



**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CIVIL APPLICATION NO. 42 OF 2019**

**BETWEEN**

**SHEIKH ALI TAIB.....1ST APPLICANT**

**ABDALLA ALI TAIB.....2ND APPLICANT**

**-VERSUS-**

**SELINA WEKESA.....1ST RESPONDENT**

**KENNEDY ELLAM WEKESA** Suing as the legal representative of the estate of

**GEORGE ELLAM WEKESA.....2ND RESPONDENT**

*(Being an application for striking out the Appeal against the decision of the High Court of Kenya (Hon. N. A. Matheka J.)*

*dated 6th December 2018*

*in*

*Mombasa ELC No. 454 of 2002)*

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**RULING OF THE COURT**

Before us is a notice of motion dated 21st May, 2019 under **Rules 82 and 84** of the **Court of Appeal Rules**, substantively seeking orders that the Memorandum of Appeal dated 29th March 2019 in **Mombasa Civil Appeal No. 55 of 2019 Selina Wekesa vs. Sheikh Ali Taib, Abdalla Ali Taib and Kennedy Eliam Wekesa** herein be struck out with costs; the record of appeal dated 29th March, 2019 in **Mombasa Civil Appeal No. 55 of 2019 Selina Wekesa vs. Sheikh Ali Taib, Abdalla Ali Taib & Kennedy Eliam Wekesa** herein be struck out with costs; together with an attendant order that the costs of this application be provided for.

It is supported by grounds on its body and a supporting affidavit sworn by **Abdalla Ali Taib** together with annexures thereto. It has been opposed by a replying affidavit of **Selina Wekesa** sworn on 31st January, 2020, together with annexures thereto. It was canvassed virtually through rival pleadings filed by the respective parties herein, in support of and against the application under consideration, in the absence of counsel for the respective parties and without oral highlighting.

In summary, it is the applicants' averments and submission that judgment was delivered by the trial court on 6th December, 2018. The respondent timeously filed a notice of appeal intending to appeal against the whole decision which they acknowledge was served on them within the timeline provided for in the **Rules**. The respondent has however never served them with any letter to the Deputy Registrar of the Court bespeaking proceedings for appellate purpose, nor annexed a copy of the same in the record of appeal dated 29th March, 2019. Instead, the applicant annexed a certificate of delay dated 7th March, 2019 signed and sealed by the Deputy Registrar, indicating that the respondent received certified copies of proceedings on 24th January 2019 and was therefore required to file her record of appeal within sixty days of that date pursuant to **Rule 82** of the Court of Appeal **Rules** which according to the applicants fell on or about 26th March, 2019. Instead it was filed on 29th May, 2019 out of time and without leave.

In rebuttal, it is the respondent's averments and submission that it is not true as contended by applicants that they were not served with a copy of the letter to the Deputy Registrar bespeaking proceedings and that the same was also annexed in the record of appeal as it appears on

page 359 of the record of appeal. The respondent concedes that there was a minor delay of three (3) days in filing the record of appeal which they contend was inadvertent and not inordinate and therefore excusable especially when the same arose as a result of the respondent making a follow up on relevant documents from the court for purposes of inclusion in the record of appeal.

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 82** provides as follows:

**(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –**

- (a) a memorandum of appeal, in quadruplicate;**
- (b) the record of appeal, in quadruplicate;**
- (c) the prescribed fee; and**
- (d) security for the costs of the appeal:**

**Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be 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 such copy.**

**(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.**

**(3) .....**

In the case of **Charles Wanjohi Wathuku vs. Githinji Ngure & Another [2016] eKLR**, this court reiterated the position taken in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others [2016] eKLR** on the intent and purport of **Rule 82** of the Court's rules as follows:

**“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispute justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”**

In light of the above threshold, it is our ruling that the respondent's delay in filing her timeously initiated appellate process within the ambit of **Rule 82(1)** itself or the proviso to **Rule 82(1)** of the Court's **Rules** is fatal to her appellate process as laid. The explanation proffered of delay of 3 days which according to them was inadvertent and second that it is not inordinate suffices for an application for extension of time and not applications of this nature. We also take note of the presence on the record of a certificate of delay which in essence would bring the respondents position within the proviso to **Rule 82(1)** subject to demonstration that the letter bespeaking proceedings was served on both the deputy registrar of the Court and the opposite party within thirty (30) days of the decision appealed against. The respondent has indeed annexed the letter bespeaking proceedings dated 19th December, 2018 to the replying affidavit. We note from the body thereof that, it was indeed copied to the opposite party. They have contended lack of service upon them of the said letter. It was incumbent upon the respondent to provide that proof. They have failed to do so. The certificate of delay relied upon by them does not therefore aid the cause of the respondent's timeously initiated appellate process.

Turning to **Rule 84** of the Court's rules cited as the access provision for the relief sought, it provides that:

**“84. 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.”**

To demonstrate compliance with this Rule, the applicants deposed at paragraph 2 of the supporting affidavit that they were served with the record of appeal dated 29th March 2019, on 25th April, 2019. The application filed on 21st May, 2019 was therefore filed within the thirty-days statutory period provided for in the said **Rule**. As such, the applicants' reliance on **Rule 84** of this Court's **Rules** as basis for seeking relief is well founded and therefore sustainable.

Bearing in mind the totality of the above assessment and reasoning, it is our finding that the respondent having failed to demonstrate compliance with the prerequisites on **Rule 82(1)** and **(2)** of the Court's **Rules** by applying for and serving the letter bespeaking proceedings on the applicant within the timeline provided in the said **Rule** of filing the record of appeal within sixty (60) days from the date of lodging of the notice of appeal on the one hand and the failure to demonstrate that the letter to the registrar bespeaking proceedings was served both on the registrar and the applicant within thirty (30) days of the decision

intended to be impugned cannot rely on the proviso to **Rule 82(1)** to provide succor for her already timeously initiated appellate process. We have no alternative in the circumstances but to reroute her back to the drawing board to take measures to resuscitate her appellate process.

Consequently, we allow the application. Accordingly, the appeal be and is hereby struck out with costs to the applicant.

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

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**