



Owners of Motor Vessel “Ioannis G” & another v Pembe Flour Mills Limited & another (Civil Application 34 of 2019 & E096 of 2021 & Civil Appeal (Application) E101 of 2021 (Consolidated)) [2022] KECA 1206 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KECA 1206 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 34 OF 2019 & E096 OF 2021 & CIVIL APPEAL (APPLICATION) E101 OF 2021 (CONSOLIDATED)

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

NOVEMBER 4, 2022

BETWEEN

THE OWNERS OF MOTOR VESSEL “IOANNIS G” APPLICANT

AND

PEMBE FLOUR MILLS LIMITED RESPONDENT

AS CONSOLIDATED WITH
CIVIL APPLICATION E096 OF 2021

BETWEEN

THE OWNERS OF MOTOR VESSEL “IOANNIS G” APPLICANT

AND

PEMBE FLOUR MILLS LIMITED RESPONDENT

AS CONSOLIDATED WITH
CIVIL APPEAL (APPLICATION) E101 OF 2021

BETWEEN

PEMBE FLOUR MILLS LIMITED APPELLANT

AND

THE OWNERS OF MOTOR VESSEL “IOANNIS G” RESPONDENT



(Applications for extension of time to file Record of Appeal, and to strike out the Notice of Appeal dated 27th July 2017 and Record of Appeal dated 30th September 2021 against the Ruling of the High Court at Mombasa (Njoki Mwangi J.) made on 18th July 2017 in Mombasa Admiralty Claim 2 of 2016)

RULING

1. This ruling is on three related applications, which all arise from pleadings filed in this Court by Pembe Flour Mills Limited, the Appellant in Mombasa Civil Appeal No E101 of 2021 (hereinafter “the Appellant”). The said appeal is filed against a ruling delivered on July 18, 2017 by the High Court in Admiralty Claim 2 of 2016, which was filed by the Appellant. The Appellant had sought the arrest and detention of the motor vessel “Ioannis G”, resulting in the issuing of a warrant of arrest against the said vessel. The Owners of Motor Vessel “Ioannis G”, the Respondent in the said appeal (hereinafter “the Respondent”), subsequently filed an application seeking the release of the vessel, that the claim against it be struck out, and warrant of arrest is set aside. The High Court (Njoki Mwangi J) in the impugned ruling struck out the admiralty claim and set aside the warrant of arrest and claim form filed by the Appellant for non-compliance with mandatory applicable laws and rules. The Appellant thereupon filed a Notice of Appeal dated July 27, 2017 on August 1, 2017, and subsequently a Record of Appeal dated September 30, 2021 on October 25, 2021, which are the subject of the three applications that are before us.
2. The first application is Mombasa Civil Application No 34 of 2019, which was filed by the Respondent by way of a Notice of Motion dated April 26, 2019. The Respondent seeks orders therein that the Appellant’s Notice of Appeal dated July 27, 2017 be deemed to have been withdrawn or struck out, on the grounds that the Appellant had failed to institute the intended appeal or to take the required essential steps within the prescribed or a reasonable time. The second application, which is also filed by the Respondent, is a Notice of Motion dated December 10, 2021 in Mombasa Civil Application No E096 of 2021, seeking to strike out the Appellant’s Record of Appeal dated September 30, 2021 and filed on October 25, 2021 on the grounds that essential steps as required under the Court of Appeal Rules had not been taken. The last application is a Notice of Motion dated November 15, 2021 filed in Mombasa Civil Appeal (Application) No E 101 of 2021 by the Appellant, seeking orders that the court be pleased to excuse the delay in filing the record of appeal; to extend time up to October 25, 2021 for the Appellant to lodge their record of appeal; and to direct that Record so lodged be deemed to have been filed within time.
3. We heard all the three applications in a virtual hearing held on July 5, 2022. Learned counsel Mr Kinyua appeared for the Appellant, while learned counsel Mr Khanna, holding brief for learned counsel Ms Wanjiku Mohammed appeared for the Respondent and canvassed their respective positions in the applications. In this respect, while the application dated November 13, 2021 in Mombasa Civil Appeal (Application) No E 101 of 2021 is a single-judge application, Mr Khanna and Mr Kinyua entered a consent on March 21, 2022 when Mombasa Civil Application No 34 of 2019 first came up for hearing, that all the three applications be heard together by a full-bench. After hearing all the applications on July 5, 2022, we also made a preliminary decision to write one ruling on the three applications, as they arise from a continuum of actions in the same appeal and raise the same issue of delay in filing of the Record of Appeal, and that the lead file will be that of Mombasa Civil Appeal (Application) No E 101 of 2021, hence this ruling.



The First Application

4. The application challenging the competence of the Notice of Appeal in Mombasa Civil Application No 34 of 2019 was supported by an affidavit sworn on April 26, 2019 by Ushwin Khanna, the advocate in the Respondent's firm that had conduct of this matter in the High Court. The said deponent averred that the Appellant had failed to institute an appeal within the prescribed time or at all, and had not served the Respondent with a record of Appeal within a reasonable time from the time of filing of the said Notice of Appeal. He annexed letters dated July 28, 2017 and 13th August 2018 sent by the Appellant to the Deputy Registrar of the High Court at Mombasa seeking a copy of the proceedings and Judge's notes respectively in the admiralty suit; and a copy of a letter by the Respondent's advocates dated December 4, 2018 to the Appellant's advocates seeking to be served with the Record of Appeal within 14 days, to which it was alleged there had been no response.
5. The Respondent's case therefore, was that no steps had been taken by the Appellant to expedite the obtaining of typed proceedings for the preparation and institution of the intended appeal, and that the Respondent was suffering prejudice as a result of the delay, arising from security it had provided to have the motor vessel "Ioannis G" released. Mr Khanna reiterated these grounds during the hearing, and relied on written submissions dated September 10, 2021 filed by Wanjiku Mohamed Advocates. The counsel cited the cases of *Banking Insurance & Finance Union vs Murata Sacco Society Limited* (2018) eKLR, *Mae Properties Limited vs Joseph Kibe & Another*, C A No 201 of 2016 and *South Coast Fitness and Sports Centre Ltd vs Clarkson Notcutt Ltd* [2000] 1 EA 230 No.3 for the proposition that a Notice of Appeal can be struck out arising from delay in obtaining typed proceedings and instituting an appeal; and the decision in *Patrick Kiruja Kithinji vs Victor Miguna Marete* [2015] eKLR that the failure to file the appeal on time goes to the jurisdiction of the court. The Respondent's counsel also challenged the filing and serving of the record of appeal in Civil Appeal E101 of 2021 without requisite leave of court.
6. The Appellant opposed the application in a lengthy replying affidavit sworn on August 28, 2021, and a further affidavit sworn on November 17, 2021 by its advocate, F Kinyua Kamundi. The gist of the Appellant's response was that its advocate applied for a copy of the handwritten proceedings at the High Court immediately after delivery of the impugned ruling on July 18, 2018; the Appellant's advocates then wrote to the Deputy Registrar requesting for, and paid for typed proceedings on July 28, 2017, lodged the Notice of Appeal in August 1, 2017, wrote follow-up letters on the proceedings dated June 8, 2018, August 13, 2018, November 17, 2020 and December 1, 2020, copies of which were attached. That on delivery of the letter dated December 1, 2020, the Appellant's advocates clerk was availed a notice dated January 10, 2019 addressed to the Appellant's advocates informing that the proceedings were ready for collection, and shown to have been received by the said advocates on January 25, 2019. The Appellant's advocate also averred that he had since filed a Record of Appeal and Memorandum of Appeal in Mombasa Civil Appeal E101 of 2021 and an application for extension of time to file the Record of Appeal.
7. The Appellant's counsel attributed the delay in instituting the appeal to the resignation of the responsible clerk in the Appellant's advocates' firm, heavy workload on the remaining staff and non-observance by the clerk of the Appellant's advocate's office mail protocols. He also attributed part of the delay to the refusal by the High Court to avail the handwritten proceedings and respond to his letters. Counsel urged in his submissions that he satisfactorily explained the delay and it would be unreasonable to deny him the right to appeal. It was submitted that the intended appeal had overwhelming chances of success, and the grounds of the appeal were detailed, and that if the



application to strike out the Notice of Appeal was allowed; the application for extension of time to file the Record of Appeal will be rendered nugatory.

The Second Application

8. The grounds for the Respondent's second application dated December 10, 2021 seeking to strike out the Record of Appeal in Mombasa Civil Application No. E096 of 2021 are that essential steps, namely the availing of required documents in the Record of Appeal, had not been taken and it had not been filed within the prescribed time; the appeal was an abuse of the process of Court as there is a pending application to strike out the notice of appeal; the memorandum and record of appeal was served outside the 14 days prescribed by Rule 90(1) of the Rules. The application was supported by an affidavit sworn on December 10, 2021 by Ushwin Khanna, the advocate in the Respondent's firm that had conduct of this matter in the High Court wherein these grounds were reiterated.
9. Mr Khanna also relied on the written submissions dated June 16, 2022 filed by the Respondent's advocates on record, wherein it was urged that leave ought to have been granted prior to the filing of the Record of Appeal, and the order granting an extension of time to the Appellant to file its appeal out of time has to be included and should form part of the Record and Memorandum of Appeal filed on October 25, 2021; that the said Record and Memorandum of Appeal was defective as it does not contain the Notice of Address for Service furnished by Respondent herein dated August 1, 2017, nor does the same contain a certified copy of the Order being appealed against being a mandatory requirement under Rule 87 (1) (b) and (h) respectively of the *Court of Appeal Rules 2010*; that the Appellant failed to serve a copy of the Record of Appeal within 7 days after lodging the same but instead served a copy of the same on the Applicant on November 15, 2021, fourteen days out of time contrary to Rule 90 (1) of the *Court of Appeal Rules, 2010*, and that the Appellant filed the Record of Appeal in abuse of the process of the Court with the intention of circumventing the Notice of Motion dated April 26, 2019 seeking to strike out the Notice of Appeal dated July 27, 2017.
10. It was further submitted that in the event that the Court excuses the delay in the filing of the Record of Appeal from January 25, 2019 until December 3, 2020 when the certified copies of the proceedings were eventually collected after a period of over 1 year and 11 months, based on the explanation given by the Appellant's counsel, the Appellant had still failed to file the Record of Appeal within the prescribed period of 60 days as provided for in Rule 82 of the Court of Appeal Rules 2010 and no explanation whatsoever has been given for the delay in filing the Record of Appeal from December 3, 2020 to October 25, 2021 being a period of almost 11 months. Lastly, that after filing its Record of Appeal on October 25, 2021 without leave, the Respondent did not take any steps to file its application for extension of time until November 15, 2021.
11. The Appellant did not file a response to, or submissions on the application, and M Kinyua submitted during the hearing that the said application was an abuse of the process of Court and an overkill, in light of the application already filed by the Respondent to strike out the Notice of Appeal.

The Third Application

12. The Appellant's application for extension of time dated November 11, 2021 in Mombasa Civil Appeal (Application) No E 101 of 2021 in essence sought to address the issue of delay in filing the Record of Appeal raised by the Respondent's applications. The grounds of the application are that Judiciary is to blame for failing to avail typed proceedings within time and yet the same were requested vide letter dated July 28, 2017; that the proceedings were ready in January 2019 but the Appellant's advocate was made aware of the same in December 2020; that the Appellant has a right of appeal and this right will be lost if the appeal is struck out; that the 18 grounds in the memorandum of appeal attest to the



arguability of the appeal; and that there will be no prejudice to the Respondent if the appeal is heard on merits.

13. Two affidavits were filed in support of the application, one sworn on November 15, 2021 by the Appellant's advocate, F Kinyua Kamundi, in which he reiterated the events that unfolded as regards the request for the proceedings and reasons why they were not aware that the said proceedings were ready for collection on January 10, 2019. The second affidavit was a supplementary affidavit sworn on November 15, 2021 by Kefa Nyaga Karenga, a clerk employed at the Appellant's advocates firm, confirming that on January 25, 2019 he received the notice from the High Court dated January 10, 2019 informing that the proceedings were ready, and being extremely busy, forgot to hand it over and was therefore to blame for the delay in the filing of the record of appeal.
14. Mr Kinyua highlighted his written submissions dated February 8, 2022 wherein it was urged that the delay in filing the Appeal is most regrettable but is sufficiently explained and arose from human error. Reliance was placed on section 59 of the *Interpretation and General Provisions Act* for the proposition that the power of the Court to extend time may be exercised even though the application for extension is not made until after the expiration of the time prescribed, and that it a good practice to correct a procedural error first and then seek the extension. The counsel distinguished the ruling of the Supreme Court of Kenya in *County Executive of Kisumu vs County Government of Kisumu & Others*, Civil Application No 3 of 2016 on the ground that the ruling was on an application to extend time made under the rules of that Court.
15. The Respondent's response was in submissions dated November 23, 2021 filed by its advocates, Wanjiku Mohamed Advocates. Mr Khanna while relying on the said submissions reiterated that there was an application for striking out the notice of appeal that was pending determination; and while citing the decision by the Supreme Court of Kenya in *County Executive of Kisumu vs County Government of Kisumu & Others*, (*supra*), urged this Court has no jurisdiction to extend time where an extension of time is sought in respect of the filing of a Record of Appeal which has already been filed, and that one need to first seek extension of that time before he or she can proceed to do that which the law requires.

The Determination

16. We note that the three applications have principally been brought pursuant to the provisions of Rules 4, 75, 77(1), 82, 83 and 84 of the Court of Appeal Rules of 2010. The cross cutting issue in all the three applications is whether the Record of Appeal filed by the Appellant is properly on record, and given that the delay in filing the Record of Appeal is not contested, the question of whether extension of time to file the Record of Appeal as requested can be granted by this Court therefore requires to be answered first. The principles on extension of time under Rule 4 are settled and were aptly stated in the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (ur) as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted”



17. Under Rule 82 of the *Court of Appeal Rules of 2010*, an appeal was required to be instituted 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.
18. The Appellant's advocate has in this respect demonstrated by way of various letters, that he made various attempts to obtain the typed and handwritten proceedings of the High Court to prepare the record of appeal, and this fact was also acknowledged by the Respondent. The Appellant's counsel also proffered an explanation for the delay between the date the typed proceedings were ready for collection on January 10, 2019 and when he became aware of this fact on December 2, 2020 which was due to inadvertence by his clerk; and exhibited a Certificate of Delay in its Record of Appeal that excluded the period between July 18, 2017 and December 3, 2020 in the computation of time for filing the appeal under the proviso to the then Rule 82 (1).
19. The Record of Appeal therefore ought to have been lodged within sixty days of December 3, 2020, and the deadline for lodging the appeal was therefore February 3, 2021. The Appellant however lodged its appeal on October 25, 2021, over ten months later. As the Supreme Court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court and the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. No explanation has been provided by the Appellant's counsel for the delay of over eight months between February 3, 2021 and 25th October 2021 in lodging the Record of Appeal. The effect therefore is that the Record of Appeal was filed out of time, and there is a delay of eight months that has not been explained and which is therefore not excusable and is inordinate. This is especially after also taking into account the facts that there was an earlier delay, and that the Respondent has averred to the prejudice it is suffering in meeting the costs of the security provided in the matter. In the premises, this Court declines to exercise its discretion to extend time under Rule 4 for these reasons.
20. Coming to the applications for striking out of the Notice of Appeal and Record of Appeal, 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. We need to point out at the outset, that the Respondent cannot invoke Rule 84 of the Rules to strike out the Notice of Appeal on account of non-compliance in this respect, having filed its application on April 29, 2019, which was more than thirty days after the service of the Notice of Appeal upon its advocates required by the said Rule. This finding notwithstanding, this Court has the discretion to deem the subject Notice of Appeal withdrawn, and it was held in *Mae Properties Limited vs Joseph Kibe & Another* [2017] eKLR that this power can be exercised by the Court on its own motion, and also where, as in that case, an application to strike out a notice of appeal is filed outside the 30-day limit in the Rule 84 proviso.
21. Rule 83 of the *Court of Appeal Rules 2010* (and the current Rule 85 of the *Court of Appeal Rules 2022*) provided as follows:



- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.
- (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

This Court is also noted in *Hamisi Omar Juma, Mwamuyee Dau Ngala, Mwalumbi Mwangata & 150 Others vs Sheileen Chandra Narottam Shah 2 Others*, Mombasa Civil Application 1 of 2018, that the provisions of Rule 83 of the Court of Appeal Rules 2010 and similarly of Rule 85 of the Court of Appeal Rules 2022 are predicated on the existence of circumstances from which this Court can deem that a notice of appeal has been withdrawn.

22. In the present applications, such circumstances do exist, as there is in effect no competent appeal filed by the Appellant in light of our earlier decision declining to extend time for the filing of the appeal, and the Record of Appeal was therefore filed out of time. Indeed in *Mae Properties Limited vs. Joseph Kibe & Anor (supra)* it was held as follows in this regard:

“It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice nor reference to the parties. The Court has this inherent power to make the formal order of the notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more

robustly as a regular house- cleaning measure.”

23. Lastly, it is not disputed that the Appellant’s Record of Appeal was filed on October 25, 2021 and served on the Respondent’s advocates on November 15, 2021, and the application dated December 10, 2021 in Mombasa Civil Application No E096 of 2021, seeking to strike out the Appellant’s Record of Appeal was lodged on December 20, 2021. The application is therefore incompetently filed, having been lodged outside the required thirty days’ timeline and is accordingly struck out.

24. In conclusion therefore, we find and order as follows:

1. The Appellant’s application dated November 15, 2021 filed in Mombasa Civil Appeal (Application) No E 101 of 2021 is not merited, with the result that the Appellant’s Record of Appeal dated September 30, 2021 and filed on October 25, 2021 is incompetently on record, and is hereby struck out with costs to the Respondent.
2. The Respondent’s application dated April 26, 2019 filed in Mombasa Civil Application No 34 of 2019 is found to be merited, with the result the Notice of Appeal dated July 27, 2017 and lodged on August 1, 2017 is hereby deemed as withdrawn, with costs to the Respondent.
3. The Respondent’s application dated December 10, 2021 in Mombasa Civil Application No E096 of 2021 was incompetently filed and is hereby struck out with no order as to costs, in



light of the outcome of the other two applications, and the fact that the Appellant did not file any response to, or submissions on the application.

4. This ruling will also apply to the applications filed Mombasa Civil Application No 34 of 2019, and Mombasa Civil Application No E096 of 2021, and copies thereof shall be placed in the record of the said applications.

25. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF NOVEMBER 2022

S. GATEMBU KAIRU (FCIArb)

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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

