



**Stephens Kithi Ngombo t/a Steve Kithi & Co Advocates & another v China Wu Yi (Kenya) Co Ltd (Civil Appeal (Application) E115 of 2021) [2023] KECA 936 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 936 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E115 OF 2021  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
JULY 28, 2023**

**BETWEEN**

**STEPHENS KITHI NGOMBO T/A STEVE KITHI & CO  
ADVOCATES ..... 1<sup>ST</sup> APPELLANT**

**PROPKEN (MAURITIUS) LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHINA WU YI (KENYA) CO LTD ..... RESPONDENT**

*(An application to strike out the appeal filed on 17th December 2021 from the ruling and order delivered on 27th September 2021 by the High Court at Mombasa (D. Chepkwony J.) in Mombasa High Court Civil Case No. 89 of 2019)*

**RULING**

1. The Applicant herein is the Respondent in the substantive appeal, and is seeking by way of a Notice of Motion application dated March 18, 2022 to strike out the appeal filed herein on December 17, 2021 by the Appellants. The grounds for the application are that the ruling that is the subject of the appeal was delivered on September 27, 2021 in Mombasa High Court Civil Case No 89 of 2019, and the Notice of Appeal was endorsed as having been lodged in the trial Court's registry on October 13, 2021, two days after the statutory 14 days within which it should have been filed had lapsed.
2. In addition, that the Appellants have never served the Applicant with the said Notice of Appeal in contravention of Rule 77(1) of the *Court of Appeal rules*. Likewise, that the letter requesting typed proceedings was never served on the Applicant as required by Rule 82(2) of the *Court of Appeal rules*. As a result, the present appeal having been filed on December 17, 2021, being 81 days from the date of delivery of the ruling on September 27, 2021, is filed out of time and should be struck out.
3. The Appellants in reply filed an affidavit sworn by the 1<sup>st</sup> Appellant on January 11, 2023, in which they stated that this is the second striking out application being filed by the Applicant, the first one having



- been filed and a ruling delivered thereon on June 24, 2022 with respect to Civil Appeal No E 108 of 2021 which the Appellants had filed against a ruling dated January 13, 2021 delivered by the High Court in the subject suit. On the prayers sought in the present application, the Appellants averred that the impugned ruling was initially scheduled to be delivered on September 21, 2021 but was deferred, and that they were not present before the trial Judge on September 27, 2021 when it was eventually delivered.
4. That it was therefore incumbent on the Applicant to attach conclusive proof that the Appellants were duly notified of the new date of delivery of the ruling, and its failure to do so was indicative of the fact that no such proof exists. The Appellants stated that they did not receive any notice to inform them that the ruling was to be delivered on September 27, 2021. After detailing the proceedings that have taken place in the subject suit in the High Court, the Appellants also averred that it is in the interest of justice that their appeal be heard and determined substantively, and that the same should not be struck out on a mere technicality, originating from the error by the trial court of failure to notify the parties of the new date when the ruling would be delivered.
  5. We heard the application on the Court's virtual platform on March 29, 2023, and learned counsel Mr. Emmanuel Eredi appeared for the Applicant, while learned counsel Mr. Stephen Ngombo appeared for the Appellants. Mr. Eredi informed the Court that he would rely on his written submissions dated 4<sup>th</sup> May 2022 which cited Rules 75(2), 77(1), 82(1), 83 and 84 of this Court's Rules as well as the case of *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* (2019) eKLR, to submit that it is a mandatory requirement that a Notice of Appeal must be lodged in the court where it is filed within 14 days from the date of delivery of the decision being appealed against.
  6. Therefore, that the Appellants, having failed to file the Notice of Appeal within the statutory timelines, and having failed to seek leave to do so, the Notice of Appeal is fatally defective and no appeal lies therefrom and it should therefore be struck out. Further, that an appeal premised on such defective notice of appeal is incurable as it is tantamount to asking a court to remedy an illegality, and the decision by the Supreme Court of Kenya in *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others*, [2014] eKLR was cited in this respect.
  7. Mr. Ngombo relied on written submissions dated January 14, 2023 to urge that the Applicant is guilty of abuse of the process of this Court in consequence of declining the opportunity granted them by the Deputy Registrar on the October 18, 2022 to the effect that the present application be determined along the lines on which this Court had already determined Mombasa Civil Application No E097 of 2021, on the June 24, 2022. In addition, that it was unfair for the learned Judge of the High Court to postpone delivery of her ruling, commit to issuing notice of the new date for delivery of ruling, fail to give any notice, and then deliver the ruling in the absence of some of the parties.
  8. Rule 75 of the *Court of Appeal Rules of 2010*, which were applicable at the time of filing of the impugned notice of appeal, specified the period within which the notice of appeal should be filed as 14 days. Rule 77(1) provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Similar provisions are now found in Rule 77(1) and 79(1) respectively of the *Court of Appeal Rules, 2022*. The impugned notice of appeal was lodged on October 13, 2021 and was therefore lodged outside the requisite fourteen days of the ruling delivered on September 27, 2021.
  9. Furthermore under the then Rule 82 of the *Court of Appeal Rules of 2010*, an appeal was instituted by lodging a Memorandum of Appeal and Record of Appeal in the appropriate registry, within sixty (60) days of the date when the Notice of Appeal was lodged. The proviso to Rule 82 (1) 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 the copy of the proceedings, where an application for the proceedings was made within thirty (30) days of the date of the decision intended to be appealed against. Rule 82 (2) in addition provided that an Appellant shall not be entitled to rely on the proviso unless the application for the copy of the proceedings was in writing and a copy of it served on the Respondent. Similar provisions are now found in Rule 84 of the *Court of Appeal Rules, 2022*. To this extent, the Appellants cannot rely on the Certificate of Delay issued by the Deputy Registrar of the High Court dated November 18, 2021 that was annexed by the Applicant, and the appeal was therefore also filed out of time.

10. The Appellants do not contest that the Notice of Appeal dated October 8, 2021 was lodged on October 13, 2021, or that they failed to serve the letter requesting for proceedings. In a ruling delivered on June 24, 2022 in a similar application made by the Applicant in Civil Appeal (Application) No E097 of 2021 with respect to a different appeal arising from the same subject suit, this Court (Gatembu, Nyamweya & Lesiit JJA) noted as follows with regards to the arguments advanced by the Appellants, which sentiments we adopt:

“7. ...Time for that purpose begins to ran from the date of the decision which is intended to be challenged. The fact that the appellant may not have been present during delivery of the impugned ruling may be a factor for consideration in an application for extension of time...”

11. It has in this regard been emphasised by this Court that the timelines for taking of certain steps are indispensable to the proper adjudication of the appeals that come before us, and that the Rules are expressed in clear and unambiguous terms and command obedience. Since it is not contested that the Appellants’ Notice of Appeal was not filed and served on the Applicant within the required time, and that the Record of Appeal was filed out of time, we find that the Applicant’s Notice of Motion application dated March 18, 2022 is merited.

12. We accordingly strike out the Appellants’ Notice of Appeal dated October 8, 2021 and lodged herein on October 13, 2021 and Record of Appeal filed herein on December 17, 2021. The Applicant shall have the costs of the application dated March 18, 2022.

13. Orders accordingly.

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

**S. GATEMBU KAIRU (FCIArb)**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**G.V ODUNGA**

.....  
**JUDGE OF APPEAL**

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

*Signed*



DEPUTY REGISTRAR

