



**Standard Ltd & another v Onchieku (Civil Application  
134 of 2019) [2023] KECA 1275 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1275 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 134 OF 2019  
HA OMONDI, JM MATIVO & GWN MACHARIA, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**JUMA KWAYERA ..... 1<sup>ST</sup> APPLICANT**

**THE STANDARD LTD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DANIEL ONCHIEKU ..... RESPONDENT**

*(Being an application to strike out the appeal from the Judgment of the High Court at Nairobi (J. Thurania, J.) delivered on 29th June 2018 in Civil Suit No. 303 of 2009)*

**RULING**

1. The Application before us for consideration is a Notice of Motion dated May 10, 2019 brought pursuant to section 3(1), 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 42(1), 82, 83 & 84 of the [Court of Appeal Rules](#), substantially seeking to strike out the appellant/respondent's appeal dated April 5, 2019, for being filed out of time without leave of the Court.
2. The Application is supported by the grounds on the face of it and the Affidavit sworn by Millicent Ng'etich, the head of the legal department in the 1<sup>st</sup> applicant's company. She avers that judgment of the High Court (Thurania, J.) was delivered on June 29, 2018 and the appellant filed a Notice of Appeal on July 6, 2018; that the appellant sought for certified copies of proceedings, but he never served the letter requesting for proceedings in accordance with this [Court's Rules](#) and, as such, time continued to run; that he ought to have filed his appeal within 60 days of the Judgment, which days ran out on August 28, 2018; that as such, the appeal herein was filed out of time and without the Court's leave, and should be struck out with costs.
3. The respondent opposes the application *vide* an undated Replying Affidavit. He deposes that the letter requesting for typed proceedings was made together with the Notice of Appeal which were then given



- to a process server and served upon the applicants on July 11, 2018; that the applicants acknowledged receipt by stamping on the Notice of Appeal, but declined to stamp on the letter; that the Application is made in bad faith and is premised on a technicality, which this Court should ignore; that upon receiving the proceedings and the Certificate of Delay, he filed the Record of Appeal two days later; and that therefore, this Court should accord him the opportunity to be heard.
4. The respondent filed a further Affidavit sworn on May 18, 2023, averring that his advocate filed the letter requesting for proceedings dated July 2, 2018, and it was received in the registry on July 20, 2018; that his Notice of Appeal was filed on July 2, 2018, and both copies of the letter and Notice of Appeal were served upon the applicants' advocates on July 11, 2018 who chose to stamp the Notice of Appeal but not the letter; that the application is an abuse to the court process and it offends article 159(2)(b) of the *Constitution*, and should be dismissed with costs.
  5. The matter came up for hearing before us on the May 31, 2023. Learned counsel Mr Bwire appeared for the applicants while learned counsel Mr Osoro appeared for the respondent. Both counsel relied on their respective written submissions, and they also made limited oral highlights. Those of the applicants are dated May 26, 2023 whilst for the respondent are dated May 22, 2023.
  6. Mr Bwire submitted that the import on rule 82(2) of the *Court of Appeal Rules* was that, for an appellant to enjoy the discretion of extension of time, he/she must demonstrate that he/she wrote a letter requesting for proceedings and that the letter was copied to the respondent(s). He submitted that in the instant case, the appellant never copied the letter requesting for proceedings to them and, as such, the time continued to run from the date he lodged the appeal. He placed reliance on the case of *Patrick Njuguna Kariuki vs Del Monte Kenya Limited* [2020] eKLR which underscored strict adherence with rule 82. And, for the reason that the appellant did not adhere to rule 82, the appeal should be deemed as filed out of time, and consequently be struck out.
  7. Counsel submitted that it was not true as alluded in the respondent's further affidavit that the letter requesting for proceedings was served on the same date with the Notice of Appeal, which is July 2, 2018. In support of this argument, he referred to the Notice of Appeal annexed to the further Affidavit which indicates that it was served on July 11, 2018 and the letter requesting for proceedings on July 20, 2018; that therefore, it is clear that it was impossible that the two documents were filed on the same date, or served on July 11, 2018. Counsel added that non-compliance with strict provisions of the Court's Rules cannot be bailed out by article 159 of the *Constitution*. Indeed, it was Mr Bwire's submission that the respondent, in seeking refuge under Article 159 of the *Constitution* is acknowledging being at fault, only that he refers to the error of non-compliance with the Rules as a procedural technicality. He thus urged us to find merit in the application by allowing it with costs.
  8. On his part, Mr Osoro submitted that the letter requesting for proceedings was received by the registry on July 2, 2018 and that is what is shown in the Certificate of Delay; that they (advocates) wrote the letter together with the Notice of Appeal and collectively served them on the applicants who received the copies; that article 159 (2)(b) of the *Constitution* commands a court to look at the substance of a case; that in this case, the substance of the appeal is that it has high chances of success, and that the suit in the High Court was dismissed on a technicality; that the respondent complied with rule 82 of this *Court's Rules* as indicated by the Certificate of Delay; and that the application is unmerited and should be dismissed.
  9. In rebuttal, Mr Bwire submitted that rule 82 is couched in mandatory terms and the appellant cannot rely on its proviso to purport to have filed the appeal on time; that while the appellant has not explained the mis-steps made, he ought to have requested for extension of time to file the appeal out of time; and that consequently, article 159(2)(b) cannot salvage the appeal.



10. We have considered the application, the response and the respective submissions made before us. It is now a settled principle that the power of this Court to strike out an appeal is discretionary, and is exercised based on the peculiar circumstances of each case. Rule 86 of the [Court of Appeal Rules, 2022](#) is instructive on the basis upon which an application for striking out a Notice or Record of Appeal can apply. It provides as follows:

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—

- a. that no appeal lies; or
  - b. 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 notice of appeal or an appeal shall not be brought after expiry of 30 days after the date of service of the notice or record of appeal or record of appeal as the case may be.
11. It is evident from the record that the applicants' complaint is not hinged on the service of the Notice of Appeal, but on the filing and service of the Record of Appeal. The Notice of Appeal herein was filed on the July 6, 2018 and served upon the applicant on July 11, 2018. The Record of Appeal was filed on April 5, 2019. The applicants did not state when the Record of Appeal was served upon them and they left it to the Court to fill in the gaps.
12. The Application in the first instance ought to have been filed within 30 days of service of the Record of Appeal. This date is not evident as it was not stated by the parties herein. Thus, we cannot find and hold that the application was filed within the stipulated timelines. It is not upon the Court to embark on a fact-finding mission as to when the Record of Appeal was served upon them. In so holding, we find solace in the case of [Salama Beach Hotel Limited & 4 others vs Kenyariri & Associates Advocates & 4 others](#) [2016] eKLR, where this Court differently constituted held as follows:

“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.

13. The instant Application is dated May 10, 2019. The respondent filed the Record of Appeal on April 5, 2019. As we cannot, with certainty determine when it was served upon the applicants, the benefit



of doubt must be given to the respondent. We also note that, whilst the applicant is seeking to enforce timelines as against the respondent, he is himself violative of the proviso to rule 86 which mandatorily requires that the instant application be filed within 30 days of service with the Notice of Appeal or the Record of Appeal. What this means is that the application is itself incompetent and is for striking out.

14. Having said that, we cannot in good conscience ignore the alleged infraction that the Record of Appeal may have been filed out of time.
15. It is not in dispute that on June 29, 2018, Thurania, J. delivered the impugned Judgment. Being dissatisfied, the respondent timeously filed a Notice of Appeal dated July 2, 2018, on the same date as can be confirmed from the registry stamp. It suffices to state that the Notice of Appeal is indicated to have been lodged on 6<sup>th</sup> July 2018 and served on the applicants on July 11, 2018, in compliance with the prerequisites under rules 77 and 79 of the Rules of the Court. As correctly contended by the applicants, the respondent ought to have processed and filed the Record of Appeal within the timelines provided for in rule 84 (1) & (2) of the *Court's Rules*. It provides that:
  - a. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged– a memorandum of appeal, in four copies;
  - b. the record of appeal, in four copies;
  - c. the prescribed fee; and
  - d. security for the costs of the appeal:

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

16. Therefore, the appeal ought to have been filed by September 6, 2018. The respondent argues that the letter was served upon the applicants on the same date as the Notice of Appeal which is on the July 11, 2018. However, this is doubtful as the said letter is receipted July 20, 2018 by the registry. The respondent avers that this is an error. However, the alleged error is not conceivable on the ground that the Notice of Appeal lodged on the same date has a stamp for July 2, 2018. Furthermore, at paragraph 1 of the Certificate of Delay, it is clear that the letter for application for certified copies of proceedings and judgment was lodged in Court on July 20, 2018. We take this as *prima facie* evidence that the said letter was filed on July 20, 2018. It would then be impossible for the said letter to have been served upon the applicants on July 11, 2018, which is nine days prior to its filing. We then arrive at the inescapable conclusion that the respondent ought to have filed the Record of Appeal within 60 days of the filing of the Notice of Appeal, which was up to the September 6, 2018. Having filed the Record of Appeal on April 5, 2019, it is then clear that it was filed out of time.
17. So, what orders recommend themselves in the circumstances?  
Rule 85 provides; that:  
85.



- (1) 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 other party, make such order.
- (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

18. In *Mae Properties Limited vs Joseph Kibe & another* [2017] eKLR, this Court expressed itself as follows:

“It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court *suo moto*, on its own motion and at its sole discretion, presumably with neither notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure.

Under the same rule 83, and assuming that the Court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply made the order deeming the notice of appeal as withdrawn. (Emphasis our)”

19. We take cognizance that the Certificate of Delay was prepared and issued on April 3, 2019, and hence ready for collection accordingly. The respondent filed his appeal two days later, on April 5, 2019. This Court in *Esther Anyango Ochieng vs Transmara Sugar Company* [2020] eKLR (Kiage JA), stated thus:

“Where, however, as in the present case the appeal has in fact been instituted, can we in clear conscience, without a dalliance with the surreal, nevertheless pronounce that the appellant’s notice of appeal is deemed to be withdrawn? I respectfully do not think so. I cannot shut my eyes to the fact that the appeal, the future filing of which was signified by the notice of appeal, in fact exists in verity. I would be engaging in smoke and mirrors and allowing the shadows to swallow the substance were I to essentially pretend that the respondent has no interest in filing an appeal that he has in fact filed. To so hold does not involve a validation of the said record of appeal and a cure for any defects it may have and which may well be the subject of attack. It only amounts to this: the existence of a record of appeal, which facially means that the appeal has been instituted, removes the said notice of appeal from the deeming purview of Rule 83. To deem, after all, is no more than to regard or consider something in a particular way that may not be the reality but only a legal fiction. And I cannot fictitiously consider the intent to appeal to be abandoned when the appeal itself has in fact and substance been instituted.



The inevitable result is that the motion before me is not only without merit, but, given that it was time-barred and sought a deeming order in the face, it turns out, of an appeal already instituted, it must be struck out for being incompetent.”

20. We cannot in good conscience say that the respondent failed to file his appeal, nor can we say that he is guilty of laches in filing the appeal, as he filed it two days after obtaining the certified copies of proceedings. We are convinced that the order that recommends itself would be to have the appeal determined on its merits.
21. Accordingly, we hereby strike out the application dated May 10, 2019 with no orders as to costs. We deem the Notice of Appeal dated July 2, 2019 as not withdrawn, and consequently, that the appeal is properly on record and shall be determined on its merits.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**J. M. MATIVO**

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**JUDGE OF APPEAL**

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**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

