr. Kangethe confirmed the position to be; that it is correct that the documents were not produced as evidence in the High Court and that the respondent had not filed an application seeking leave to adduce additional evidence and did not see the need to do so, as the respondent filed the documents under rule 89(k) of this Court.
  10. In rejoinder, Ms. Maumo for the 1<sup>st</sup> applicant submitted that: it is not in dispute that the documents in volume two of the record of appeal were not filed before the High Court; that there was no application



before the Court of Appeal seeking to adduce additional evidence and the documents contained at pages 419 to 681; that rule 87(k) only applies to documents that were filed before the High Court and not fresh documents; that they were not served with the letter bespeaking proceedings and that they filed a statement of the address of service dated August 10, 2022.

11. We have carefully read the application and considered the rival submissions by the parties. We note that the parties accuse each other of non - compliance with the rules of this Court and specifically Rule 87 by the respondent and Rule 81 by the 1<sup>st</sup> applicant. In our view, the issues that emerge for determination are whether the record of appeal was filed out of time and whether the documents on volume two, specifically from pages 419 to 681 should be struck out.

12. On the allegation by the applicants that they were not served with the letter bespeaking proceedings, the respondent stated that he served the documents by electronic mail. The [Civil Procedure Rules, 2010](#) under Legal Notice 20 of 2020, amended the modes of service to include service by email, under Order 5 rule 22B. It stated as follows:

“ 22B Electronic Mail Services (E-mail) [Order 5, rule 22B]

1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming”

13. The respondent has annexed in its replying affidavit as the second annexure, “KGJ2”, evidence of the email sent out to the applicants forwarding the notice of appeal and the letter requesting for proceedings and thus service is deemed to have been done regularly. It cannot lie, in the mouth of the applicants that they were not served with the letter bespeaking proceedings.

14. Turning to the question as to whether the appeal by the respondent should be struck out, the following facts are salient in the determination of the application:

- a. Judgment was delivered by the High Court on July 28, 2022;
- b. The respondent filed the record of appeal on October 13, 2022 and served it on the applicants on October 21, 2022;
- c. The respondent also wrote to the deputy registrar on July 28, 2022 applying for the proceedings and the decree and served on all respondents on the same day by email;
- d. A certificate of delay was issued on November 2, 2022 and it excludes 60 days from computation of time, specifically from July 28, 2022 to September 28, 2022;



- e. The supplementary record of appeal was filed on November 4, 2022 and served on the same day.

15. With the above background, the elephant in the room is whether the record of appeal was filed out of time. The 1<sup>st</sup> respondent/ applicant argues that for the appeal to have been filed within time, it should have been filed between July 28, 2022 to September 29, 2022. We note that this cannot be accurate, bearing the contents of the certificate of delay. The certificate specifically precludes the computation period from July 28, 2022 to September 28, 2022 as being the period it took the Court, to prepare and supply copies of the proceedings and judgment. Hence the appellant/ respondent had 60 days from September 28, 2022 to file the record of appeal. The computation therefrom would mean that the appellant had up to November 28, 2022. He filed the record of appeal on October 13, 2022 and therefore complied with the requirement for filing within 60 days. We, therefore, reject the arguments by the applicants on this ground as a basis to strike out the record of appeal. Having found that the record of appeal was filed within time, the prayer to strike it out fails.
16. On the issue of whether the documents in volume two of the record of appeal should be struck out the answer lies in rule 89 of the Rules of this Court which provides that:

“(1) For the purposes of an appeal from a decision of a superior court in exercise of its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents-

- (a) an index of the pages with the numbers of the pages at which they appear:
- (b) ....; (c) .....; (d) .....; (e) .....
- f. the affidavits read and documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;
- g. ....;
- h. ....;
- i. ...
- j. ....; and
- k. such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:”

17. It is important to note how the documents to be included in the record of appeal are listed. The subrules are listed chronologically and followed by a semi colon before the next sub rule. It is important to note that rule 89(j) reads as follows;

“the notice of appeal; and; 89(k) reads ‘any such documents, if any...’”.

18. It is therefore clear that rule 89 must be read conjunctively and not disjunctively as the respondent is trying to do. If one was to agree with the respondent for a moment, this would lead to an absurd scenario as the parties would be at liberty to introduce any document under the sun if they thought



it was necessary for the appeal even though it was not adduced in evidence. Under this rule, the only documents a party can produce are documents that were produced by the High Court. If a party intends to introduce additional evidence which was not adduced in the High Court, they should seek leave under rule 31 of the *Court of Appeal Rules* and they would have to meet the threshold required. See Civil Application number 276 of 2020, *Hon. Basil Criticos vs The Honourable Attorney General* (unreported).

19. It is submitted by the 1st applicant that the respondent did not produce in evidence, before the High Court, the documents on pages 419 to 681 of the record of appeal (volume two). In the replying affidavit opposing the application, the respondent chose not to address that issue. In answer to that allegation and in his own words during the hearing when asked whether the documents on page 419 to 681 were produced before the High Court, learned counsel Mr. Kangethe for the respondent stated as follows:

“They were not produced.... let me clarify that those are the documents that appellant was callously and capriciously denied to present before the superior Court...that is why we utilized the rule under 89(k) any other document that may assist the court in the proper determination of this matter ...”

20. From a cursory reading of the documents whose production is being contested, it is not in doubt that those documents were not produced in Court, and leave was not sought to admit them as additional evidence. The question for the Court to consider is, whether we strike out the additional documents that have been filed without the leave of Court. The answer to that question is straightforward. The only documents that can be included in a record of appeal are those that were produced in evidence in the trial court. Any other document can only be introduced with the leave of the court and a party must satisfy the requirements set out in rule 31 of the rules of this Court. Accordingly, we order that all the documents in pages 419 to 681 of the supplementary record of appeal (volume 2) be and are hereby struck out.

21. Considering the foregoing, this application succeeds only to the extent that the documents on pages 419 to 681 of the supplementary record of appeal (volume 2) are struck out. The costs shall abide by the outcome.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**L. GACHOKA, CIArb, FCIArb**

.....

**JUDGE OF APPEAL**

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

*Signed*



DEPUTY REGISTRAR

