



**Vitrociset S P A Kenya Branch v Hussein (Civil Application
59 of 2019) [2022] KECA 985 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 985 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 59 OF 2019
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
SEPTEMBER 23, 2022**

BETWEEN

VITROCISSET S P A KENYA BRANCH APPLICANT

AND

MUSAJI INAYAT HUSSEIN RESPONDENT

(An application to strike out a notice and record of appeal against the judgment of the Employment and Labour Relations Court at Malindi (Ndolo, J.) delivered on 26th September 2018 in ELRC No. 19 of 2017)

RULING

1. A. Kenya Branch, has sought orders for Musaji Inayat Hussain, the respondent's notice of appeal dated October 12, 2018, and lodged on October 19, 2018 and the record of appeal lodged on May 10, 2019 to be struck out with costs.
2. The application supported by grounds on its face, and the affidavit of Jackline Chepkurui Chepkwony, contended that the judgment that gave rise to the appeal was delivered on 26th September 2018 and that the respondent lodged a notice of appeal on 19th October 2018 and served it on the applicant on 23rd October 2019; that the notice was lodged out of the prescribed time by 10 days. The applicant further contended that the respondent did not serve them with a copy of the letter requesting for typed proceedings, and that they only came across the letters dated 19th October 2018 and 14th March 2019 in the record of appeal; that the failure to file the notice and record of appeal goes to the root of the appeal for the reason that this Court would have no jurisdiction to entertain appeals filed outside the requisite timeframe or where leave of the Court was not sought.
3. In a replying affidavit dated 12th June 2019, the respondent deponed that the Notice of appeal was lodged six days late and that the applicant was duly served; that he inadvertently delayed in confirming instructions for the lodging of an appeal. It was further averred that the typed proceedings took long to



be supplied, and that his counsel was misled that he had 30 days within which to lodge a formal appeal to this Court. Furthermore, that the respondent was merely seeking to rely on a procedural technicality to lock the respondent out of pursuing his claim against it, particularly as he had an arguable appeal with a high chance of success.

4. Learned counsel Ms. Metto appearing on behalf of the applicant submitted that there is no proper notice of appeal filed by the respondent since it was lodged out of time, and the requisite procedure to regularize it was not followed. It was submitted that the letter requesting for typed proceedings was not served on the applicants within the prescribed timeframe. Counsel further submitted that the respondent's replying affidavit disclosed that there was indeed a delay in filing the notice and record of appeal.
5. Though there was no appearance for the respondent despite their having been served, it was observed that the respondent had filed written submissions. The respondent's submitted that the applicant's application was filed on 17th May 2019 and the notice of appeal was filed on 19th October 2018; that the application to strike out is defective as it was not filed within the 30 days period stipulated by rule 84 of the 2010 Court's *rules*, which were then applicable. It was also submitted that having obtained a certificate of delay, the respondent's record of appeal was properly filed; that whereas the notice of appeal was filed five days late, the record of appeal was properly filed after leave was obtained.
6. Having considered the application and the submissions, it is clear that the applicant seeks to strike out the respondent's notice and the record of appeal for the reason that they were not filed within the timeframe stipulated by the rules. The applicant complained that the notice of appeal was filed 10 days after the timeframe prescribed by the rules, and that the respondent had not sought for time to be extended. Another complaint was that the letter bespeaking the request for proceedings was not served on it within the prescribed 7 days from the date of lodging the request in the registry, as a consequence of which the respondent is not entitled to benefit from the proviso to rule 82 of the Court's *rules* of 2010, so as to deem the record of appeal as properly filed.
7. To begin with rule 84 provided for a party to apply to the Court to have a notice of appeal, or a record of appeal struck out. The rule specifies;

“A person affected by 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.” Our plain reading of this Rule is that in order for it to provide succor for relief, the remedy has to be sought within thirty days of service upon the aggrieved party of the process sought to be vitiated”. (emphasis ours)

8. But it cannot be gainsaid that the proviso to the rule above is of pertinence. It specifies that in order for an application to strike out a notice of appeal or an appeal to succeed, such application shall not be brought after the expiry of 30 days from the date of service of the notice of appeal or record of appeal.
9. As concerns the notice of appeal, rule 75(2) of the Court's *rules* of 2010 specified the period within which the notice of appeal should be filed as 14 days. The impugned notice of appeal was lodged on 19th October 2018. There is no doubt that it was filed 10 days later than the period prescribed by the rules. However, in order to come within the ambits of the proviso to rule 84, the applicant ought to have filed an application seeking to strike out the notice of appeal 30 days after the notice was lodged.



This application was filed on 17th May 2019 which was long after the 30 days specified had lapsed. This has rendered the application to strike out the notice appeal as incompetent, and such order incapable of being granted.

10. However, as concerns the status of the record of appeal filed on 10th May 2019, rule 82 (1) provided for filing of the record in the following terms;

“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. 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.

(3)

11. Once again, there was a proviso to this rule. The proviso allowed time for preparation of the typed proceedings to be excluded in the computation of the 60 days prescribed for filing the record, on condition that the appellant has served the respondent with a copy of the request for the typed proceedings within 7 days from the date of lodging the request in the registry. Rule 82 (2) then provided that an appellant will be unable to rely on subrule (1) to exclude the period for preparation, where he or she has omitted to serve the respondent with a copy of such request.
12. In the case of *Charles Wanjohi Wathuku vs Gitthinji Ngure & Another* [2016] eKLR, that upheld the case of *John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others* [2016] eKLR on the strictures of rule 82, this Court observed;

“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost- effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the Respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”



13. The applicant contended that it was not served with the letter requesting for typed proceedings and it only came to learn that such request was made through letters dated 19th October 2018 and 14th March 2019 that were included in the record of appeal.
14. Attached to the respondent's replying affidavit is the certificate of delay dated 19th March 2019 that he seeks to rely on to exclude the period of preparation of the typed proceedings in order to compute the 60 days. Since the applicant was not served with the request for proceedings, in accordance with rule 82 (2), the respondent cannot rely on the certificate of delay to explain the eight month's delay. It therefore becomes apparent that the record was not filed within the stipulated 60 days. In addition, it has not been shown that the respondent sought to extend time for filing of the record of appeal.

Furthermore, in terms of the proviso to rule 84, the record of appeal was filed on 10th May 2019, and this application was brought on 17th May 2019, which was well within the 30 days' period stipulated by the rule.
15. As such, the respondent having failed to file the appeal in accordance with this Court' rules of 2010, the record of appeal lodged in this Court on 10th May 2019 is hereby struck out.
16. In sum, the notice of motion dated 17th May 2019 is partially allowed only to the extent of striking out of the record of appeal, with costs to the applicant. The prayer to strike out the notice of appeal dated 12th October 2018 is declined.

It is so ordered.

DATED 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

DEPUTY REGISTRAR

