



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 39 OF 2019**

**BETWEEN**

**RIPE FREIGHT SERVICES LTD.....APPLICANT  
AND**

**PAN AFRIC COMMODITIES (UGANDA) LTD.....RESPONDENT**

***(Being an application for striking out the Record of Appeal against the decision of the***

***High Court of Kenya (Hon. P.J. Otieno J.) dated 27th December 2018***

***in***

***Mombasa HC Misc. Application No. 359 of 2018)***

\*\*\*\*\*

**RULING OF THE COURT**

Before us, is a notice of motion dated 25th May, 2019 under **Rules 42** and **84** of the **Court of Appeal Rules**, substantively seeking orders that this Court be pleased to strike out with costs the record of appeal filed herein as having been served outside the time prescribed by **Rule 90 (1)** of the **Court of Appeal Rules** together with an attendant order that there be an order for costs.

It is supported by grounds on its body and a supporting affidavit sworn by **Moses Mwakisha** together with annexures thereto. It has been opposed by a replying affidavit of **Samuel S. Ouma** sworn on 30th May 2019, together with annexures thereto. It was canvassed virtually through rival pleadings filed by the respective parties herein and respondents written submissions in support of and against the application under consideration, in the absence of learned counsel for the respective parties and without oral highlighting.

In summary, it is the applicants' averments that the respondent filed a notice of appeal on 7th January, 2019 and caused it to be served upon it on 17th January, 2019 within the timeline set out in **Rule 75(1)** and **(2)** of the **Rules** of the Court. In response to the service of the notice of appeal upon it, the applicant filed a notice of address on 23rd January, 2019 and served the same upon the respondent the next day on 24th January, 2019. According to it, the record of appeal ought to have been filed within sixty (60) days of the filing of the notice of appeal in accordance with **Rule 82(1)** of the **Court of Appeal Rules** which fell on or about 8th March, 2019. The respondent can only escape the penal consequences attendant to noncompliance with the prerequisite in **Rule 82(1)** of the **Rules** of the Court if there is demonstration that the respondent was by virtue of the proviso to **Rule 82(1)** of the Court's **Rules** entitled to a certificate of delay.

Having so filed and served the notice of address, the applicant was entitled to be served with the record of appeal within seven days of it being lodged in accordance with **Rule 90(1)** of the **Court of Appeal Rules**. The record filed on 18th April, 2019 was served upon the applicant on 26th April, 2019, which was the eighth day upon such filing. The applicant in the circumstances contends that the record of appeal ought to have been served upon it not later than 25th April, 2019 and thus it was served out of time. It is, therefore, incompetent and a proper candidate for striking out.

In rebuttal, it is the respondent's averments and submission that its record of appeal was delivered to the Court of Appeal sub registry on 18th April, 2019 but due to factors beyond its control, the Deputy Registrar endorsed, sealed and stamped the same on 24th April, 2019. It was collected on 25th April, 2019 and served upon the applicant on 26th April, 2019. The record was therefore served within forty-eight (48) hours of being released to it by the Deputy Registrar well within the timeline provided in **Rule 90(1)** of the **Court of Appeal Rules**. Further, that even if there was demonstration that the applicant was indeed served after the statutory seven (7) days had lapsed, no injury, damage or prejudice was occasioned to it to warrant granting of such draconian relief which in its opinion is a mischievous tactic employed by the applicant to scuttle the merit disposal of the appeal which is not only properly before Court but also has high chances of success. Lastly, the

respondent submits that the applicant's requests offends the provisions of **Article 159(2)(d)** of the Constitution that stipulates that justice shall be administered without undue regard to procedural technicalities and the overriding objective principle of the Court enshrined in **sections 3A and 3B** of the **Appellate Jurisdiction Act, Cap 9** of the Laws of Kenya which donates to the Court greater latitude in the discharge of its mandate.

We have considered the record in light of the above rival pleadings and submissions. Our invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited above. **Rule 42** is merely procedural and does not therefore fall for interrogation. **Rule 84** of the Court's **Rules** 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.**

**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.**

This being an application for striking out the record of appeal, for it to succeed the applicant has an obligation to demonstrate that the application for striking out was filed within thirty (30) days from the date of service upon them of the record. It is common ground that the applicant was served on 26th April, 2019. It filed this application on 25th May, 2019, that is twenty-nine days after service upon it of the record of appeal which in our view is within the thirty-day statutory period provided for in the above **Rule**. We are, therefore, properly seized of the application.

Turning to the merits of the application, the applicant's complaint is that service upon it of the record offends the prerequisites in **Rule 90(1)** and **(2)** of the Court's **Rules**. It provides:

**90(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79.**

**(2) The appellant shall also serve copies of the memorandum of appeal and the record of appeal on such other parties to the original proceedings as the Court may at any time on application or of its own motion direct and within such time as the Court may appoint.**

The respondent's response to this complaint is as already highlighted above. We have considered this rival position in light of the record as assessed above. We have also perused a copy of the memorandum of appeal annexed to the respondent's replying affidavit. Our observation thereon is that the date on the memorandum of appeal indicates clearly that the record of appeal was endorsed by the deputy registrar on 24th April, 2019. The respondent alleges it was released to them for service on 25th April, 2019; and served upon the applicant on 26th April, 2019 which according to it and correctly so in our view was within the timeline provided for in **Rule 90** of the **Rules** of the Court. This finding in essence disposes of the application but we find no harm in interrogating the applicability of the other provisions of law relied upon by the respondent even if it be only for purposes of the record.

With regard to **Article 159** of the Constitution of Kenya, we take it from the position taken by the Supreme Court of Kenya when it reiterated in the case of **Raila Odinga and 5 Others vs. IEBC and 3 Others [2013] eKLR** as follows

**“...that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis”.**

The Supreme Court also agreed with the dicta of **Kiage J.A** in **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others [2013] eKLR** stating:

**“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”**

Borrowing from the above exposition, it is our view that indeed **Article 159(2)(d)** is not a panacea for all procedural ills. However, in the circumstances prevailing herein, we find no procedural ills that can be cured by this principle as already alluded to above and which we find no need to repeat here.

As for the overriding objective of the Court enshrined in **sections 3A and 3B** of the **Appellate Jurisdiction Act**, it is sufficient for us to state that this donates greater latitude to the Court in the dispensation of justice. Bearing both sets of principles in mind and applying them to the rival position herein, it is our finding that applicant's complaint has no basis for the failure to rebut the respondent's computation of time from the time the deputy registrar of the Court endorsed the record of appeal and released it to the respondent for service upon the applicant, a position we have already ruled above that it was accomplished within the timelines provided for in **Rule 90(1)** of the **Rules** of the Court.

In the premises, the application is accordingly rejected and dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL, 2021.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**