



**Owners of the Motor Vehicle "Tanya" v Shipmarc Agency & Logistics Limited
(Civil Application E007 of 2022) [2022] KECA 766 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 766 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E007 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 24, 2022**

BETWEEN

THE OWNERS OF THE MOTOR VEHICLE "TANYA" APPLICANT

AND

SHIPMARC AGENCY & LOGISTICS LIMITED RESPONDENT

(An application to withdraw/strike out the Notice of Appeal dated 28th September 2021 from the ruling and order of the High Court at Mombasa delivered by Hon. D.O. Chepkwony, J on 24th September 2021 in High Court Admiralty Claim No.3 of 2020)

RULING

1. The Owners of the Motor Vehicle "Tanya" are the applicant and they have brought this Notice of Motion dated 17th February 2022 pursuant to Rules 42, 77, 83 and 84 of the *Court of Appeal Rules, 2010* seeking for orders that the Notice of Appeal dated 28th September 2021 be deemed withdrawn or struck out on the ground that Shipmarc Agency & Logistics Limited the respondent herein, failed to lodge an appeal within the prescribed time of 60 days from 24th September 2021, the date the judgment of the High Court was delivered. In addition, the applicant contends that the respondent failed to serve them with the letter it wrote to the Deputy Registrar requesting for the proceedings and the judgment of the High Court. The application was further supported by written submissions and an affidavit sworn by Vincent Omollo, learned counsel on record for the applicant. The application is opposed, the respondent having filed a replying affidavit and written submissions.
2. The application was called out for virtual hearing on the 15th March 2022. Mr. Omollo, learned counsel for the applicant, and Mr. Asige learned counsel for the respondent were both present. Each counsel highlighted their written submissions, as well as relied on the affidavits filed in support and opposition, respectively to the application.



3. The background to the application is that the respondent sought and was granted a warrant of arrest dated 3rd September 2020, against the applicant vessel on account of goods, materials and services rendered to “Tanya” for its towage, operation and maintenance, arising out of an operation and maintenance agreement between the parties, including disbursements, and on account of a maritime lien. The applicant then filed an application dated 12th October 2020 seeking that the warrant of arrest be set aside and that the entire claim be struck out. The respondent in turn vide application dated 27th October 2020 sought that the applicant’s defence filed on 1st October 2020 be struck out and summary judgment be entered in its favour. The two applications were heard together and a ruling rendered thereto on 24th September, 2021. It is against that ruling that the respondent filed a notice of appeal dated 28th September, 2021 which it served upon the applicant’s counsel on 4th October, 2021.
4. The applicant’s position is that the respondent was obliged to lodge its memorandum of appeal and a record of appeal within 60 days from the date the notice of appeal was lodged. The applicant’s counsel has urged that the respondent’s counsel has not served him with the letter to the Deputy Registrar requesting for the proceedings and the ruling delivered by the Superior Court. The applicant seeks that orders do issue striking out or withdrawing the notice of appeal dated 28th September 2021. The applicant relied on the decision in *Mae Properties Limited v. Joseph Kibe & Another* (2017) eKLR where this Court stated that “failure to comply with timelines has consequences”.
5. In response to the application, the respondent filed a replying affidavit dated 14th March 2022 and written submissions of even date. The application is opposed. It was submitted that the respondent filed an application under certificate on 28th September, 2021 seeking to stay execution of the ruling of the High Court pending hearing and determination of its intended appeal against its decision delivered on 24th September, 2021. That application was heard, and in a ruling delivered on 3rd December 2021, was granted in the respondent’s favour. The respondent urges that since the ruling, the court file went missing causing delay in typing of proceedings. That this, together with the intervening Christmas vacation delayed the production of the typed proceedings which were only availed on 4th March 2022, and that the respondent has already lodged the appeal.
6. The respondent relied on the proviso in Rule 84 of this Court’s Rules, 2010 and challenged the instant application urging that the notice of motion was filed on 17th February 2022 well beyond the required 30 days after the service of the contested notice of appeal. The respondent urged that the application to strike out was made in bad faith and the same had not considered the unique circumstances surrounding the period between filing the respondent’s notice of appeal and the filing of the application herein.
7. We have considered this application together with the rival submissions of counsel and the affidavits sworn for and against the application. Our invitation to intervene on behalf of the applicant has been invoked substantively under Rules 42, 77, 82(1) & (2), 83 and 84 of the *Court of Appeal Rules*. Rule 77(1) provides as follows:

“77(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.”



8. Rule 83 of the Court's *Rules*. It provides as follows:

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served”.

9. In the case of *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [supra], the Court had this to say about the intent and purport of Rule 83:

“This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals.

...Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion.

10. The respondent lodged the notice of appeal on the 28th September, 2021, against the ruling of the High Court delivered on the 24th September, 2021. That was within the 7 days prescribed under Rule 77 of the Rules. The notice of appeal was also served upon the applicant within time on 7th October 2021. The applicant decries failure by the respondent, firstly, to serve it with the letter bespeaking of the proceedings and secondly, to lodge and serve the memorandum and record of appeal within 60 days as prescribed under Rule 83. Considering the respondent's affidavit in reply and the submissions, while there is admission of delay in serving the said documents, it is stated that the appeal and memorandum of appeal have already been lodged. While this Court in this respect has discretion to deem a Notice of Appeal as withdrawn suo moto under Rule 83, it is notable that the said Rule applies when there is default in instituting an appeal, whereas it is not disputed that there is an appeal already filed by the Respondent in the instant application. Rule 83 is therefore inapplicable in the circumstances.

11. Notwithstanding the record and memorandum of appeal were filed but never served, the respondent may still have run afoul of the Rules of this Court. The respondent has challenged the competence of the application on grounds it has been brought outside the 30 days prescribed in the Rules. Rule 84 of the Rules provides:

84. Application to strike out notice of appeal or appeal

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.



12. The applicant, in the supporting affidavit sworn by his counsel, undated but filed together with the notice of motion herein avers that the respondent served the notice of appeal upon the advocates on record for the applicant on 7th October, 2021 after filing it on the 28th September, 2021. It is therefore uncontested that the applicant should have made this application within 30 days of service with the notice of appeal. The application has been brought almost five months after the notice of appeal was served, which is way out of time. It is therefore sustained that the challenge is well founded. This court has numerously pronounced itself on consequences of noncompliance with the above prerequisites.
13. An application seeking to strike out a notice of appeal must be filed within thirty (30) days of service of the notice of appeal. This Court in *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, held that the proviso under Rule 84 is couched in mandatory terms, and that 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 was 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. 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. We think that we have said enough to show that the applicant has brought this application out of time without leave. The application dated 17th February 2022 is therefore incompetent. That ousts this Court's jurisdiction to consider the application on merit. Accordingly, we strike out the application with costs to the respondent.
15. Those are our orders.

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



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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

