



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KIAGE, MURGOR & SICHALE, JJA]

CIVIL APPEAL (APPLICATION) NO. 120 OF 2016

BETWEEN

PATRIOTIC GUARDS LIMITED.....APPELLANT/RESPONDENT

AND

SAFARICOM LIMITED.....RESPONDENT/APPLICANT

(Being an application to strike out the Notice of Appeal, Record of Appeal and the entire Appeal

in Nairobi Civil Appeal No. 120 of 2016 against the Ruling and Order of Ochieng, J

delivered at Nairobi on 27th April 2016

in

HC Misc Application No. 573 of 2014)

RULING OF THE COURT

Before us is a motion dated 12th July, 2016, brought under Rules 42 (1), 43 (1), 75 (2) and 84 of the Court of Appeal Rules, 2010 in which **Safaricom Limited (the Respondent/ Applicant)** seeks the following orders:

“1. The Notice of appeal dated 7th May 2016 be struck out with costs.

2. The Record of Appeal dated 31st May 2016 and the entire Appeal in Nairobi Civil Appeal No. 120 of 2016 be struck out with costs.

3. The applicant herein be awarded the costs of this application and the appeal”.

The application is supported on the grounds on the face of the motion and an affidavit sworn by **Daniel Ndaba** the applicant’s Principal In House Counsel-Litigation, who deposed *inter alia* that on **27th November 2014**, the Respondent filed an Originating Summons pursuant to the provisions of Section 35 of the Arbitration Act, seeking to set aside the award dated **15th August, 2014**, pursuant to which the Applicant swore a replying affidavit in opposition to the same and a notice of Preliminary Objection which was upheld by **Ochieng, J** vide his ruling dated **27th April, 2016**; that, the Respondent being aggrieved and dissatisfied with the said ruling, lodged a Notice of Appeal on **12th May, 2016** which he ought to have filed within 14 days of the impugned ruling *i.e.* on or before **11th May, 2014**, and that as such, the Notice of Appeal herein, was filed after the lapse of the requisite timeframe in contravention of Rule 75 (2) of this Court’s Rules. It was further contended that failure by the Respondent to obtain leave of this Honourable Court prior to filing the said Notice of Appeal goes into jurisdiction and the said notice was therefore a nullity and of no legal

consequence. The applicant's counsel further deposed that to the extent that the Respondent was appealing against a decision of the High Court exercising its jurisdiction under Section 35 of the Arbitration Act, this Court lacks the jurisdiction to hear and determine the same.

The applicant's submissions reiterated the averment in the applicant's supporting affidavit.

On the other hand, it was submitted for the Respondent that the instant application offends the mandatory provisions of Rule 84 of this Court's Rules as the same was brought after expiry of 30 days from the date of service of the Notice of Appeal; that **1st of May, 2016** and **2nd of May, 2016** were public holidays; and that the Notice of Appeal was filed on **12th May, 2016** within the provisions of Rule 75 (2) of this Court's Rules considering the precluded days as provided under Rules 3 (a) (b) (c) (d) of this Court's Rules.

We have carefully considered the motion, the supporting affidavit, the authorities and the submissions relied upon by the parties. It is indeed not in dispute that the impugned Ruling was delivered on **27th April, 2016**, while the Notice of Appeal was filed on **12th May, 2016**, which was a day after the statutory timelines as provided by Rule 75 of this Court's Rules.

On the other hand, the motion as filed offends the mandatory provisions of Rule 84 of this Court's Rules which provides:

“84. Application to strike out notice of appeal or appeal

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)

In the instant case it is indeed not in dispute that the Notice of Appeal was served upon the Applicant on **13th May, 2016**, whereas the instant motion was filed on **12th July, 2016**, clearly way beyond the 30 days provided for by Rule 84 of this Court.

In the case of ***Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others [2016] eKLR*** 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.

It would thus appear that both the court and the litigants are strictly bound by the timelines set by the proviso to Rule 84. In this case, it is common ground that service of the purported notice of appeal was effected on 2nd July, 2015 while this application, seeking to strike it out, was filed in November 2015; four months after service of the notice. No leave was sought to file it out of time. In view of the aforesaid provisions of law and the authorities, the inescapable result is that the advocates application fails and must be dismissed.”

We need not say more regarding the fate of the 1st prayer in the Applicant's motion.

Finally, the Applicant has contended that the Respondent has no right of appeal to this Honourable Court either by way of leave or otherwise from the decision of the High Court in respect of the ruling delivered by **Ochieng, J** in Nairobi High Court Misc. Application No. 573 of 2014 being a decision in respect of an application filed under Section 35 of the Arbitration Act. Firstly, we note that the Applicant has not expressly sought that prayer in the main body of the motion as the same was only brought out in the grounds on the face of the motion and the submissions. Secondly, we are of the considered opinion that such a prayer is premature and misconceived as we cannot make a determination on the issue of jurisdiction in the instant motion at this stage as we are not seized of the complete Record of Appeal.

In the circumstances, we have no choice but to strike out the motion dated **12th July, 2016** in its entirety which we hereby do. We shall make no orders as to costs.

Dated and delivered at Nairobi this 23rd Day of April, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

A.K MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR