



**Mutyaene v Kenya Commercial Bank Limited & another (Civil Appeal
(Application) E017 of 2020) [2023] KECA 1160 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1160 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E017 OF 2020
FA OCHIENG, LA ACHODE & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

REUBEN KIOKO MUTYAENE APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT

**TRANSUNION T/A CREDIT REFERENCE BUREAU AFRICA
LIMITED 2ND RESPONDENT**

(An application to strike out the Record of Appeal arising from the Judgment of the High Court at Nakuru, (J.N. Mulwa, J.) dated 27th May, 2020 in HCCC No. 38 of 2017)

RULING

1. Before us is a Notice of Motion dated 22nd March, 2021 pursuant to Rules 82, 84, 87 and 90 of the [Court of Appeal Rules, 2010](#) and Sections 3A and 3B of the [Appellate Jurisdiction Act](#). The application seeks orders that; the record of appeal dated 14th October, 2020 and the supplementary record of appeal dated 11th January, 2021 be struck out.
2. The application is supported by the affidavit of Rosemary Mbugua, the 2nd applicant's legal officer and on the following grounds:
 - a. The impugned judgement was delivered on 27th May, 2020. The respondent filed a record of appeal on 15th October, 2020 which he served upon the applicant on 25th February, 2021.
 - b. The record of appeal was served after the 7 days' period prescribed under Rule 90.



- c. The respondent failed to attach the Judge's notes to the record of appeal as provided for under Rule 87.
 - d. The record of appeal was filed outside the 60 days' period stipulated under Rule 82, yet the respondent failed to file a certificate of delay.
 - e. The respondent having failed to take the essential steps within the prescribed time, it is in the interest of justice that the record of appeal be struck out.
3. In response, the respondent in his replying affidavit stated that:
- a. The respondent started the process of lodging the record of appeal through the e-filing portal on 15th October, 2020 but he encountered unprecedented challenges or delays at the court registry, in the approval of court fees and invoicing. The respondent shared the correspondence between him and the court registry ICT personnel regarding the same.
 - b. The respondent also pointed out that there were two case numbers for the same appeal, and the issue had to be resolved by the registry before he could proceed. The first file which was filed on 15th October, 2020 was COACA E012 OF 2020 while the second file, COACA E036 OF 2020 was opened on 11th December, 2020.
 - c. The invoice generated by the registry on 11th February, 2021 for Kshs. 20,290- was erroneous and had to be rectified before payments were made.
 - d. The e-filing system was rectified on 24th February, 2021 and the appellant proceeded to pay the filing fees of Kshs. 11,530/- on 25th February, 2021.
 - e. The appeal is deemed to have been filed on 25th February, 2021 when the court acknowledged payment of the prescribed fees and security for costs as provided for under Rules 14(2) and 82(1)(c) of the [*Court of Appeal Rules*](#).
 - f. In the circumstances, it is in the interest of justice that the days from 15th October, 2020 to 25th February, 2021 be excluded when computing the time for filing the record of appeal, as the invoicing challenge was pending at the court registry.
 - g. Immediately after paying the prescribed fees, the respondent served the record of appeal, including the Judge's notes in the supplementary record of appeal, upon the applicant as provided for under Rules 82(1), 87(1) and 88 of the [*Court of Appeal Rules*](#).
 - h. There was no delay in filing the supplementary record of appeal, it was filed on 25th February, 2021 and leave of court was not required under Rule 88 of the Court of Appeal Rules.
 - i. A certificate of delay was obtained on 23rd September, 2020. The time taken to prepare and supply typed proceedings was 106 days. Having lodged the record of appeal on 15th October, 2020; it was well within the 60 days' provided for under Rule 82(1) of the [*Court of Appeal Rules*](#). The certificate of delay was served upon the applicant on 25th February, 2021.



- j. Upon delivery of the impugned judgment on 27th May, 2020 the respondent lodged a notice of appeal dated 6th June, 2020 and a letter requesting for typed proceedings dated 8th June, 2020 which documents were served upon the applicant on 17th June, 2020.
 - k. The applicant did not lodge and serve the respondent with a notice of a full and sufficient address of service within 14 days of service of the notice of appeal as envisioned under Rule 79 of the [Court of Appeal Rules](#). In this regard the applicant missed an essential step in the appellate process, and the automatic right to be served with record of appeal under Rule 90(1) of the [Court of Appeal Rules](#).
 - l. The application herein is bad in law, misplaced, fatally defective and a blatant abuse of the court process, and ought to be dismissed with costs.
4. When the application came up for hearing, parties relied on their respective written submissions.
 5. The applicant pointed out that the respondent served the record of appeal filed on 15th October, 2020 upon them on 25th February, 2021 being 134 days' after he lodged the appeal in contravention of Rule 90(1) of the [Court of Appeal Rules](#). The applicant further pointed out that the appeal was in contravention of Rule 87 of the [Court of Appeal Rules](#); the respondent did not annex the trial Judge's notes and certificate of delay, and the said documents were filed out of the 60 days' period prescribed by Rule 82 of the [Court of Appeal Rules](#).
 6. The applicant was of the view that the supplementary record of appeal dated 11th January, 2021 was filed without leave of court and yet it was not within the 30 days' period provided for under Rule 88 of the [Court of Appeal Rules](#). The same was also served after 7 days'. The applicant urged that the application be allowed.
 7. The 2nd applicant was of the view that the respondent having served the applicants on 25th February, 2021 had neglected to take essential steps within the time prescribed by the rules. The 2nd applicant further pointed out that the record of appeal dated 14th October, 2020 failed to include the trial Judge's notes in contravention of Rule 87 of the [Court of Appeal Rules](#). To buttress this submission, the 2nd applicant cited the case of [Tropicana Hotels Limited v SBM Bank \(Kenya\) Limited](#) [2020] eKLR.
 8. The 2nd applicant pointed out that the respondent had failed to annex a certificate of delay in the record of appeal to account for the time taken in obtaining and preparing the documents, hence the deviation from 60 days prescribed was not justified. The 2nd applicant relied on the case of [Mistry Premji Ganji \(Investments\) Limited v Kenya National Highways Authority](#) [2019] eKLR to support this submission. The 2nd applicant urged that the appeal be struck out.
 9. The respondent pointed out that he was not served with the application herein and only became aware through a notice by the court for a case management conference on 17th January, 2023. Reiterating the contents of his replying affidavit, the respondent submitted that the applicant was in contravention of Rule 70 of the [Court of Appeal Rules](#) and as such, he cannot be heard to complain of the irregularities committed by the respondent. To buttress this submission, the respondent cited the case of [Ann Wanjunu v Mwihaki Waruiru & 2 Others](#) [2018] eKLR.
 10. The respondent was of the view that by failing to conform to Rule 79 of the [Court of Appeal Rules](#), the applicant had failed to place themselves on the right side of the law in furtherance of the overriding principles.



11. The respondent submitted that he had remained vigilant and unreservedly complied with the relevant rules. Citing the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* [2013] eKLR, the respondent urged the court to dismiss the application on the ground that the applicant had failed to comply with the initial step in the appellate process.
12. The respondent went on further to submit that the reasons for the delay in service were well captured in his replying affidavit. The respondent reiterated that the inception of the e-filing system and the Covid-19 pandemic were the main challenges for the delay. The respondent pointed out that email trail between him and the court personnel and stated that he had been vigilant in pursuing the appeal. The respondent maintained that in the circumstances, service of the record on the applicant on 25th February, 2021 was within the timelines set out under Rule 82 of the *Court of Appeal Rules*.
13. The respondent continued further that, the delay was a technicality which could not be blamed on him; the challenge at the court registry was evident, well explained and documented. Therefore, striking out the record would unfairly drive away the respondent from the seat of justice. The respondent relied on the case of *Kiai Mbaki & 2 Others v Gichuhi Macharia & Another* [2005] eKLR to buttress this submission.
14. As regards the filing and service of proceedings, the respondent submitted that they were served concurrently through the supplementary record of appeal after payment of the requisite court fees on 25th February, 2021. The respondent had to wait for the registry to provide him with an invoice before he could make payments. The respondent pointed out that the certificate of delay was served upon the applicant on 25th February, 2021.
15. We have carefully considered the application, affidavit in support, replying affidavit, submissions by parties, authorities cited and the law. The issue for determination is whether or not the application herein has merit.
16. The applicant's main contention was that the record of appeal was not served within the prescribed timelines and that the Judge's notes and certificate of delay did not form part of the record of appeal. The respondent's rebuttal is that the delay in service was occasioned by challenges at the registry and that the Judge's notes and certificate of delay were filed in the supplementary record of appeal which was served upon the applicant.
17. Sections 3A and 3B of the *Appellate Jurisdiction Act* are the twin provisions which enshrine the overriding objective principles of the Court. The overriding principles donate power to the Court to discharge its mandate with great latitude.
18. The applicant relied on the following provisions. Rule 82 of the *Court of Appeal Rules* provides as follows:
 - “(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. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - 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.

- (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.”

19. Rule 84 of the [Court of Appeal Rules](#) provides that:

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

20. Rule 87 of the [Court of Appeal Rules](#) provides that:

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

- a. an index of all the documents in the record with the numbers of the pages at which they appear;
- b. a statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service as required by rule 79, his last known address and proof of service on him of the notice of appeal;
- c. the pleadings;
- d. the trial judge’s notes of the hearing;
- e. the transcript of any shorthand notes taken at the trial;
- f. the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;
- g. the judgment or order;
- h. the certified decree or order;
- i. the order, if any, giving leave to appeal;
- j. the notice of appeal; 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:

Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.”

21. Rule 90 of the *Court of Appeal Rules* provides as follows:

- “(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79.
- (2) The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint.”

22. The consequence for non-compliance with the prerequisites in Rule 82(1) and (2) of the Court of Appeal Rules was addressed in the case of *Mae Properties Limited v Joseph Kibe* [2017] eKLR 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 lodgement 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.”

23. In the case of *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others* [2016] eKLR the court stated thus:

“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispute justice in a timely, just, efficient and cost-effective manner. 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 thirty days and served the letter upon 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.”



24. It is common ground that the respondent was not able to lodge his appeal within 60 days of lodging of the notice of appeal. However, the respondent sought recourse in the proviso to Rule 82(1) of the *Court of Appeal Rules*. The respondent annexed a certificate of delay dated 23rd September, 2020 in his replying affidavit. It is not in dispute that the respondent lodged his appeal on 15th October, 2020 well within the timelines after being issued with a certificate of delay. What is in contention is the failure by the respondent to annex the said certificate and the Judge’s notes to the record of appeal, and service of the record of appeal after the lapse of 7 days.
25. The respondent stated that the delay in service of the record of appeal was as a result of the delay in processing the payment invoice and the two case numbers. He annexed a myriad of emails he sent to the registry personnel upon lodging his appeal on 15th October, 2020. There was a total of 16 emails sent by the respondent following up on the issue of invoices and the two case numbers. The first email was on 29th October, 2020 while the last email was on 26th February, 2021. It is safe to say the respondent was vigilant in following up the matter.
26. In the case of *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR the Court stated that:

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice. It is however, not a principle the court may invoke without giving the parties an opportunity of being heard on the matter...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of *the Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

27. In doing so, the Court puts into the scales of justice the question as to whether justice is better served by striking out the record of appeal or by sustaining it and thereafter paving way for the hearing of the appeal on its merits.
28. This Court in *Mukenya Ndunda v Crater Automobiles Limited* [2015] eKLR observed as follows:

“We take the view that where there is a plausible explanation for non-observance of the rules of procedure or where default is not flagrant, flippant, deliberate or reckless or where it has not occasioned prejudice to the other party that cannot be redressed by way of costs, the Court should be disinclined to strike out an appeal. We take the view that the rules of procedure are designed to assist in the administration of justice. They are intended to serve as the hand-maidens of justice, not to defeat it”.



29. Similarly, in the case of *Hassan Nyange Charo v Khatib Mwashetani & 3 others* [2014] eKLR the Court stated that:

“Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail. We note that the last correspondence in the record before us was on 20th January, 2014, and that could cast doubt on the measure of assertion of diligence; but there is nothing to show that the applicant has not made other efforts to inquire about the proceedings, or to show that the proceedings are now ready but remain uncollected. As no respondent has called into question the assertion that the proceedings are not yet available, we would not impugn the applicant's claim of diligence. Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not. We find that though prejudice to the representation of the people of Lunga Lunga Constituency will persist, it is due to no fault on the part of the applicant.”

30. It is our considered view that the respondent's explanation for the delay in serving the record of appeal on the applicant was justified and plausible. The explanation and the evidence tendered show that indeed, the situation was beyond his control. The record of appeal could only be deemed to be filed upon payment of the prescribed filing fees. This was done on 25th February, 2021 after the respondent was issued with the correct invoice. The respondent diligently served the record of appeal on the applicant on 25th February, 2021. This was within the 7 days' period envisioned by Rule 90 of the *Court of Appeal Rules*.

31. The respondent in an attempt to cure the discrepancy in failing to annex the Judge's notes and the Certificate of Delay in the record of appeal, he lodged a supplementary record of appeal incorporating the said documents. The respondent stated that he did not require leave of court before filing the supplementary record of appeal. The respondent relied on the provisions of Rule 88 of the *Court of Appeal Rules* which provide that:

“Where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the deputy registrar on application.”

32. In the circumstances, we find that since the respondent was only able to officially lodge his appeal on 25th February, 2021 he did not require leave to file the supplementary record of appeal.

33. In the result, we hold that the application dated 22nd March, 2021 is without merit and the same is hereby dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE



.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

