



REPUBLIC OF KENYA



**KENYA LAW**  
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**Saicare Enterprises Limited v Mana Pharmacy & another (Civil Application  
E087 of 2022) [2022] KECA 1058 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1058 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E087 OF 2022  
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA  
OCTOBER 7, 2022**

**BETWEEN**

**SAICARE ENTERPRISES LIMITED ..... APPLICANT**

**AND**

**MANA PHARMACY ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL OULULA WANGURA ..... 2<sup>ND</sup> RESPONDENT**

*(An application to strike out the notice of appeal from the High Court of Kenya at Nairobi, Milimani (Majanja, J.) dated 18th February 2022 in HCCC No. E044 of 2019)*

**RULING**

1. By a notice of motion dated March 17, 2022, Saicare Enterprises Limited (the applicant), seeks orders in the main that this Court be pleased to strike out the notice of appeal dated February 18, 2022 in Nairobi High Court Commercial Case No. E044 of 2019 Saicare Enterprises Limited vs. Mana Pharmacy Limited & Another; and that costs of the application be awarded to the applicant.
2. The application is brought under Rules 84 of the *Court of Appeal Rules* (the Rules) and is made on the grounds, inter alia, that: on November 22, 2021 a NR Civil Application No. E087 of 2022 Ruling of Court Page 1 of 5 judgment was delivered by Majanja, J. in the above suit. Subsequently, a decree was issued by the Court on December 8, 2021; the respondents filed a notice of appeal intending to challenge the said judgment and decree; the notice of appeal ought to have been filed within 14 days of the said judgment and decree pursuant to Rule 75(2) of the rules. However it was filed on February 18, 2022 and therefore, it was filed out of time by over 78 days or so, and ought therefore to be struck out.
3. The affidavit in support of the motion merely reiterated and expounded on the above grounds and we need not rehash them.



4. The motion was opposed by the respondents through the affidavit of Caleb Kisuya Kwoba, their learned counsel. He deposed that he filed an application in the trial court for orders of stay of execution, setting aside the judgment and decree, leave to come on record after judgment and decree and finally, leave for the respondents to be allowed to give evidence; that he was allowed to come on record but the other prayers were denied. Once on record, he applied for typed proceedings on November 25, 2021. However, since the e-filing system of the Court was experiencing technical challenges, it was difficult to file the notice of appeal on time. According to the respondents, the filing of the notice of appeal was consequential upon the determination of their application aforesaid and that therefore time started running on February 22, 2022 with the delivery of the ruling.
5. The application was canvassed by way of written submissions. According to the applicant, the respondents filed a notice of appeal challenging the judgment and decree of the trial court on February 18, 2022 when the decision had been rendered on November 22, 2021. This was approximately 78 or so days, way beyond the 14 days required pursuant to Rule 75(2) of this Courts Rules. The applicant relies on the case of *Harun Theuri Ngunyi vs. Kinangop Division Land Disputes Tribunal* (2021) KECA 428 eKLR and *Kabinga vs. Mutura* KLR 428 where this Court struck out notices of appeal that had been filed out of time and implores us to do likewise.
6. In response, the respondents acknowledged that judgment and decree was delivered on November 22, 2021 but did not file the notice of appeal immediately. Instead, they filed an application for stay of execution, to set aside the judgment and for leave for their counsel to come on record. That the gravamen of this application is when time started running for purposes of filing notice of appeal in respect of the judgment and decree. According to the respondents, time started to run on February 22, 2022 when the ruling on their application was delivered. Accordingly, their notice of appeal was filed within time and thus prayed for the dismissal of the application.
7. We have considered the application, the submissions, the authorities cited and the law. From the record, judgment was delivered on November 22, 2021. The respondents concede that they filed the notice of appeal against the judgment and decree on February 18, 2022, a whole 78 days later.
8. Rule 84 of the Rules is the basis upon which an application for striking out a Notice or record of appeal can be made. It provides:-
 

“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.....”
9. As regards the notice of appeal, it has been stated by the Supreme Court to be a jurisdictional issue and not a technical matter of procedure. The court so stated in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, thus: -
 

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant’s notice of appeal as having been filed out of time in *Silverbrand vs. County of Los Angeles* (2009) 46 Cal. 4<sup>th</sup> 106, 113 stated inter alia:

“As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. “Unless the notice is actually or constructively filed



within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.” (sic) The purpose of this requirement is to promote the finality of judgments by forcing the losing party to take an appeal expeditiously or not at all.”

10. There is no dispute that the notice of appeal was filed in February 18, 2022 when the judgment appealed against was delivered in November 22, 2021. It is clear therefore that this was far off from 14 days required by the law. There was no evidence brought to our attention that the respondent had ensured that the notice of appeal filed out of time is legitimized through an application and or order for extension of time. The respondents may well have lodged in the trial court an application for stay of execution, to set aside the judgment as well as to have their counsel come on record. However, that did not stop time from running for purposes of filing the notice of appeal in respect of the judgment and decree dated November 22, 2021, contrary to the submissions of the respondents. The assertion by the respondents that time started to run on February 22, 2022 when the ruling on their application was delivered would be applicable if the applicant intended to appeal against the ruling. This is not the case here as it is clear that the notice of appeal filed was against the judgment and decree and not the ruling.
11. We have in the premises, no reason not to accede to the applicant’s request. Accordingly, we strike out the notice of appeal dated March 17, 2022 with costs to the applicant.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

