



**Sea Angel Service Station v Abdul (Civil Appeal (Application)
116 of 2019) [2022] KECA 989 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 989 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 116 OF 2019
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
SEPTEMBER 23, 2022**

BETWEEN

SEA ANGEL SERVICE STATION APPELLANT

AND

YUSUF ABDUL RESPONDENT

(An application to strike out the Record of Appeal against the ruling of the High Court at Mombasa (P.J. Otieno J.) delivered on 22nd June 2017 in MSA HC Civil Appeal No. 108 of 2013)

RULING

1. The application that is the subject of this ruling is a Notice of Motion dated September 27, 2019, brought by the Respondent herein pursuant to Rules 42 and 84 of the Court of Appeal Rules, 2010. The Respondent is seeking to have the Record of Appeal lodged herein by the Appellant on August 26, 2019 struck out, for being filed out of time without leave of the Court and for being anchored on an irregular Certificate of Delay, and that the said Certificate also ought to be expunged from the record.
2. The application is supported by an affidavit sworn on even date by Moses Mwakisha Mateka, the Respondent's advocate, who explained that the Certificate of Delay was irregular for reasons that the application for copies of the proceedings had not been brought to the attention of the Respondent as mandatorily required by Rule 82(2) of the Court of Appeal Rules of 2010, that there are two notices of appeal lodged in the High Court, one lodged on May 17, 2017 and the other on July 5, 2017, and that the sequence of notices and correspondence points to mischief on the part of the Appellant.
3. The Appellant in response opposed the application through a replying affidavit sworn on December 21, 2019 by its director, Gulamhussein Fakruddin Gulamhussein. According to the deponent, after delivery of the impugned judgment on May 3, 2017, he instructed the Appellant's advocate to issue a notice of appeal, but that on July 1, 2017, he was furnished with a copy of the said judgment indicating its date of delivery as 22nd June 2017, after which their advocate accordingly lodged a second notice of



appeal and memorandum of appeal on the said date. That the Appellant's advocate thereupon wrote to the High Court to inquire about the discrepancy in the date of delivery in the judgment, and on 13th November 2017 the High Court issued a corrected and certified copy of the judgment showing the correct date of delivery of 3rd May 2017. The deponent indicated that the Appellant accordingly filed an application in this Court to regularize the record.

4. We heard the application on 16th May 2022, and learned counsel Mr. Wafula, holding brief Mr. Mwakisha appeared for the Respondent, while learned counsel Mr. Atancha appeared for the Appellant. Mr. Wafula relied on written submissions dated 16th March 2022 filed by Moses Mwakisha & Company Advocates, while Mr. Atancha likewise indicated he would rely on the Appellant's written submissions dated 10th May 2022 filed by S.O. Odingo Company Advocates.
5. The Respondent's counsel reiterated that the subject record of appeal was filed outside the 60 days provided for under Rule 82 of the Rules of the Court, and that no letter requesting for proceedings was served on them. Further, that the Appellant's application seeking enlargement of time for filing a notice of appeal in this Court, namely Civil Application No. 110 of 2019, was refused by a single Judge of this Court, thus confirming the deficiencies in the Record of Appeal, and should therefore be struck out, and other appropriate relief be sought by the Appellant.
6. The Appellant's counsel submitted that the presence of the two notices of appeal in the record of appeal was explained to have arisen from a clerical error on the date of delivery of the impugned judgment, which error was corrected by the High Court. That as a consequence, the Notices of Appeal and Certificate of delay are properly on record and can be cured by amendment. Further, that striking out the record of appeal would be prejudicial to the Appellant, as it would be denied the opportunity to present its case due to a technicality.
7. We have considered the various pleadings filed by the parties herein. Under Rule 82 of the retired Rules of this Court of 2010, which were then applicable, a Record of Appeal was required to be filed within sixty days of lodging of the Notice of Appeal. The proviso to Rule 82(1) 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 the copy of proceedings, where an application for the proceedings was made within thirty days of the date of the decision intended to be appealed against. Rule 82(2) in addition provided that an appellant shall not be entitled to rely on the proviso unless the application for the copy of proceedings was in writing and a copy of it was served upon the respondent. Similar provisions are now found in Rule 84 of the Court of Appeal Rules of 2022.
8. The then applicable provision for striking out of a Notice of Appeal was Rule 84 of the Court of Appeal Rules of 2010, and the proviso to the said Rule required an application to strike out a notice of appeal or appeal to be brought before the expiry of thirty days from the date of service of the notice of appeal or record of appeal, as the case may be. It is not disputed that the Appellant's Record of Appeal was served on the Respondent's advocates on 30th August 2019, and the instant application, which was lodged on 30th September 2019 is therefore competently filed, having been lodged within the required thirty days' timeline.
9. The Appellant has explained the presence of the two Notices of Appeal, and referred us to correspondence with the Deputy Registrar of the High Court on the error in the date of the impugned judgment delivered on 3rd May 2017, which was annexed to its replying affidavit. The irregularity with respect to the existence of two notices has in our view been adequately explained, and is not fatal to the appeal. However, since it is not possible to have two notices of appeal in respect of the same appeal, it is our view that the notice of appeal lodged by the Appellant on 17th May 2017, having been lodged within 14 days of delivery of the impugned judgment on 3rd May 2017, is the valid notice of appeal,



and the one to which the record of appeal should apply, including the timelines of filing of the said record.

10. The Appellant has however not brought any evidence of notification of the Respondent of the request for a copy of the proceedings of the High Court as was required under Rule 82(2) of the Court of Appeal Rules of 2010, or explained the failure to copy the Respondent on the request. The import of Rule 82(2) in this regard was that there was a time limit of thirty days from the date of the decision intended to be appealed against that also applied to the service of the request for a copy of the proceedings on the respondent.
11. In the absence of evidence of service of a copy of the request for proceedings on the Respondent within the required timelines, the Appellant cannot rely on the Certificate of Delay issued by the Registrar of the High Court. In the circumstances, the Record of Appeal lodged on 26th August 2017 was filed out of time. For this reason, the Respondent's Notice of Motion dated 27th September 2019 is merited, the Record of Appeal lodged herein on 26th August 2017 is hereby struck out with costs to the Respondent.
12. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022

A.K. MURGOR

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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

