



Ngombo t/a Steve Kithi & Co. v China Wu Yi (Kenya) Company Ltd (Civil Appeal (Application) E097 of 2021) [2022] KECA 767 (KLR) (24 June 2022) (Ruling)

Neutral citation: [2022] KECA 767 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E097 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 24, 2022**

BETWEEN

**STEPHENS KITHI NGOMBO T/A STEVE KITHI & CO.
ADVOCATES APPELLANT**

AND

CHINA WU YI (KENYA) COMPANY LTD RESPONDENT

(An application for an order that appellants' appeal herein filed on 23rd November 2021 against the ruling and orders of the High Court of Kenya at Mombasa (Chepkwony, J.) given on 13th January 2021 in High Court Civil Case No. 89 of 2019 be struck out on grounds that it was filed out of time)

RULING

1. In its application dated 31st December 2021 presented under Rule 84 of the Court of Appeal Rules, the applicant, China Wu Yi (Kenya) Company Limited, seeks an order that appellants' appeal herein filed on 23rd November 2021 be struck out on grounds that it was filed out of time.
2. Based on the grounds in support of the application; the affidavit in support of the application sworn by a director of the applicant, Luo Zicheng; and the replying affidavit in opposition to the application sworn on 7th March 2021 by Stephens Kithi Ngombo, there is no contest that the ruling of the High Court the subject of this appeal was delivered on 13th January 2021. The appellants' notice of appeal dated 8th February 2021 was filed before the High Court on 9th February 2021.
3. Rule 75 of the [Court of Appeal](#) Rules requires any person who desires to appeal to the Court to give notice which should be lodged "within fourteen days of the date of the decision which it is desired to appeal." Fourteen days from the date of delivery of the decision of the lower court lapsed on 27th January 2021. Clearly therefore, the notice of appeal was filed out of time.



4. The memorandum and record of appeal was filed on 23rd November 2021. Under Rule 82 of the [Court of Appeal Rules](#), the appellants were required to file the same within sixty days of the date when the notice of appeal was lodged. Again, on the face of it the memorandum and record of appeal was filed outside the prescribed period.
5. In the replying affidavit to the application, the appellants, while setting out in detail their grievances with the impugned decision of the High Court of 13th January 2021 and the handling of the matter by that court, do not contest that the notice of appeal was filed outside the time prescribed by the Rules but explain at length that notice of delivery of the ruling by the High Court was not given. Learned counsel Mr. Kithi submitted that the prescribed timeliness assume parties were aware of the date of ruling and that it has been demonstrated that in this case the respondent was not present when the ruling was delivered.
6. On his part, learned counsel for the applicant, Mr. Eredi, submitted that there is no contest that the notice of appeal and the memorandum and record of appeal were filed out of time and that the respondents by their extensive replying affidavit are in effect seeking extension of time.
7. We have considered the application, the affidavits and the submissions. As already indicated, Rule 75 of the [Court of Appeal Rules](#) requires any person who desires to appeal to the Court to give notice which should be lodged “within fourteen days of the date of the decision which it is desired to appeal. Time for that purpose begins to ran from the date of the decision which is intended to be challenged. The fact that the appellant may not have been present during delivery of the impugned ruling may be a factor for consideration in an application for extension of time. Moreover, it has also not been contested that the appellant did not serve on the respondent the letter requesting for a copy of the proceedings in accordance with Rule 82 of the Court of Appeal Rules, and that the record of appeal is also filed out of time.
8. In [Boy Juma Boy & 2 Others -v- Mwamlole Tchappu Mbwana & Another](#) (2014) eKLR this Court held that:

“...The jurisdiction of this court as an appellate court can only be triggered through the filing of the notice of appeal. In the absence of such notice the court has no proper basis upon which its jurisdiction can be anchored.”
9. In [Apungu Arthur Kibira vs. Independent Electoral and Boundaries Commission & 2 others \[2018\] eKLR](#), Odek, JA stressed that a notice of appeal occupies a central place and without it there can be no appeal and that it is the notice of appeal that gives the Court jurisdiction to hear an appeal. Recently, the Supreme Court of Kenya underscored the importance of timely filing of a notice of appeal in [University of Eldoret & another vs Sitienei & 3 others](#) [2020] eKLR, where that Court restated that the filing of a notice of appeal is a jurisdictional prerequisite adding that:

“...as we noted in Nicholas Salat case, the purported filing of a Notice of Appeal and Petition of Appeal without the requisite leave cannot be sanctified by the Court, notwithstanding that a case number was issued to the applicants. The alleged Notice of Appeal and Petition of Appeal therefore have to be struck out from the Court record for having been ‘filed’ without Court sanction and out of time. The Notice of Appeal not having been filed on time, the Court cannot resuscitate anything in this matter.” [Emphasis added]
10. Based on the foregoing, we hold that there is merit in the application dated December 31, 2021. However, in lieu of striking out the appeal at this stage, the appellant shall have 21 days from the date



of delivery of this ruling to take steps to regularize the appeal failing which the appeal will stand struck out with costs without further ado. The applicant shall have the costs of the application in any event.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

