



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO (P), KARANJA & GATEMBU, J.J.A.)

MISC. CIVIL APPLICATION NO. 69 OF 2018

BETWEEN

MAKUPA TRANSIT SHADE LTD.....1ST APPLICANT
REGIONAL LOGISTIC LTD.....2ND APPLICANT
MITCHEL COTTS FREIGHT (K) LIMITED.....3RD APPLICANT
KENCONT LTD.....4TH APPLICANT
INTERPEL CONTAINER FREIGHT STATION LTD.....5TH APPLICANT
FOCUS CONTAINER FREIGHT STATION LTD.....6TH APPLICANT
AWANAD ENTERPRISES KENYA LTD.....7TH APPLICANT
CONSOLBASE LIMITED.....8TH APPLICANT
BOSS FREIGHT TERMINAL LTD.....9TH APPLICANT
PORTSIDE FREIGHT TERMINALS LTD.....10TH APPLICANT
MOMBASA ISLAND CARGO TERMINAL LTD.....11TH APPLICANT
AUTOPORT FREIGHT TERMINAL LTD.....12TH APPLICANT
SIGNON CONTAINER FREIGHT STATION LTD.....13TH APPLICANT
MULTIPLE INLAND CONTAINER DEPOT LTD.....14TH APPLICANT
MOMBASA CONTAINER TERMINAL LTD.....15TH APPLICANT
KENYA RAILWAYS CORPORATION.....16TH APPLICANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

(Being an application for striking out a Notice of Appeal lodged in the High Court of Kenya at Mombasa by Kenya Ports Authority, on the 10th May, 2018 in a intended appeal against the decision of the High Court of Kenya at Mombasa (Ogola, J.) made on 3rd May, 2018

in

Constitution Petition No. 80 of 2018)

RULING OF THE COURT

1. Makupa Transit Shade Ltd and 15 Others, through learned counsel Mr. Paul Buti filed the application dated 8th June, 2018 seeking orders that the Notice of Appeal dated 9th May, 2018 and lodged at the High Court Registry at Mombasa on 10th May, 2018 by Kenya Ports Authority (the respondent) be struck out. They also pray for costs. The motion is predicated on **Rules 77(1) and 84** of the Court of Appeal Rules (the Rules).

2. The application is premised on grounds, *inter alia*, that the Notice of Appeal was lodged on 10th May, 2018 and pursuant to **Rule 77(1)** of the Rules, it ought to have been served within seven days but, according to the applicant, it was served five days out of the stipulated time, without leave of the Court. The applicant contends that on that ground and as the respondent failed to move the Court for extension of time, the entire appeal is a nullity and it ought to be struck out.

3. The application is supported by an affidavit sworn by Daniel Nzeki, the executive officer of the 1st applicant on 7th June, 2018, where he basically reiterates the grounds on the face of the application.

4. The motion is opposed through a replying affidavit sworn by Turasha J. Kinyanjui, the 1st respondent’s head of litigation and disputes, in which she deposes that a copy of the Notice of Appeal was actually served on all the advocates appearing for the several parties in the appeal on 10th May, 2018; and contrary to learned counsel’s assertion, the applicant was actually served with the said Notice of appeal on time. She has annexed a copy of the Notice of appeal which bears the stamp of Paul Buti Advocate.

The said stamp shows that the Notice of appeal was received by the said firm on 10th May, 2018 at 2.40 pm.

5. There is no contestation that the stamp in question is genuine. We also note that other than stating that the Notice of appeal was served out of time, counsel has not adduced any evidence whatsoever to that effect. On the other hand, the respondent has brought forth evidence to show that the notice was actually served the same day it was lodged and the same was acknowledged by stamping with Mr. Buti’s official stamp.

6. We have looked at the copy of the Notice of appeal annexed to Ms. Turasha’s affidavit and we have no reason to doubt its authenticity. We have satisfied ourselves that the Notice of appeal was actually served on 10th May, 2018. We still cannot fathom why this application was filed in view of the glaring evidence that it has no legs to stand on. We were even more perplexed by the fact that even after the Court pointed out to Mr. Makori, learned counsel who held brief for Mr. Buti, counsel on record for the applicant when the application came up for hearing, the futility of proceeding with the application he still insisted that he had firm instructions to prosecute the application and so we had to reserve it for Ruling.

7. Needless to say, even as we appreciate that counsel have a duty to serve their client’s interests to the best of their ability, they must never forget that **Section 3A (3)** of the Appellate Jurisdiction Act enjoins them to assist the Court to further the overriding objective of utilising Court’s time and resources in the most effective, efficacious, fair and proportionate manner, in the Court’s solemn role of dispensing justice. It is in applications such as this one where courts are sometimes inclined and are justified to order that costs be met by the concerned advocates individually. We say no more. This Notice of Motion is totally devoid of merit and is hereby dismissed with costs to the respondent.

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

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR