



County Government of Uasin Gishu & 3 others v Zedka Technical Services Ltd (Civil Appeal (Application) 168 of 2019) [2022] KECA 1071 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1071 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) 168 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 7, 2022**

BETWEEN

**COUNTY GOVERNMENT OF UASIN GISHU 1ST RESPONDENT
COUNTY SECRETARY (UASIN GISHU) 2ND RESPONDENT
COUNTY PUBLIC SERVICE (UASIN GISHU) 3RD RESPONDENT
MINISTRY OF ROADS TRANSPORT & PUBLIC WORKS (UASIN
GISHU) 4TH RESPONDENT**

AND

ZEDKA TECHNICAL SERVICES LTD APPLICANT

(An application to strike out the Notice of Appeal filed on 15th May 2019 and the Record of Appeal filed on 7th August 2019 against the ruling of the High Court of Kenya at Eldoret (Gitthinji, J.) dated 15th May, 2019 in H.C.C.C. No. 9 of 2016)

RULING

- 1 By the motion dated 24th September 2019, ostensibly brought under Rule 5(2)(b) of the *Court of Appeal Rules* 2010, the applicant, Zedka Technical Services Ltd seeks to strike out the notice of appeal filed on 15th May, 2019 and the record of appeal filed on 7th August, 2019. The motion is predicated on grounds on the face of it and the applicant's supporting affidavit dated 24th September, 2019.
- 2 The grounds are to the effect that: the appellant filed its notice of appeal on 15th May 2019 and applied for certified copies of proceedings which were certified on 10th July 2019; the record of appeal was filed on 7th August 2019 after expiry of the 30-day period as provided under Rule 82(1) of the Court of Appeal Rules, 2010; failure to comply with Rule 82(1) rendered the notice of appeal and the record of appeal as already filed incompetent, and the same should be deemed as withdrawn by virtue of Rule 83



- of this Court’s Rules, 2010. The applicant added that failure to file the appeal within the prescribed timelines is fatal and cannot be cured by an application under Article 159(2)(d) of *the Constitution*.
3. The grounds of the application are further re-stated in a supporting affidavit sworn by Martin Chemonges, learned counsel for the applicant.
 4. In response and opposition to the motion, Julius Rotich, the appellant’s Chief Officer for Roads, Transport, Energy and Public Works, swore a replying affidavit on 6th June, 2022 in which he deposed that despite the applicant filing the motion on 24th September 2019, the same was never served on the appellant until 30th May, 2022 after directions had been given by this Court. In effect, their right to be heard pursuant to Article 50 of *the Constitution* had been infringed. The appellant further revealed that upon its request, typed and certified proceedings of the matter at the High Court were ready on 10th July 2019, and it picked them the same day. It was averred that pursuant to Rule 82(1), and the certificate of delay issued indicating that the court utilised the period between 15th May 2019 and 10th July 2019 to prepare the proceedings, that period should be excluded when computing time. In effect it was urged, the appeal was filed within the stipulated time frame.
 5. At the hearing of the motion, learned counsel for the applicant Ms. Jeruto, holding brief for Mr. Luseria, and her learned counterpart, Mr. Ngarngar holding brief for Ms Boinett, for the appellant, relied on the filed affidavits and submissions.
 6. Ms. Jeruto added that the applicant was served with the record of appeal on 2nd September 2019, a claim which Mr. Ngarngar confirmed. She contended that the certificate of delay presented was an afterthought as the record of appeal had been filed much earlier without the certificate of delay. In the filed written submissions, the applicant reiterates that the appellant having lodged its notice of appeal on 15th May 2019, time for filing the record of appeal started to run then, and therefore the record of appeal filed on 7th August 2019 was filed out of time. The applicant further maintained that an appeal filed out of time is not curable under Article 159 of *the Constitution*, nor is it curable under sections 3A and 3B of the *Appellate Jurisdiction Act*, citing this Court’s decision in *Patrick Kiruja Kitbinji vs. Victor Mugira Marete* [2015] eKLR.
 7. On his part, Mr. Ngarngar conceded that the record of appeal had been filed 28 days late, but insisted that in view of the certificate of delay indicating that a period of about 55 days was utilised by the court to prepare proceedings, the record was filed within time. Counsel further conceded that the certificate of delay was dated 2 years after the filing of the record. He argued that this Court has discretion to extend time for filing an appeal where such extension would not cause prejudice to the counter party and where the delay was not inordinate, relying on the holding in *Andrew Kiplagat Chemarango vs. Paul Kipkorir Kibet* [2018] eKLR. Moreover, counsel asserted, the delay in filing the record of appeal was not inordinate and the appeal was a public interest matter concerning the county government hence it ought not to be struck out.
 8. We have carefully considered the application before us, the rival affidavits and submissions, the Rules of this Court and the law. Our attention is firstly drawn to the wrong provisions of the law under which the application was supposedly made. An application for striking out is required to be made under Rule 84 of the Court of Appeal Rules, 2010 now Rule 86 of the new Court of Appeal Rules, 2022. Counsel need to be keen to ensure that the correct provisions of law are invoked.
 9. There is no dispute that by dint of Rule 82(1) of our former Rules, now Rule 84(1), a person who has filed a notice of appeal is required to institute the appeal by lodging within 60 days;

“(a) a memorandum of appeal in four copies;



- (b) the record of appeal in four copies;
- (c) the prescribed fee; and
- (d) security for costs of the appeal.”

10. The proviso to the sub-rule is to the effect that such time as may be certified by the registrar of the court appealed from as having been required for the preparation and delivery of a copy of the proceedings shall be excluded in the computation of time, provided that such copy was requested in writing within 30 days of the impugned decision, and the request copied to the deponent.
11. Where there is default in taking an essential step in the proceedings, a person affected by an appeal may apply under Rule 84 (now 86) of the Rules to strike out the notice or the appeal itself, if already instituted. It is under this Rule that the applicant has moved us, asserting, which is common ground, that the respondent failed to take the essential step of instituting the appeal by lodging the record of appeal within the time prescribed.
12. The Rule itself has a proviso 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.”
13. It is common ground that the applicant was served with the record of appeal on 2nd September 2019, and the application was lodged on 24th September 2019. We are therefore satisfied that the application before us is within the 30-day timelines in the Rule.
14. The applicant’s contention is that the appellant having filed a notice of appeal on 15th May 2019, the lodging of the record of appeal on 7th August 2019 was outside the stipulated 60 days’ period. It is further asserted that the certificate of delay issued on 31st May, 2022 does not aid the appellant’s situation as it was furnished way after the record of appeal had been filed. The appellant resists the application claiming that the delay in filing the record was occasioned by the delay in providing the typed and certified proceedings by the court. The appellant relies on the submitted certificate of delay, holding that when the period used to prepare proceedings, that is 15th May 2019 to 10th July 2019 is excluded from computation of the 60 days, then the record should be deemed to have been filed in time.
15. We note that by the appellant’s own admission in the replying affidavit sworn on 6th June 2022 by Julius Rotich, its Chief Officer for Roads, Transport, Energy and Public Works, and as disclosed in its submissions, the typed and certified proceedings were ready for collection on 10th July 2019, and indeed the appellant collected them that very day. No reason was given to explain why the appellant then decided to lodge the record of appeal on 7th August 2019, a period of almost one month later. Besides, we find the certificate of delay that the appellant seeks to rely on unhelpful, for the reason that it is incomprehensible why a certificate of delay for proceedings that were ready and collected on 10th July 2019, would be issued on 31st May 2022, almost 3 years later. Seemingly, there is some truth in the applicant’s submission that the certificate was obtained as an afterthought.
16. In the result, we do not find the appellant to have provided a sufficient answer to the notice of motion. We accordingly grant the same and strike out the record of appeal with costs as prayed. The applicant shall have the costs of the motion.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

P. O. KIAGE

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**JUDGE OF APPEAL
MUMBI NGUGI**

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**JUDGE OF APPEAL
F. TUIYOTT**

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

