



REPUBLIC OF KENYA



KENYA LAW
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**(Suing as the legal representative of John Muritu Kagwe) & another v
East African Building Society & 3 others (Civil Appeal (Application)
571 of 2019) [2022] KECA 1010 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1010 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 571 OF 2019
W KARANJA, MSA MAKHANDIA & K M'INOTI, JJA
SEPTEMBER 23, 2022**

BETWEEN

**SUSAN WANJIRU MURITU (SUING AS THE LEGAL REPRESENTATIVE OF
JOHN MURITU KAGWE) 1ST APPELLANT
KELLY PETROLEUM LIMITED 2ND APPELLANT**

AND

**EAST AFRICAN BUILDING SOCIETY 1ST RESPONDENT
P.V.R TAO 2ND RESPONDENT
CANPAN INVESTMENT LIMITED 3RD RESPONDENT
JUJA FORTY – NINE LIMITED 4TH RESPONDENT**

*(An application to strike out the Notice of Appeal and Record of Appeal
from the Judgment and Decree of the High Court of Kenya at Nairobi (F.
Tuiyott, J.) delivered on 27th September, 2019 in HCCC No. 411 of 2017)*

RULING

1. By a Notice of Motion dated February 18, 2020, Eco Bank Kenya Limited, formerly East Africa Building Society, (the 1st respondent/applicant) through the firm of KTK Advocates has moved this Court for orders that the notice of appeal filed by the firm of P. M. Kimani & Company Advocates on 24th October, 2019 and the record of appeal filed by the firm of Kamau Kuria & Company Advocates on 21st November, 2019 be struck out under Rules 42, 83 and 84 of the Court of Appeal Rules, 2010.
2. The reasons advanced are that the appeal was filed out of time without leave of the Court; that the judgment intended to be appealed from was delivered by the High Court on 27th September, 2019;



that the intended appellants, represented by the firm of P. M. Kimani & Company Advocates, filed their notice of appeal at the High Court registry on 24th October, 2019, yet the last day for filing was 14th October, 2019.

3. The applicant avers that the firm of Kamau Kuria & Company Advocates with the firm of P. M. Kimani & Company Advocates were both on record for the plaintiff in HCCC No. 665 of 2008; that Kamau Kuria, (SC) was leading lawyer P. M. Kimani who took over the file from Waruhiu & Gathuru Advocates; that the record of appeal has been filed by Kamau Kuria (SC), yet their notice of appeal was filed late, on October 24, 2019 by P. M. Kimani & Company Advocates.
4. It concludes by stating that the notice of appeal has not been filed within the time prescribed by the Rules of this Court and that it is in the interests of the expeditious administration of justice that the orders sought be granted.
5. When the matter came up for highlighting of submissions on 21st March, 2022, learned counsel Ms. Anyango held brief for Mr. Kipkorir for the applicant. She informed the Court that Mr. Kipkorir was indisposed and her instructions were that the applicant would be fully relying on their written submissions.
6. Learned counsel Dr. Kamau Kuria (SC) appeared for the 1st, 2nd and 3rd respondents. He informed the Court that they had not filed a replying affidavit but they were responding on points of law. He submitted that the application was made outside the timeline required by Rule 84 and according to the cases cited, the Court lacked jurisdiction to entertain such an application; that there was no application to extend time for making the application.

On his part, Mr. Mugo learned counsel holding brief for Mrs. Wambugu appeared for the 4th respondent, Juja Forty – Nine informed the Court that the 4th respondent was taking a neutral stand in the matter and had not filed submissions.

7. It was the 1st - 3rd respondents' position that the appeal arose from consolidated suits in which two notices of appeal were filed; that the application is based on the premise that one notice of appeal was filed out of time while the other was not contested; that since it is from a consolidated appeal, and there was a notice of appeal which was not contested, then there was no merit in the application because even if it was struck out for that reason, the appeal would remain intact on account of the other valid notice of appeal.
8. We have considered the application and the submissions both written and oral by counsel. We have also considered the applicable law. It is indeed not in dispute that the impugned judgment was delivered on 27th September, 2019. As observed earlier, there are 2 notices of appeal filed in respect of the same judgment. The first notice is dated 2nd October, 2019 while the 2nd notice of appeal was filed on 24th October, 2019. The first notice was filed within the timelines provided under Rule 75 of the Court of Appeal Rules and is, therefore valid, but the 2nd one was evidently filed outside the said timelines and without leave of the Court. From the record before us, the said notice of appeal which the applicants seek to be struck out was served on the respondents' counsel on 30th October, 2019. This application was filed on 18th February, 2020, way outside the timelines stipulated under Rule 84 of the *Court of Appeal Rules* which provides as hereunder:-

“ 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.” (Emphasis supplied).

9. Addressing a similar issue in Civil Appeal (Application) No. 120 of 2016, *Patriotic Guards Limited v Safaricom Limited* [2021] eKLR, this Court referring to the case of *Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others* [2016] eKLR held:-

“This Court differently constituted, stated as follows as regards applications brought under Rule 84 out of time:

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In *Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court’s Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out. That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the Joyce Bochere case (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court’s Rules. Similarly, in *William Mwangi Nguruki v. Barclays Bank of Kenya Ltd* [2014] eKLR, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also *Michael Mwalo v. Board of Trustees of National Social Security Fund* [2014] eKLR...”

10. In view of the above, it is indisputable that the application to strike out the notice of appeal filed on 24th October 2019, having been filed in contravention of Rule 84 of the Rules of this Court cannot see the light of day. We find the same to be irredeemably incompetent and dismiss it with costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

