



Kamau & another v National Bank of Kenya Ltd & another (Civil Application E175 of 2021 & E008 of 2022 (Consolidated)) [2022] KECA 701 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 701 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E175 OF 2021 & E008 OF 2022 (CONSOLIDATED)**

M NGUGI, JA

JULY 22, 2022

BETWEEN

ALLAN GEORGE NJOGU KAMAU APPLICANT

AND

NATIONAL BANK OF KENYA LTD RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPLICATION E008 OF 2022**

BETWEEN

NATIONAL BANK OF KENYA LTD APPLICANT

AND

ALLAN GEORGE NJOGU KAMAU RESPONDENT

(An application for extension of time within which to file an application to strike out the notice of appeal dated 4th October, 2021 arising out of the judgment of the High Court of Kenya at Eldoret (S.M. Gitinji J) dated 27th September, 2021 and Civil Application No. E008 of 2022)

RULING

1. The applications listed for hearing before this Court arise from the same judgment and relate to the same notice of appeal filed by the defendant before the High Court, National Bank of Kenya, against the decision of the High Court. For reasons that will be obvious shortly, I have considered the applications together and rendered a single ruling thereon.



2. In Civil Application No. E175 of 2021 dated 17th December 2021, the applicant, Allan George Njogu Kamau (hereafter for convenience referred to as ‘Mr. Kamau’) asks this Court to grant him three prayers: First, an extension of time to file and serve his application for striking out the notice of appeal dated 4th October 2021 filed by the respondent, National Bank of Kenya (hereafter ‘NBK’), for failing to comply with the Court of Appeal Rules; secondly, that upon grant of the prayer for the extension of time, the Court should deem his attached application for striking out the notice of appeal for being incurably defective and fatally incompetent as properly filed and be accordingly dealt with. He asks, finally, that the costs of the application be provided for.
3. The application, which is supported by an affidavit sworn by Mr. Kamau, is expressed to be brought under section 1A, 1B and 3A of the *Civil Procedure Code*, 2010 and Rules 4, 42(1) and 43(1) of the *Court of Appeal Rules* 2010 and all enabling provisions of the law. Mr. Kamau states in these grounds and the affidavit in support that by a plaint dated 5th November, 2003 and amended on 17th December, 2011, he sued NBK seeking, among other orders, a declaration that he does not owe NBK any money, a refund of overpaid sums of Kshs 609,659 together with interest thereon and an order directing NBK to register a discharge of charge and release his title document to him. NBK had entered appearance and filed its defence. The matter was heard and judgment rendered on 27th September, 2021 in favour of Mr. Kamau.
4. Aggrieved by the decision, NBK filed a notice of appeal on 6th October 2021 and served the said notice on Mr. Kamau on 16th October, 2021. Mr. Kamau contends that he could not file the application to strike out the notice of appeal as he had not obtained the judgment sought to be appealed from. He was eventually able to obtain the file from Mombasa, the station to which Githinji J had been transferred and from where he had delivered the judgment, on 17th November 2021. By the time he received a copy of the judgment, the time prescribed under Rule 84 of the *Court of Appeal Rules* for filing an application to strike out the notice of appeal had already lapsed, necessitating the filing of the present application.
5. Mr. Kamau further avers that he seeks to strike out the notice of appeal as it states, in contravention of Rule 75 (3) of the *Court of Appeal Rules*, that the intended appeal is against a ruling yet it is a judgment that was delivered. Further, that neither the director nor the advocates on record for NBK endorsed his signature as required under Rule 75(6) of the *Court of Appeal Rules*, which renders the notice of appeal incompetent. Mr. Kamau further contends that the said notice of appeal was not endorsed by the Deputy Registrar contrary to the provisions of Rule 77 of this Court’s *Rules*. It was also served outside the seven-day period stipulated in the Rules and was served 12 days after it was lodged. For these reasons, Mr. Kamau avers that it is imperative that he is granted an extension of time within which to file and serve the application to strike out the notice of appeal.
6. NBK is the applicant in Civil Application No. E008 of 2022. Its application is dated 18th January, 2022 and is brought under Rule 4 of the *Court of Appeal Rules* 2010 and supported by an affidavit sworn by its Advocate, Mwangi Kang’u, on 12th January 2022. It asks this Court to extend the time for serving the notice of appeal dated 4th October, 2021, and that the notice of appeal, which was lodged in Court on 8th October, 2021 and served upon Mr. Kamau on 7th January, 2022, be deemed to have been properly served.
7. The application is based on grounds similar to those relied on by Mr. Kamau in his application for extension of time. It is averred on behalf of NBK that the time allowed for service of a notice of appeal is seven days from the date of lodging in Court, which lapsed on 15th October, 2021. It had not been able to serve the notice on time as the Deputy Registrar could not endorse the notice of appeal without the physical file which was with the Judge in his new station in Malindi. By the time the physical file



was available at the Registry and the notice of appeal endorsed, the 14 days (sic) statutory period for service of the notice of appeal had lapsed. NBK had served Mr. Kamau on 7th January 2022, 66 days after the delivery of the judgment. It is NBK's case that the delay is not inordinate and the respondent will not be prejudiced if the leave sought is granted.

8. Both applicants blame the failure to take the respective actions that they were required to take under the Rules on the non-availability of the file in respect of the decision in the Registry in Eldoret. Mr. Kamau seeks extension of time to file an application to strike out NBK's notice of appeal. NBK seeks extension of time in respect of the notice that Mr. Kamau seeks extension of time to file an application to strike out. The issue for determination is whether I should grant Mr. Kamau leave to file an application to strike out NBK's notice of appeal out of time, or grant the extension of time sought by NBK and deem its notice of appeal as duly filed and served.

9. Rule 84 of the *Court of Appeal Rules* 2010 provides that:

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.

10. Under Rule 4 of the *Court of Appeal Rules* 2010 which were in force at the time of filing of this application, the Court is empowered, on such terms as it thinks just, to extend the time limited by the Rules for the doing of any act authorized or required by the Rules, whether before or after the doing of the act.

11. The reasons advanced by the parties before me for failure to comply with the rules for the doing of the acts in question are the same: the inability to access the court file on the matter before the High Court. Such inability was due to reasons outside the control of both parties. The trial judge had been transferred from Eldoret to either Mombasa or Malindi- the parties give different stations. He delivered the judgment in the new station, but the file was not returned to Eldoret in time to allow NBK to file its notice of appeal in time to have it endorsed by the Deputy Registrar and for it to be served on Mr. Kamau within the time prescribed by the Rules. Mr. Kamau wishes to have time extended so enable him file his application to strike out the NBK notice of appeal out of time, again because the High Court file was not returned to the Registry in time for him to do so.

12. The application by Mr. Kamau is novel, and does not appear to be contemplated by Rule 4. Rather than an application for extension of time to file the application to strike out the notice out of time, an application to deem the notice of appeal as withdrawn would perhaps have been more appropriate.

13. That notwithstanding, NBK has presented its application under Rule 4 seeking extension of time in relation to the notice of appeal. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997 it was held that the matters that a court should consider in exercising its discretion under Rule 4 are, first, the length of the delay, the reason for the delay, (possibly), the chances of the appeal succeeding if the application is granted: and finally, the degree of prejudice to the respondent if the application is granted.

14. It is conceded in this case that there was a delay of 66 days in serving the notice of appeal. However, the reason for the delay, which Mr. Kamau tacitly acknowledges in his own application, was outside



the control of NBK. In those circumstances, it is my view that the justice of the matter requires that the application by NBK succeeds. The application for extension of time dated 18th January 2022 is accordingly allowed. The notice of appeal dated 4th October, 2021 and lodged in Court on 8th October 2021 and served upon the respondent in Civil Application No. E008 of 2022 on 7th January 2022 is deemed as duly filed and served. It follows that the application by Mr. Kamau dated 17th December 2021 must fail.

15. Given that the reasons for the delay in this matter are wholly attributable to factors outside the control of either party, there shall be no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JULY, 2022

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

