



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: WARSAME J.A. IN CHAMBERS)**

**CIVIL APPLICATION NO. 110 OF 2019**

**BETWEEN**

**SEA ANGEL SERVICES STATION LIMITED.....APPLICANT**

**AND**

**YUSUF ABDUL.....RESPONDENT**

*(An application for extension of time to file a notice of appeal against the judgment of the High Court at Mombasa (Justice P.J. Otieno) dated 3rd May, 2017*

*in*

*Civil Appeal No. 108 of 2013)*

\*\*\*\*\*

**RULING**

In its notice of motion dated 2nd December 2019, the applicant seeks extension of time within which to file and serve a fresh notice of appeal against the judgment of the High Court (P.J Otieno, J.) delivered on 3rd May 2017. The applicant also seeks further orders to withdraw its notices of appeal dated 17th May 2017 and 3rd July 2017 respectively.

Briefly, the background to the application is that the court delivered its judgment on 3rd May 2017 in the presence of both parties. The applicant consequently filed its notice of appeal dated 17th May 2017 and erroneously stated that judgment was delivered on 5th May 2017.

The Court made a similar error upon issuing a certified copy of the judgment by stating that the judgment was delivered on 22nd June 2017. The applicant then lodged another notice of appeal dated 3rd July 2017 against the decision allegedly delivered on 22nd July 2017.

The applicant informed the court of its mistake vide a letter dated 1st August 2019 and the court corrected the typographical error under Section 99 of the Civil Procedure Act on 24th October 2019. The applicant now wishes to withdraw its earlier notices and file a fresh notice of appeal against the judgment given that the delay was occasioned by an error made by the court.

With that background, I now deal with the application before me which has been opposed through a replying Affidavit dated 19th May 2019. The respondent’s advocate depones that the applicant filed a record of appeal on 24th September 2019 in Civil Appeal 116 of 2019 and in response, the respondent filed an application under Rule 84 of this Court’s Rules seeking to have the record of appeal struck out, which application is yet to be determined and is pending before the court. It is alleged that the current application is an attempt to undercut the respondent’s application in the main appeal without withdrawing the appeal or awaiting the court’s decision and the same amounts to an abuse of the court’s process.

I have carefully weighed the affidavits on record and the submissions counsel. It is not in dispute that the applicant filed the first notice of appeal timeously on 17th May 2017 albeit with defects. By the applicant’s own admission, the second notice was filed to correspond with the court’s erroneous date of 22nd June 2017. Upon realising that the notices were defective, the applicant did not correct the mistakes on the notices but opted to file a record of appeal and include both notices of appeal. The applicant now wants this court to withdraw the two notices and extend the time to file a fresh notice of appeal.

It is quite obvious that at the time of filing this application for leave and extension of time there was a subsisting notice of appeal though defective according to the applicant. This Court cannot purport to extend time to file a notice of appeal where one as filed timeously nor is it

the premise of this court to go into its validity.

In the case of ***Fortune Finance Ltd vs Geoffrey Nguigi Githaiga*** CA No. NAI. 22 of 1999, this Court addressed itself thus:-

***“A notice of appeal is a primary document within the meaning of rule 85 of the Rules and the learned Judge had clearly no jurisdiction to make an order for filing a fresh Notice of Appeal while the original was still extant.”***

Unfortunately, the respondent has filed an application in the main appeal to have the record of appeal struck out. The applicant cannot attempt to steal a march against the respondent by asking this court to withdraw the notices of appeal. Logic dictates that the application to be struck out must be heard and determined by the court.

The upshot is that the application is premature before this court and is dismissed with no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**