



**African Service Maintenance Limited v Comarco Supply Base (EPZ) Limited & another
(Civil Appeal (Application) 160 of 2019) [2022] KECA 613 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 613 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 160 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 6, 2022**

BETWEEN

AFRICAN SERVICE MAINTENANCE LIMITED APPLICANT

AND

COMARCO SUPPLY BASE (EPZ) LIMITED 1ST RESPONDENT

PURMA HOLDINGS LIMITED 2ND RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Mombasa [Njoki Mwangi J.] dated and delivered on 16th November 2018) in Civil Suit No 15 of 2018)

RULING

1. The application that is the subject of this ruling is a Notice of Motion dated February 21, 2021 brought by Comarco Supply Base (EPZ) Limited (the Applicant) which is the 1st Respondent in the substantive appeal. It seeks to have the Notice of Appeal dated November 20, 2018 and lodged on November 23, 2018 struck out for being incompetent. The said Notice of Appeal was lodged by African Service Maintenance Limited, the Appellant in the substantive appeal. The Applicant also seeks an order that the appeal dated December 18, 2018 be struck out and the cost of the application and the appeal be provided for.
2. The Applicant's case is set out in the supporting affidavit sworn on February 21, 2020 sworn by Kailesh Chauhan, its acting General Manager, who deponed that vide a preliminary objection dated 19th March 2018, the Applicant challenged the jurisdiction of the trial Court to hear and determine the Appellant's suit therein, on the grounds that the charter party agreements entered between the Applicant and Appellant dated 11th October 2017 and November 2, 2017 respectively were governed by English Law, and that disputes arising therefrom were to be settled by way of arbitration.



3. On November 16, 2018, the trial Court delivered its ruling on 16th November 2018 wherein it upheld the Applicant's objection and struck out the Appellant's suit against the Applicant, but ordered that the suit between the Appellant and the 2nd Respondent subsisted. The Appellant, being dissatisfied with the said ruling lodged a Notice of Appeal on 23rd November 2018, and thereafter filed a record of Appeal on December 18, 2019.
4. It is the Applicant's case that the Appellant failed, refused and or neglected to lodge its appeal within the prescribed time under Rule 82 of the *Court of Appeal Rules, 2010* since the Appeal was lodged on 16th December 2019 approximately one year after the impugned ruling of 16th November 2018. The applicant also contends that the Notice of Appeal is incompetent because the appellant failed, refused and or neglected to serve the Notice of Appeal within the prescribe time pursuant to Rule 77 of the *Court of Appeal Rules, 2010*, since the said Notice of Appeal was lodged on 23rd November 2018 and served on the Applicant on 30th November 2018 which was a day after the prescribed time. Lastly, that the Appellant also failed to comply with the provisions of Rule 82(1) of the *Court of Appeal Rules, 2010* by applying for a 'copy of the proceedings' instead of applying for 'certified copy of the proceedings'.
5. The Applicant annexed copies of the ruling of delivered 16th November 2018, the impugned Notice of Appeal dated 20th November 2018, and of a letter by the Appellant's advocates dated 17th November 2018 to the Deputy Registrar, of the High Court Mombasa, requesting for certified copies of proceedings and ruling of the Court to enable lodge the intended Appeal.
6. The Appellant in response filed a Notice of Preliminary Objection dated March 9, 2021, seeking to strike out the instant application with costs for being fatally defective and/or bad in law in light of Rule 84 of the Court of Appeal Rules, 2010, and also filed a replying affidavit sworn on March 9, 2021 by Abdalla Rashid, its Managing Director. The Appellant's case is that that the Applicant conceded that the Notice of Appeal was filed on 23rd November 2018 and served on November 30, 2018 in prayer 1 of its application, and the Notice of Appeal was therefore filed and served within time. The Appellant also contested the allegation that the Record of Appeal was filed out of time for the reasons that a certificate of delay was issued on November 21, 2019, showing that the certified copies of proceedings and ruling were supplied on November 15, 2019 and the Record of Appeal having been filed on December 18, 2019 was therefore within time.
7. The Applicant's application and Appellant's preliminary objection were canvassed together, at a hearing held on February 15, 2022 at which learned counsel Ms. Nancy Murahe was present for the Appellant. There was no appearance for the Applicant or for the 2nd Respondent, despite their advocates being served with notice of the hearing.
8. We have considered the written submissions dated April 23, 2021 filed by the Applicant's Advocates, wherein they reiterated that the Appellant did not adhere to Rule 77 (1) of the *Court of Appeal Rules, 2010* in respect of service of the Notice of Appeal, which was served upon it on 30th November 2018 instead on 29th November 2018. Reliance was also placed on the holding in *Mistry Premji Ganji (Investments) Limited vs Kenya National Highways Authority* [2019] eKLR that Rule 77(1) is couched in mandatory terms. The Applicant therefore urged that as the Notice of Appeal was the foundation of the appeal the entire appeal was also incompetent and should therefore be struck out.
9. The Applicant further submitted that the Appellant violated Rule 82 of the *Court of Appeal Rule of 2010* when it lodged the appeal on December 18, 2019, more than a year after filing the Notice of Appeal. Therefore, that the Notice of Appeal stood withdrawn and no appeal lies in the circumstances. Lastly, it was submitted that the Appellant only needed uncertified copies of proceedings and rulings which would have been made available in good time, and reliance was placed on Rule 87 (1) of the *Court*



of *Appeal Rules, 2010* on the material parts of a record of appeal, and the decisions in *Rodgers Abisai t/a Abisai & Company Advocates vs Wachira Waruru & another* [2009] eKLR and *L. Z Engineering Construction Limited vs Trade Bank Limited (in Liquidation)* [2000] eKLR that certified copies of proceedings and judgment are not necessary documents for the purposes of an appeal.

10. Ms. Murage relied on written submissions dated 15th March 2021 filed on behalf of the Appellant, and made reference to the case of *Joyce Bochere Nyamweya vs Jemima Nyaboke Nyamweya & another* [2016] eKLR on the mandatory nature of the proviso to Rule 84 of the Court of Appeal Rules of 2010, that required the Applicant to file its application to strike out the Notice of Appeal or the appeal within 30 days of service of the same. Therefore, that failure to do so rendered the instant application fatally defective and liable to be struck out.
11. Additionally, that the prayers to strike out the Notice of Appeal and appeal were misguided, as the Applicant conceded that the Notice of Appeal lodged on November 23, 2018 was served on November 30, 2018, which was within time pursuant to Rule 77 of the Court of Appeal Rules, 2010. Similarly, that the Record of Appeal was filed within the prescribed 60 days and in line with Rule 82, and reliance was placed on a Certificate of Delay annexed to the Appellant's replying affidavit to submit that the Appellant had up to 21st January 2020 to file and serve its record of appeal, and the record filed on December 18, 2019 was within time. Therefore, that the instant application is without merit and should be dismissed with costs.
12. We shall address the Appellant's preliminary objection first. The proviso to Rule 84 of the Court of Appeal Rules of 2010 requires an application to strike out a notice of appeal or appeal to be brought before the expiry of thirty days from the date of service of the notice of appeal or record of appeal, as the case may be. It is not disputed that the Appellant's notice of appeal was lodged on November 23, 2018 and served on 30th November 2018, and while it is not in dispute that the record of appeal was filed on 18th December 2019, it is not indicated when the said record was served. Therefore, in relation to the striking out of the Notice of Appeal, the instant application, which was lodged on 27th February 2020, was clearly out of time, having been lodged after the thirty days' requirement in the proviso to Rule 84,.
13. This Court has in this regard held in numerous decisions that the timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals, and explained the purpose of the proviso to Rule 84 in *Salama Beach Hotel Limited & 4 others vs Kenyariri & Associated Advocates & 4 others* (2016) eKLR 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.

The 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.”

14. The instant application seeking to strike out the Notice of Appeal is therefore incompetent, as it is filed out of time and the Applicant did not bring any evidence of having been granted extension of time to file the said application.
15. We shall proceed to address the arguments made on the incompetence of the appeal, which the Applicant impugns on the basis of both the Notice of Appeal and the record of appeal being filed out of time. The Applicant pleaded that the Appellant’s Notice of Appeal lodged on 23rd November 2018, was served on it out of time on November 30, 2018. Rule 77(1) of the Court of Appeal Rules requires a Notice of Appeal to be served on all persons directly affected by the appeal within seven days of its lodging. Rule 3(a) of the *Court of Appeal Rules* in this regard states that a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens, or the act or thing is done.
16. Therefore, the date of November 23, 2018, which was the date of lodging of the Notice of Appeal was excluded for purposes of computing time, and time started to run on 24th November 2018, with the seven days for service expiring on 30th November 2018. The service of the Notice of Appeal on the Applicant was therefore within time.
17. As regards the time of filing of the substantive appeal, Rule 82 of the *Court of Appeal Rules of 2010* requires an appeal to be instituted by lodging a memorandum of appeal and record of appeal in the appropriate registry within sixty days of the date when the notice of appeal was lodged, unless an application for a copy of the proceedings has been made to the trial Court, and a certificate of delay issued by the Registrar of the said Court indicating the period for preparation and delivery of the proceedings, which period is excluded from the computation of time.
18. The Appellant annexed a copy of a Certificate of Delay which indicated the period between November 17, 2018 and November 15, 2019 was required for the preparation of and delivery of the certified copies of the proceedings and rulings, and therefore excluded as provided by the proviso to Rule 82. In our view, the argument by the Applicant and fact of the proceedings and ruling being certified is not material to the issue or validity of a certificate of delay in compliance with Rule 82, as also noted by this Court in *Rodgers Abisai t/a Abisai & Company Advocates v Wachira Waruru & another (supra)*. The cases relied upon by the Applicant in this respect are also distinguishable, as there was no certificate of delay issued therein, unlike in the present application. The time for filing the Record of Appeal consequently started to run from 16th November 2019, arising from the period excluded by the said Certificate of Delay, and the sixty days’ deadline expired on 16th January 2020. The Appellant’s Record of Appeal, having been lodged on December 18, 2019, was therefore within time.
19. We accordingly find that the Applicant’s Notice of Motion application dated February 21, 2021 is incompetent and not merited, and the said application is hereby dismissed with costs to the Appellant.
19. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA



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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

