



REPUBLIC OF KENYA



**Neilsen & another v Nguruman Limited (Civil Appeal (Application)
20 of 2018) [2022] KECA 99 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 99 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 20 OF 2018
RN NAMBUYE, HM OKWENGU & J MOHAMMED, JJA
FEBRUARY 4, 2022**

BETWEEN

JAN BONDE NEILSEN 1ST APPLICANT

PETER BONDE NEILSEN 2ND APPLICANT

AND

NGURUMAN LIMITED RESPONDENT

(An application to strike out the entire appeal from the ruling and order of the High Court of Kenya at Nairobi (Aburili, J.) of 28th March 2017 in HCC No. 237 of 2014)

RULING

Background

- 1) The Notice of Motion dated 26th August, 2020 is brought pursuant to Sections 3A, 3B (b) & (c) of the *Appellate Jurisdiction Act* and Rules 42(1), 43, 84, 100 (2) of the *Court of Appeal Rules* (this Court's Rules). Jan Bonde Neilsen & Peter Bonde Neilsen (the 1st and 2nd applicants) seek orders in the main:
 - a) That this Court be pleased to strike out/dismiss the appeal in its entirety for want of prosecution; and
 - b) That costs of this application and of the appeal be borne by Nguruman Limited (the respondent herein).
- 2) The application is based inter alia on the grounds: that the respondent filed a suit in the High Court against the applicants vide HCCC No. 237 of 2014 where it sought inter-alia damages over the applicants alleged use of the property known as Narok/Nguruman/Kamorora/1 (the suit property); that the applicants filed a defence and brought to the High Court's attention the existence of four (4) other cases pending in other courts in respect of the suit property thereby objecting to the court's



jurisdiction; and that the High Court (Aburili, J.) held that the matter was subjudice Nakuru HCC/ ELC 103/2009, leading to the filing of the appeal herein.

- 3) Further, that the respondent filed a notice of appeal on 31st March, 2017 and a record of appeal on 31st January, 2018; that this Court issued case management notices in March and May, 2018, and on 17th May, 2018 the respondent was directed to file its written submissions within the prescribed time which it has failed to do to date; that despite constant reminders by the applicants, the respondent has failed and/or neglected to prosecute the appeal; that the respondent has absolutely lost interest in the appeal or never intended to prosecute it in the first instance; and that it is in the interest of justice that the appeal be struck out and/or dismissed with costs for want of prosecution.
- 4) The application was supported by the affidavit of Mr. James Gitau Singh, learned counsel for the applicants who reiterated the grounds in the face of the motion. Counsel submitted that the matter came up for case management on 25th July, 2018 when the respondent was directed to file its written submissions within 30 days thereof and the applicants to respond 30 days thereafter. Counsel further submitted that the respondent has not filed written submissions despite several reminders made by counsel for the applicants; that the respondent has not complied with this Court's directions despite a lapse of over two years since they were issued; and that the respondent has obviously lost interest in pursuing its appeal and it should therefore be dismissed for want of prosecution and /or struck out for non-compliance with this Court's directions.

Submissions by Counsel

- 5) The application was heard by way of written submissions. Counsel for the 1st and 2nd applicants submitted that Section 3A (3) of the Appellate Jurisdiction Act provides that an advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and to comply with the directions of the Court. Further, that Rule 84 of this Court's Rules provides that a person affected by an appeal may at any time apply to the court to strike out the notice of appeal 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 within the prescribed time. Counsel relied on the decision of this Court in *Simon Kimutai & another v Sammy Makove (Commissioner of Insurance) & another [2018] eKLR* where an application under Rule 84 to strike out a record of appeal for not being served within the prescribed timelines was allowed; and *Kenya Commercial Finance Company Limited v Richard Akwesera Onditi [2010] eKLR* for the propositions that failure to comply with well settled procedures cannot be excused by simply waving before the Court the provisions of Section 3A and 3B of the Appellate Jurisdiction Act; that the Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; and that the only difference now is that the Court has wider powers and will not automatically strike out proceedings.
- 6) Ms. Hanan H. El- Kathiri, learned counsel for the respondent submitted that the instant application is defective and an abuse of the Court process; that the 1st and 2nd applicants have failed to bring their application within the requisite Rules of this Court; that the instant application was filed on 26th August, 2020 whereas the record of appeal before the Court was filed on 31st January, 2018. Counsel relied on this Court's decision in *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & Another [2016] eKLR* for the proposition that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court's Rules and the failure to comply with the proviso renders an application thereunder defective; that the 1st and 2nd applicants failed to file their application within thirty (30) days from the date of service of the notice of appeal or record of appeal; that the proviso to Rule 84 of this Court's Rules is couched in mandatory terms; and that the respondent has a triable appeal which should be addressed on its merits. Counsel referred to the record of appeal and the written submissions dated 29th March, 2021 filed in support of the main appeal. Counsel relied on the decision



of this Court in *Kivanga Estates Limited vs National Bank of Kenya Limited [2017] eKLR* for the proposition that the jurisdiction of the Court to strike out pleadings has been described as draconian and that the rules of natural justice require that the court must not drive away a litigant from the seat of justice, without a hearing, however weak his or her case may be. Counsel urged us to dismiss the application with costs.

Determination

- 7) We have considered the application, the submissions, the authorities cited and the law. Rule 84 of the Court of Appeal Rules 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 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.” [Emphasis supplied].

- 8) This Court in *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another (supra)* held that the proviso under Rule 84 is couched in mandatory terms, and as such applications brought after 30 days of service of the notice of appeal or appeal are incompetent and liable for striking out. A party intending to bring an application under Rule 84 out of time ought to first file an application for extension of time under Rule 4 of this Court’s Rules, as stated in *Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others [2016] eKLR*:

“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.”

- 9) Further, *Kiage, JA in Esther Anyango Ochieng v Transmara Sugar Company [2020] eKLR* rendered himself as follows:

“Having given this matter due consideration, I have no doubt in my mind that the application to strike out the notice of appeal on the grounds that it was served out of time and that it was not followed by the filing of the record of appeal is incompetent. It is incompetent because, while it seeks to enforce timelines as against the respondent, it is itself violative of the proviso to Rule 84 which mandatorily requires that it be filed within 30 days. It was not so filed and leave to file it out of time not having been sought and given, the notice of motion should be for striking out.”

- 10) The instant application was filed on 26th August, 2020 while the record of appeal was filed on 31st January, 2018. The instant application was therefore filed over two years after the record of appeal was filed. The applicants did not seek an extension of time to file the application out of time as provided under Rule 4 of this Court’s Rules. It follows therefore that the application is incompetent.



11. In *Gichuki King'ara & Co Advocates v Al Jalal Enterprises Ltd and Others*, Civil Appl. No. NAI 211 of 2012 (*unreported*) this Court in reference to Rule 84 succinctly stated as follows:

“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

12) By parity of reasoning, the instant application is incompetent for reason that it was filed outside the stipulated time in the proviso to Rule 84 of this Court's Rules. The applicants did not seek an extension of time within which to file the application. Accordingly, the notice of motion dated 26th August, 2020 has no merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

