



Shah & another v Trust Bank Limited (In liquidation) & 2 others (Civil Application Nai 271 of 2014) [2023] KECA 959 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 959 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION NAI 271 OF 2014
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
JULY 28, 2023**

BETWEEN

AJAY SHAH 1ST APPLICANT

JIGNESH DESAI 2ND APPLICANT

AND

TRUST BANK LIMITED (IN LIQUIDATION) 1ST RESPONDENT

NITIN CHANDARIA 2ND RESPONDENT

VINOD PATEL 3RD RESPONDENT

(Being an application to strike out the Notice of Appeal from the judgment and/or decree of the High Court of Kenya at Nairobi (Azangalala, J.) dated 22nd November, 2007 in High Court Civil Case No. 875 of 2001)

RULING

1. The application for consideration by this court is the notice of motion dated October 23, 2014. It is supported by the affidavit of even date sworn by the applicant's advocate, M Billing. The application is brought pursuant to rules 42, 53(2)(c) and 83 of the [Court of Appeal Rules, 2010](#). The application seeks orders to strike out the notice of appeal filed on December 3, 2007 as well as costs of the application.
2. The application is premised on grounds that the 1st respondent has failed to compile and lodge the record of appeal for 7 years, and that the applicants cannot be kept in abeyance indefinitely; that the 1st respondent has failed to comply with rule 82(a) of this [Court's Rules](#); and that the continued existence of the appeal is causing anxiety to the applicants as all litigation must come to an end.
3. In the supporting affidavit, it is deposed that, since lodging their notice of appeal on December 3, 2007, and contrary to procedure, the first respondent by itself and/or through its Advocates on record,



have failed to comply with rule 82(a) of the *Court of Appeal Rules, 2010*; and that they have since not bothered to follow up on the proceedings and lodge their record of appeal. Further, that, in the event that they have made some follow ups, then the applicants have not been served with copies of such record, and that it is only fair that the respondent's notice of appeal be struck out or be deemed to have been withdrawn.

4. The application is opposed. In the replying affidavit sworn by Desterio Oyatsi, learned counsel for the 1st respondent, it is stated that the applicants have at all material times been aware of the fact that the 1st respondent was unable to file the appeal due to the trial court's inability to provide the necessary proceedings and exhibits to the 1st respondent despite several letters written to the court, and copied to the applicants; that, eventually, on December 19, 2014, the High Court issued a certificate of delay confirming delay between the period between November 2007 to December 2014 to the 1st respondent, and that the respondents have now filed the appeal. The 1st respondent urges us to find that the application lacks merit and dismiss it.
5. Has the applicant satisfied the requirements for striking out the notice of appeal? It is widely acknowledged that striking out a pleading is a draconian act, which may only be resorted to in plain cases. The power of this court to strike out an appeal is discretionary and its exercised based on the peculiar circumstances of each case. The main issue for this court to deal with in this application is on the competency of the appeal.
6. Rule 82 addresses the institution of appeals and provides that:

"1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged:

- (a);
- (b) the record of appeal, in quadruplicate;
- (c)
- (d) .

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent."

7. The respondent maintains that the application has no merit and states:
 - i. that the 1st respondent has been unable to file the appeal due to the unavailability of the proceedings as evidenced by letters written to the court and copied to the applicants.
 - ii. that the 1st respondent has been unable to file the appeal due to the unavailability of the proceedings as evidence by letters written to the court and copied to the applicants.



- iii. that the appeal has since been filed on January 29, 2015.
 - iv. that the 1st respondent was supplied with a certificate of delay on December 19, 2014 as evidence showing the delay on the court's bit in providing the proceedings.
8. In the case of *Charles Wanjohi Wathuku vs Githinji Ngure & another* [2016] eKLR, the court reiterated the intent of rule 82 of this court's rules stating that:
- “That timeline is strict and is meant to achieve the constitutional, statutory and rule based objective of ensuring that the court process dispense justice in a timely manner.”
9. This court has on numerous occasions stated that the rules of this court exist for the purpose of orderly administration of justice before the court. The timelines for doing of certain things and taking of certain steps are indispensable in the proper adjudication of the appeal before this court. The rules are expressed in clear and unambiguous terms and the command appearance as per Kiage, J, *Esther Anyango Ochieng vs Transmara Sugar Company* [2020] eKLR.
10. This court has also pronounced itself on the non-compliance with the pre-requisites in rule 82(1) and (2) of this court's rules. This court in *Peterkeen Mwiu Kimweli & 47 Others vs National Social Security Fund Board of Trustees* (Civil Application E008 of 2021)[2021]KECA 167 (KLR) (19 November 2021)((Ruling) agrees with the holdings in the *Charles Wanjohi* case (*supra*) as well as the position taken in *John Mutai Mwangi & 26 others vs Mwenja Ngure & 4 others* [2016] eKLR, on the intent and purport of rule 82, that:
- “...the rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within 30 days and served the same to the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the Registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”
11. It is common ground that the respondent was not able to lodge the appeal within 60 days of lodging the notice of appeal. It is the respondent's contention, which has not been denied, that the respondent filed and served the letter bespeaking proceedings on the applicants; and that the respondent was supplied with certified copies on November 21, 2014 and a certificate of delay issued on December 19, 2014 showing the delay to be of 2563 days, with the Memorandum of Appeal filed on January 29, 2015.
12. Rule 83 addresses the effect of default in instituting an appeal in the following terms:
- “If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the court may, on its own motion or on application by any part, make such order.”
13. The application was filed before the record of appeal was filed, but after the notice was filed and served in time. If an appeal is required to be filed within sixty days of the date when then the notice of appeal is filed, it is inconceivable how an applicant can be expected to apply for striking out of an appeal within 30 days from the date of service of the notice of appeal. Under rule 83, the applicant can only, upon expiry of the statutory or appointed time for filing an appeal, apply to have the notice of appeal deemed



as having been withdrawn and no more. If the applicant was desirous of having the appeal struck out, then he should have moved this court under rule 84 which provides:

"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 expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

We therefore hold that this application is not properly drawn since it does not cite rule 84 which provides for striking out. We also note that, after filing the notice of appeal, the respondent has taken steps to file the record of appeal, albeit without leave of the court. The respondents have advanced good reasons for the delay in filing the record of appeal.

14. We therefore hold that the delay in filing the appeal has been well explained. Consequently, the application dated October 23, 2014 is without merit and is hereby dismissed. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

