



REPUBLIC OF KENYA



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**West Kenya Sugar Company Limited & 4 others v Cabinet Secretary, Ministry
of Agriculture, Livestock and Fisheries & 50004 others (Civil Appeal
(Application) 22 of 2018) [2022] KECA 675 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 675 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) 22 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 8, 2022**

BETWEEN

**WEST KENYA SUGAR COMPANY LIMITED 1ST APPELLANT
AGRICULTURE FISHERIES AND FOOD AUTHORITY 2ND APPELLANT
SUGAR DIRECTORATE 3RD APPELLANT
ALFRED BUSOLO TABU 4TH APPELLANT
ROSEMARY MKOK 5TH APPELLANT**

AND

**CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK AND
FISHERIES 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
BUTALI SUGAR MILLS LTD 3RD RESPONDENT
COUNTY GOVERNMENT OF KAKAMEGA 4TH RESPONDENT
WILLIAM KOPI & 50000 OTHERS 5TH RESPONDENT**

(Being an application to strike out the Appeal filed on 5th March 2018 from the Judgment and Decree in the High Court of Kenya at Kakamega (Ruth N. Sitati, E.N. Maina and A.C. Mrima JJ.) delivered at Kakamega on 21st June 2017 in Constitutional Petition 26 of 2014)

RULING

1. The 1st appellant has created a perfect storm for itself.



2. The judgment that aggrieves the 1st appellant by was delivered on June 21, 2017 by a High Court bench of three (R. Sitati, E. N. Maina and A. C. Mrima, JJ.) The 1st appellant filed a notice of appeal against the judgment on July 7, 2017 but the applicant (the 3rd respondent in the appeal) in the motion before Court contends that it was neither served with a copy of the notice of appeal nor a letter by the appellants seeking proceedings. This is not controverted. It would seem, however, that the 1st appellant wrote a letter dated July 4, 2017 bespeaking proceedings and filed it with that superior court on July 5, 2017. Preparation of proceedings delayed but were eventually collected by the 1st appellant on the 10th of November, 2017 and a certificate of delay issued in that regard. The appeal was then filed on March 5, 2018.
3. It is against this background that the applicant has filed a notice of motion dated April 9, 2018 stating that both the notice of appeal and record of appeal be struck out. The motion is said to be brought under the provisions of Rules 84 and 42 of the *Court of Appeal Rules* (2010). All parties other than the 1st appellant support the application.
4. The answer put forward by the 1st appellant is that the application as regards the notice of appeal is incompetent as it was not brought within 30 days of that notice and therefore offends Rule 84 of the Rules of this Court. We are asked to note that the applicant does not, in the application, state when it became aware of the notice and seeks to introduce the date of March 12, 2018 in its submissions in support of the motion, an impermissible way of adducing evidence. The 1st appellant also contends that the applicant had an option to file the application after service of the record of appeal but instead chose to bring it earlier, on April 11, 2018. We are asked to find that this contravenes Rule 84 because, it is argued, the application could only be brought after service of the record of appeal and not before. We are also asked to consider that the 1st appellant sought to remedy the error in its appeal in an application dated March 28, 2019 as it never sought to enjoin the other appellants as co-appellants. It is argued that striking out an appeal is draconian and the issues raised by the applicant can be remedied under Article 159 of *the Constitution* of Kenya 2010, sections 3A and 3B of the *Appellate Jurisdiction Act* Cap. 9 and Rule 4 of this *Court of Appeals Rules*, 2010. The 1st appellant further contends that the certificate of delay was ready on February 26, 2018 and it thereafter filed its record of appeal on March 5, 2018. It is argued that the other four respondents were served within time and the appeal cannot be defective as against those four.
5. We have considered the submissions filed by the parties who participated in the application before us.
6. To start with, we have to determine whether the application was brought within the timeline set out in Rule 84 of the *Court of Appeal Rules*, 2010 which 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.”



7. Although counsel for the 1st appellant had submitted that the applicant did not disclose when it learnt of the existence of the notice of appeal there is this desposition in paragraph 5 of the supporting affidavit of Jayantilal Patel;

“ 5. The Applicant therefore got to know of existence of a Notice of Appeal and letter requesting typed proceedings both dated July 5, 2017 and existence of the present appeal, on or about March 12, 2018, when Mr. Mitchel Menezes, advocate from the firm of L.G. Menezes & Company advocates informed me that he has been served with a Record of Appeal by the 1st Appellant herein in the present appeal. This was in an informal discussion we met to go over another court case in Kisumu Environment and Land Court wherein both of us are witnesses.”

That the applicant learnt of the notice on 12th March, 2018 is a matter of evidence and remains uncontroverted. As the present motion was filed on April 11, 2018, then it is within 30 days from the date when the applicant learnt of the existence of both the notice of appeal and record of appeal and the motion would be competent in that respect. In addition, the motion is not caught up by the proviso to Rule 84 which contemplates an instance where the notice of appeal or record of appeal is served upon the applicant.

8. Rule 77 is on service of notice of appeal on persons affected by the appeal. It reads:

77. Service of notice of appeal on persons affected

- (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.

- (2) Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.

9. It is not controverted that the applicant who is the 3rd respondent in the main appeal was not served with the notice of appeal within 7 days. Indeed, other than as part of the record of appeal, the notice of appeal was not served upon the applicant at all. The consequence of failure to comply with Rule 77 is to make the notice of appeal defective (see *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others* [2016] eKLR) and it matters not that the other persons affected by the appeal were served on time. Failure to serve one renders the notice of appeal against all respondents incompetent: it is not severable.
10. Matters do not get any better. As the 1st appellant did not serve a copy of the letter bespeaking proceedings upon the applicant, the 1st appellant cannot benefit from the exclusion of the time that



may be required for the preparation and delivery of proceedings in reckoning of time within which an appeal ought to be instituted granted by the proviso to Rule 82(1). Rule 82 provides:

82. Institution of appeals

(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

- (a) a memorandum of appeal, in quadruplicate;
- (b) the record of appeal, in quadruplicate;
- (c) the prescribed fee; and
- (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

11. Unable to qualify for that benefit, the applicant ought to have instituted this appeal within sixty days of the date when the notice of appeal was lodged, being July 7, 2017. Sixty days lapsed on September 6, 2017 yet the appeal was instituted on March 5, 2018, way out of time.

12. Even if the letter bespeaking the proceedings was duly served on all affected persons still the appeal was instituted out of time. According to the certificate of delay issued by the trial court, proceedings were collected by the 1st appellant on November 10, 2017. The 1st appellant does not explain under what circumstances it would take for the certificate of delay to be issued on February 28, 2018, over 2 months after the proceedings were ready and actually collected by its advocates. Absent that explanation, the time for instituting an appeal has to be computed from November 10, 2017 when the proceedings were collected by the 1st appellant. Excluding the excluded days of the Christmas break from the computation of time, 60 days lapsed on February 1, 2018. The appeal filed on March 5, 2018 was therefore out of time.

13. As we had earlier said, these are circumstances of a perfect storm. There is another matter which, although not taken up in the motion, may well have rendered the entire appeal a nonstarter. The timeline for filing a notice of appeal against a decision of the High Court and other Courts of equal status to the High Court is set out in Rule 75(2) of the 2010 Rules of this Court;

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

14. The judgment sought to be appealed against was delivered on June 21, 2017. The 14 days granted for lodging of notice of appeal would lapse on 5th July of 2017 and so the notice of appeal lodged on July



7, 2017 would be two days late. Everything built on this notice of appeal would be on quicksand and fall by the wayside as it is incompetent.

15. The 1st appellant has failed to move Court so as to remedy the various defects in this appeal and its application of March 28, 2019 to amend the memorandum of appeal could never be an answer to those defects. Neither can its attempts to fall back on Article 159 of *the Constitution* as the Rules of this Court provide efficacious avenues for a party who has fallen afoul of the Rules to seek relief and make amends.

16. We must allow the application of April 9, 2018, as we now do. Costs to the applicant.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

