



C. B Gor & Advocates v Oriental Commercial Bank Limited (Civil Application 3 of 2019) [2022] KECA 634 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 634 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 3 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 8, 2022**

BETWEEN

C. B GOR & ADVOCATES APPLICANT

AND

ORIENTAL COMMERCIAL BANK LIMITED RESPONDENT

(An application to deem the notice of appeal dated 19th October 2018 from the judgment and decree of the High Court of Kenya at Mombasa, (P.J.O Otieno, J) delivered on 5th October 2018 in HCCC No. 886 of 2005 as withdrawn or the same be struck out)

RULING

1. C.B Gor & Gor Advocates the applicant has by a Notice of Motion dated 16th January 2019 sought an order that the Notice of Appeal dated 19th October 2018 to be deemed to have been withdrawn and or be struck out. The application is brought pursuant to Rules 42, 77, 83 and 84 [now Rules 44, 79, 85 and 86] of the *Court of Appeal Rules*, 2010. The application is supported by an affidavit sworn by Amritlal B. Shah, learned counsel on behalf of the applicant. It is further supported by grounds the Oriental Commercial Bank Limited, the respondent effected serve of their Notice of Appeal out of time on the applicant, being a party directly affected by the intended appeal. That the respondent failed to lodge an appeal within the appointed time of 60 days from the date of the judgment.
2. When this application was called out for virtual hearing on the 21st March 2022, learned counsel Mr. Sanjev Khagram for the 1st respondent, learned counsel Mr. Wafula for the 2nd respondent and Mr. Mohamed Ali for the 3rd respondent were present. Mr. A.B. Shah, learned counsel for the applicant was absent despite service with the hearing notice. Mr. Khagram wished to be heard in opposition to the application, even though the applicant's counsel was not present to prosecute it. The counsel for the 2nd and 3rd respondents informed the court that they will go by the court's direction on the matter.



3. The applicant filed an affidavit sworn by Mr. A. B. Shah, counsel on record for the applicant. In the affidavit it is deposed that since judgment was delivered by the High Court on the 5th October 2018, and a Notice of Appeal filed by the respondent on the 19th October, 2018 and served upon him on 9th January 2019, no memorandum or record of appeal has been served as required under Rule 79 of this Court's Rules, nor has the letter to the Deputy Registrar bespeaking the proceedings been served upon him. He sought to have the Notice of Appeal struck out. In his written submissions dated 9th September 2021 Mr. Shah reiterated the contents of the supporting affidavit in urging that the application should be allowed and relied on the decision of this Court in *Spenco (K) Limited vs. Hema Investments Limited and another*, Civil Application NYR No. 95 of 2018.
4. The 1st respondent relied on a replying affidavit sworn by Mr. Khagram, counsel on record for the 1st respondent. Counsel deposed that the letter bespeaking of the proceedings to the Deputy Registrar was served on all the parties, as well as the notice of appeal, and that it is only the applicant's advocate who claimed he never received. Objecting to the application to deem the notice of appeal as withdrawn and/or strike it out, counsel deposed that the notice of appeal dated 19th October 2018 was timeously filed and served on all parties directly affected by the intended appeal vide email. The respondent attached evidence of service thereon.
5. Counsel deposed that his efforts to obtain the proceedings in 2020 were frustrated on account of the closure of the courts due to Covid-19. He annexed the various notices posted in court on the issue. He urged that time stopped running until the proceedings will be availed. He opposed the application urging it would be unfair to lose the opportunity to pursue the appeal on merit on no fault of their own.
6. We have considered the application and the affidavits sworn by counsel for the applicant and the 1st respondent for and against the application respectively and the submissions. In order for the Court to strike out a notice of appeal, it must be shown that the intended appellant has, since filing the notice taken no steps in the matter as prescribed by the Rules.
7. Under Rule 79 of this Court's Rules, an intended appellant should serve the notice of appeal on all parties likely to be affected by the appeal within 7 days from date of filing. While under Rule 86 an application can be brought to strike out a notice of appeal on grounds that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The step envisaged here includes failing to serve the appeal processes including the notice of appeal, as well as the letter to the registrar bespeaking of the proceedings.
8. The 1st respondent has proved that it has taken every essential step in the proceedings within the prescribed period, and that there has been no slip or failure on his part to comply with the relevant Rules. He has been diligent in tracking the preparation of the proceedings, and is not to blame for any delay.
9. In the circumstances we find the application has no merit. Accordingly, we dismiss the application in its entirety. We make no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 8TH 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

