



Cooperative Bank Housing Society Limited v Wambega & 733 others (Civil Appeal (Application) E28 of 2020) [2022] KECA 951 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KECA 951 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E28 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 29, 2022**

HENRY WAMBEGA & 733 OTHERS.....APPELLANT

AND

THE ATTORNEY GENERAL KATHINI SPRING WATER LIMITED.....1ST RESPONDENT

COOPERATIVE BANK HOUSING SOCIETY LIMITED.....2ND RESPONDENT

CANON ASSURANCE COMPANY LIMITED.....3RD RESPONDENT

HEDGE FARM LIMITED.....4TH RESPONDENT

MOHAMED BIN ALI MOHAMED(GANDI).....5TH RESPONDENT

NAAMAN BINALI BIN MUSES.....6TH RESPONDENT

NATIONAL LAND COMMISSION.....7TH RESPONDENT

SAFEPAK LIMITED.....8TH RESPONDENT

THE CHIEF LANDS REGISTRAR.....9TH RESPONDENT

IN AN

APPLICATION

BETWEEN

COOPERATIVE BANK HOUSING SOCIETY LIMITED APPLICANT

AND

HENRY WAMBEGA & 733 OTHERS APPELLANT

(An application to strike out a record of appeal from the judgement and decree of the Environment and Land Court at Mombasa, (Munyao, J) delivered on 22nd October 2020 in ELC Petition No. 2 of 2018)



RULING

1. The 3rd respondent in this appeal, Cooperative Bank Housing Society Limited, has by way of a Notice of Motion dated 2nd February 2021, brought pursuant to Section 3A and 3B of the *Appellate Jurisdiction Act* and Rule 84 (now Rule 86) of the Court of Appeal Rules (the Rules), sought for two orders. The first order seeks to strike out Civil Appeal No. E28 of 2020; and the second order seeks for costs of the application and of the struck out appeal be borne by the appellants, jointly and severally.
2. On the face of the application, six grounds are advanced in support of the motion and are reiterated in an affidavit sworn by John Kimutai Ng'eno in support thereof. However, upon considering them, there are only two grounds urged. The applicant has urged that the record of appeal dated 17th December, 2020, and served on the applicant does not contain a certified copy of the decree from the trial court contrary to the mandatory requirements of Rule 87 (1) (now Rule 89) of the Rules. The second one challenges the appeal itself on the basis it was filed without proper instructions on behalf of various parties since; two separate notices of appeal had been filed by the appellants in the trial court, the first was dated 22nd October 2020 and the other dated 3rd November 2020. That the parties that filed the notice of appeal dated 3rd November 2020 purported to file an application for extension of time to file the intended appeal.
3. The background of this appeal is that the Environment and Land Court dismissed the Appellants/ Respondents Petition on 22nd October 2020. Being aggrieved, the appellants filed 2 separate notices of appeal dated 22nd October 2020 and 3rd November 2020 within the statutory prescribed time. The 3rd respondent further submitted that for some reason, a record of appeal dated 17th December 2020 was filed on behalf of all the 734 of them by the firm of Kenga & Company Advocates. A different firm, Omulama E.M. & Company Advocates, filed Civil Application No. E061 of 2021 on behalf of 485 of the appellants seeking to extend time to file the record of appeal. Civil Application No. E061 of 2021 was dismissed on 4th April 2022.
4. The record of appeal was served on 23rd December, 2020 and the 3rd respondent filed a notice of motion seeking to strike it out on 3 principle grounds. Firstly, that the notice of appeal has never been served on the 3rd respondent. Secondly, the record of appeal omits a certified copy of the decree and thirdly, the appeal is brought by a firm which lacks instructions to do so.
5. The application is opposed by the 3rd appellant/respondent in a replying affidavit dated 15th October 2021. In that affidavit it is deposed that the omission to attach the certified copy of decree was an inadvertent mistake due to the bulky nature of the record, that the omission is curable under Rule 88 of the Rules, and that the same has however been rectified by the filing of a supplementary record appeal. It was deposed that the issue of which firm has instructions, is beyond the scope of Rule 84 of the Court of Appeal Rules. The 3rd appellant/respondent averred that furthermore, the notice of Motion has been brought outside the time limited by the rules.
6. Mr. Tushar Shah, the director of the 9th respondent in the appeal, in his relying affidavit averred that the supplementary record of appeal is an attempt to sanitize an already defective record of appeal and a belated reaction to the application for striking out. The 9th respondent contended that on 31st August 2021, more than 8 months after lodging the record of appeal, the appellants forwarded a draft decree. The same was received under protest since, to the 9th respondent, it was an attempt to circumvent the fatal defect in the record of appeal and as a means of responding to the application. As such, the 9th



respondent concluded that non-compliance with the mandatory requirements of the Court's rules renders the appeal fatally defective and ripe for striking out.

7. The application was heard virtually on 11th April 2022. Learned counsel Mr. Opole held brief for learned counsel Mr. Kongere for the applicant/3rd respondent. Learned counsel Mr. Kenga was present for the appellants/respondents; learned counsel Mr. Makuto for the 1st and 10th respondents in the appeal; learned counsel Mr. Kinuthia for the 4th respondent in the appeal; and learned counsel Ms. Onesmus for the 9th respondent in the appeal. There was no appearance for the 2nd, 5th, 6th and 7th respondents in the appeal, despite service with the hearing notice.
8. Mr. Opole relied on the written submissions dated 4th April 2022. He urged that the applicant was seeking orders striking out the record of appeal on three grounds; one, the notice of appeal has never been served on the applicant; two, the record of appeal did not include decree; and three, the appeal was filed without instructions as there were two notices of appeal file, one for all the Petitioners (734 of them) and a second one for 458 of the total, filed by a different counsel.
9. Learned counsels Mr. Makuto and Mr. Kinuthia had not filed any submissions or affidavits in this application, however, they indicated that they were supporting the application.
10. Ms. Onesmus relied on the replying affidavit filed by the 9th respondent in the appeal, and urged that in it, one more issue is raised in support of the application to the effect that the filed supplementary record of appeal was filed in contravention of Rule 88 of the Rules, having been filed outside the prescribed time.
11. We have considered the application together with the affidavits filed herein and the submissions of counsel. We note that the applicant sought an order striking out the record of appeal pursuant to Rule 84 (now 86) of the Rules. On the body of the application, the applicant urges that failing to include in the record the decree of the Superior Court contravened Rule 87 (1) (now 89) of the Rules.
12. The decree of the Superior Court has since been included in the record of appeal through a supplementary record of appeal, which the 9th respondent in the appeal conceded. The appellants/respondents has through the replying affidavit deposed that the supplementary record of appeal was filed with leave of the Deputy Registrar. The applicant has not raised issue with the fact that the decree has since been included in the record. The same is annexed dated 22nd October 2021, indicated on the face of it to have been filed pursuant to Rule 88 as read as Rule 92(3) of the Rules. Rule 88 of the Rules provides the two instances when a supplementary record of appeal can be filed, which the appellants/respondents alluded to have complied with. It speaks for itself, and provides as follows:

“ 88. Where documents are omitted from the record of appeal Where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 92(3) and thereafter with leave of the deputy registrar on application.”
13. An attempt was made to challenge the supplementary record of appeal, seeking that it be struck off, through the 9th respondent's (in the appeal) replying affidavit. That attempt cannot succeed as the application before us is in respect to the record of appeal and not the supplementary record. As parties are bound by their own pleadings, we lack the jurisdiction to consider anything other than what has been pleaded in the application before us.
14. The applicant also challenged the validity of the appeal itself on account of their being two notices of appeals and on the issue of representation of the appellants. The applicant invoked Rule 84(86) of



the Rules, which supports challenge to a record of appeal or an appeal ‘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.’ That Rule does not apply to a challenge of the appeal on account on the basis of duplicity of notices of appeal or want or otherwise of representation.

15. The appellants/respondents raised issue with the validity of the application urging that it was filed on the 12th February 2021, challenging the record of appeal filed on 17th December 2020, urging that the same contravened Rule 84 of the Rules, having been filed over 30 days after the prescribed period under the Rules. The application was filed outside time.
16. This was the position held by this Court in *Edward Njuguna Kangethe v Joel Kiema Mutinda & another* [2015] eKLR. In that case, the Court observed thus;

“An applicant can seek an order striking out an appeal on the ground that firstly, either no appeal lies or secondly that an essential step in the proceedings has not been taken or thirdly that the essential step has not been taken within the prescribed time. See (Lither Peter Muia & another V Zuena Ngando Kababu, (2015) eKLR)..... This Court in the recent case of Gichuki King’ara & *Company Advocates V Al Jalal Enterprises Limited & 2 Others*, Civil Application No. NAI 211 OF 2012 (UR 156/2012) (Unreported) stated in reference to Rule 84:

“The applicant did not file its application within the stipulated period of thirty days. It did so on 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.”

17. Having considered this application, we find that it lacks merit. In any event the application is incompetent for flouting the Rules.
18. Accordingly, we dismiss the application dated 2nd February 2021 with costs to the appellants/respondents.

DELIVERED AND DATED AT MOMBASA THIS 29TH DAY OF JULY, 2022.

S. GATEMBU KAIRU, FCIArb

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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

