



**Unilever Tea Kenya Limited v National Land Commission & 2 others (Civil Application 113 of 2018) [2022] KECA 31 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 31 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION 113 OF 2018  
W KARANJA, J MOHAMMED & S OLE KANTAI, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**UNILEVER TEA KENYA LIMITED ..... APPELLANT**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**SOLEI BONEH INTERNATIONAL (SBI) HOLDINGS ..... 3<sup>RD</sup> RESPONDENT**

*(An Application for striking out of the Notice of Appeal dated 8th December, 2017 in respect of the Ruling and Order of the Environment & Land Court at Kericho (J. M. Onyango, J) delivered on 22nd November, 2017 in Constitutional Petition No. 11 of 2017)*

**RULING**

1. The Application dated 23rd August, 2018 and brought under Section 3A & 3B of the *Appellate Jurisdiction Act* and Rule 83 and 84 of the *Court of Appeal Rules, 2010* seeks the striking out of the Notice of Appeal dated 8th December, 2017 which is in respect of the Ruling and Order of the Environment & Land Court in Kericho (J. M. Onyango, J) delivered on 22nd November, 2017 arising from Constitutional Petition No. 11 of 2017.
2. It is predicated grounds, inter alia, that the Notice of Appeal has never been served on the respondent as per Rule 77 (1) of the Court of Appeal Rules; that the appeal is frivolous and an abuse of the Court process for failing to meet the requirements of Rule 77(1) of the Court of Appeal Rules and that the appeal is incompetent and cannot lie.
3. It is averred in the grounds of the application that on 8th December, 2017, Ms. Unilever Tea Kenya Limited, (the appellant) lodged the Notice of Appeal dated 5th December 2017, and simultaneously sent its letter dated 5th December 2017, addressed to the Registrar of the court, among others,



requesting for typed proceedings for purposes of preparing the record of appeal. Both documents were duly served on the 2nd respondents/applicant herein on 13th December, 2017; that according to Rule 75 (2) of the Rules of this Court, the said Notice of Appeal ought to have been lodged by 6th December 2017, for it to fall within Fourteen (14) days from the date of 22nd November, 2017, when the said Ruling/Judgment, complained against, was delivered, hence it was lodged two (2) days outside the prescribed time.

4. The application is supported by the Affidavit of Jude Ragot, learned Counsel for the 2nd respondent sworn on 23rd August, 2018 in which he deposes that the typed and certified proceedings of the superior court were ready for collection by 5th January, 2018, and according to Rules 82 and 83 of the Rules of this Court, as read with the appellant's letter dated 6th December, 2017 requesting for the proceedings to be typed, the appellant ought to have lodged its record of appeal within sixty (60) days from that 5th January, 2018, which lapsed on 4th March, 2018; that as at the time when this application was filed in Court, the appellant had neither lodged its record of appeal nor otherwise sought leave to do so out of time, in circumstances in which the delay is now about six months out of the prescribed period; that the appellant having failed to lodge its appeal within the time prescribed by the law, and the lapse of time being so unreasonably inordinate, and the Notice of Appeal itself, having been lodged out of the prescribed period of time, and in the absence of the requisite leave of the court to address the said issues, the Court is entitled to accede to the respondent's instant application.
5. According to the applicant, the appeal involves an enormous economic undertaking by the 2nd respondent in the construction and or renovation of the national highway running into billions of shillings, and it would be imprudent to allow the fate of the said Notice of Appeal and its intended appeal predicated thereon, to remain hanging indefinitely with such uncertainty, in such circumstances where so much is at stake for the 2nd respondent and the general welfare of the public whose funds are used in such undertakings; that it is in the interests of justice that this application be allowed.
6. The application is opposed vide a replying affidavit sworn by one Lydia Musili, learned counsel for appellant/1st respondent in which she deposes that the Notice of Appeal in this matter was filed within fourteen (14) days of the decision which is the subject of the intended appeal; that at the time of lodging the Notice of Appeal, they also formally requested for typed proceedings and a certified copy of the order on 6th December, 2017; that a record of appeal ought to be lodged within sixty (60) days of the date when the notice of appeal is lodged, provided that where an application for copies of proceedings is made within thirty (30) days of the decision which is sought to be appealed against, that the time for preparing and delivering the copies of proceedings sought should be excluded while computing the time within which the appeal is instituted.
7. That contrary to procedure, the Deputy Registrar has not notified the 1st respondent's advocates that the requested typed proceedings and certified copies of the ruling are ready for collection to date; the 1st respondent's advocate only became aware of the existence of some typed proceedings when the 1st respondent's advocates saw some proceedings attached as annexure "JR-3" to the supporting affidavit of Jude Ragot sworn on 23rd August, 2018 but is unable to verify their authenticity and accuracy in the absence of official certified copies delivered by the Deputy Registrar as requested.
8. She further deposes that upon noting the existence of the typed proceedings aforesaid, that the 1st Respondent's Advocates wrote a reminder to the Deputy Registrar to confirm the availability of the typed and certified proceedings, ruling and order for collection, but to date, the Deputy Registrar is yet to confirm the existence of such typed proceedings and certified copy of the ruling and order; that it is not possible for the 1st Respondent to prepare a proper Record of Appeal in the absence of typed proceedings and certified copies of the ruling and order delivered by the Deputy Registrar as these are



the only authentic documents which the 1st Respondent can rely on in lodging its Record of Appeal, whose accuracy would not be in question.

9. We have considered the application before us, the rival affidavits and submissions by learned counsel. We have also considered the relevant law and the authorities cited to us. As a starting point, we wish to point out that as at the time this application was filed, there was no certificate of delay on record. In paragraphs 15 and 16 of the 1st respondent's replying affidavit, the deponent deposes that no certificate of delay had been issued as at the time of swearing the said affidavit. Although in his written submissions learned counsel for the 1st respondent states that there is a certificate of delay in the record that was filed subsequent to the filing of this application, no leave was sought to introduce any such document to the record of this application. This Court is therefore oblivious of any certificate of delay in this matter.
10. That said, we shall only consider this application based on the material that has been placed before us. Firstly, and without belabouring the point, we are satisfied that the Notice of appeal was filed on time. We say so because the official receipt shows that the Notice of Appeal was filed on 6th December 2017. That is the evidence of filing that concerns us. We say so because, the date the document is lodged is made by the registrar and so if the Deputy Registrar took 2 days to stamp and indicate the date of lodgment of the Notice of Appeal, that cannot be blamed on the respondent. In any event, if the Notice of Appeal was filed late, it behooved the applicant to file the application to strike out the Notice of Appeal within 30 days of the date it was lodged. That argument therefore falls on its face.
11. However, as far as the record of appeal is concerned, there is evidence on record that the proceedings had been ready for a long time but the respondent did not bother to collect the same from the registry. There were no reminder letters sent to the Deputy Registrar placed before us to demonstrate that the 1st respondent's counsel was diligent in following up the matter. We have not been shown either any correspondence from the Deputy Registrar eventually officially notifying the 1st respondent's counsel that the proceedings in question were ready for collection.
12. We note that in its application, the applicant has cited Rule 83 of the Rules of this Court and is not purely relying on Rules 82 and 84 of the Court's Rules. We are satisfied that the appellant herein was indolent and appeared intent on holding the Notice of appeal over the respondents heads indefinitely and only decided to act when they were served with this application. For the foregoing reasons, we have no hesitation in allowing this application and deeming as withdrawn the appellant's Notice of Appeal dated 5th December, 2017 which we hereby do with costs to the applicant/2nd respondent in the appeal.

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

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

