



**Okemwa v Kenya Marine & Fisheries Research Institute (Civil Application
88 of 2019) [2021] KECA 316 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 316 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 88 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 17, 2021**

BETWEEN

EZEKIEL NYANGOYA OKEMWA APPLICANT

AND

KENYA MARINE & FISHERIES RESEARCH INSTITUTE RESPONDENT

(An application to strike out the appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Rika J.) dated 8th July 2016 in Mombasa ELRC No. 186 of 2013)

RULING

1. Dr. Ezekiel Nyangoya Okemwa, the Applicant herein, has filed a Notice of Motion application dated 20th September 2019, brought under Rule 82 and 84 of the Court of Appeal Rules. The Applicant is seeking orders therein that the Record of Appeal dated 5th August 2019 filed herein be struck out with costs. The Applicant states in his affidavit in support of the application sworn on 20th September 2019, that from the time of service of the Record of Appeal upon his advocates on 22nd August 2019 to date, they have not been notified of the Appeal number by the Appellant, nor have they been served with a letter formally addressed to the Deputy Registrar requesting for a copy of the proceedings.
2. Further, that the Certificate of Delay dated 25th July 2019 in the Record of Appeal does not conform with the Court of Appeal rules because it did not indicate when the proceedings were typed and ready for collection by the Appellant. However, that a perusal of the Typing Dispatch book at the Employment and Labour Relations Court at Mombasa, showed that the said proceedings were already typed and ready for collection on 27th October 2016. Therefore, that the delay to file the Record of Appeal was inordinate and unreasonable, as no explanation has been offered as to why no step was taken to lodge the Record of Appeal for a period of three years after the proceedings were typed. In addition, that the Appellant's advocates only acted after the Applicant filed judicial review proceedings to compel payment of the decretal sum.



3. Kenya Marine & Fisheries Research Institute which is the Appellant in the main appeal and Respondent herein, filed a replying affidavit sworn on 29th June 2021 by Prof. James Njiru, its Chief Executive officer, in response. The Respondent's case is that it had instructed two advocates to file and prosecute the appeal, but who failed in their mandate. Thereupon, that the Respondent instructed the firm of Ham Lagat and Associates who are on record, and who prepared the Appeal, but that there was a delay caused by the bureaucracy of the registry, long queues at the typing pool, and shortage of judges. The Respondent averred that the proceedings were eventually collected on 19th July 2019, which is when the period of 60 days started running for filing the Record of Appeal. Therefore, that the Record of Appeal was duly filed and served timeously.
4. The Applicants in their submissions dated 11th June 2021 drew Court's attention to rule 82 (1) and (2) of the *Court of Appeal Rules* and cited the case of *Tropicana Hotels Limited v SBM Bank (Kenya) Limited (formerly known as Fidelity Commercial Bank Ltd [2020] e KLR* for the position that strict timelines for filing the Record of Appeal are meant to ensure that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The Applicant reiterated that the Notice of Appeal herein was lodged on 20th July 2016 while the Record of Appeal dated 5th August 2019 was lodged on 16th August 2019, and that the time it took to prepare the proceedings is not shown in the Certificate of Delay. The effect therefore is that Record of Appeal is not properly on record and should be struck out on the ground that no appeal lies pursuant to Rule 84 of the Court of Appeal Rules. Besides, that there was no application for extension of time.
5. The Respondent in submissions dated 8th October 2021, stated the period when the proceedings were being prepared should not be used in computation of time, and that the Record of Appeal dated 5th August 2019, filed on 16th August 2019 and served on 22nd August 2019 fell within the exception of Rule 82 (1) of the Rules. Reliance was placed on the decision 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 of Appeal Rules, and the Respondent urged the Court to rely on the Certificate of Delay as opposed to the Dispatch Book of the typing pool of the Employment and Labour Relations Court at Mombasa in this regard. The Respondent also submitted that the instant application dated 20th September 2019 was filed outside the 30 days from the date of filing the Record of Appeal on 16th August 2019, and ought to have been filed on 16th September 2019. The decision in *Total Kenya Ltd vs Reuben Mulwa Kioko [2018] eKLR* where the Court struck out an Application for having been filed out of time.
6. We have carefully considered the application before us and the rival submissions by learned counsels. The competency of the instant application and of the Respondent's Record of Appeal are both in issue. On the competency of the instant application, Rule 84 of the Court of Appeal allows any person affected by an appeal to apply to the Court to strike out the notice of appeal or the appeal 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. However, the proviso to Rule 84 also provides that an application to strike out 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 (emphasis ours).
7. In the present application the Respondent does not dispute, and in fact in its submissions expressly states, that it served the Record of Appeal on the Applicant on 22nd August 2019. The thirtieth day after such service would have fallen on 21st September 2019, while the instant application is dated and lodged at this Court's registry on 20th September 2019. The application is therefore competently before us.



8. Coming to the competency of the Respondent’s Record of Appeal, it is not contested that Rule 82 of the Court of Appeal Rules provides for a time limit for institution of appeals of sixty days from the date when a Notice of Appeal is lodged, and that the Notice of Appeal herein was lodged by the Appellant on 20th July 2016. The Applicant annexed a copy of the said Notice of Appeal, and of the Certificate of Delay dated 25th July 2019, which read as follows:

“This is to certify that Kenya Marine Fisheries Research Institute made an application for certified copies of proceedings on 21st July 2016 in this case and the same were collected on 19th July 2019.”

9. The proviso to rule 82 states 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”. The import of the proviso is that there is a time limit that also applies to applications for proceedings, and the time spent in obtaining the proceedings are excluded from the 60-day timeline for lodging of the appeal.

10. A perusal of the Certificate of Delay reveals three pertinent facts. Firstly, that the application for proceedings was made on 21st July 2019 within thirty days of the decision appealed from which was delivered by the trial Court on 8th July 2019. Secondly, that the time stopped to run for purposes of Rule 82, as the time between the date of the application for proceedings on 21st July 2019 and date of issue of the Certificate of Delay on 19th July 2019 was excluded as provided by the proviso to Rule 82. Thirdly, that time for filing the Record of Appeal started to run from 19th July 2019, and the sixty days’ deadline therefore expired on 19th September 2019. The Record of Appeal having been filed on 16th August 2019, was therefore within time.

11. The Applicant would want us in this respect to rely on the Dispatch Book of the typing pool of the Employment and Labour Relations Court as evidence that the proceedings were in fact received much earlier. He annexed a copy of the relevant pages of the said Dispatch Book. We note firstly, that the said copy is not certified, and there is therefore no way of verifying its source or author. Secondly, the relevant entries are crossed over and are not clear. Lastly, and most importantly, Rule 82 provides that the relevant documents for computing or excluding the time within which the appeal is to be instituted, are the application for a copy of the proceedings, and the certificate by the registrar indicating the time taken to prepare the proceedings. The Dispatch Book of a typing pool is thus not a relevant document for purposes of Rule 82.

12. In the circumstances, the Notice of Motion application dated 20th September 2019 is found not to have merit, and is accordingly dismissed with costs to the respondent.

Orders accordingly.

DELIVERED AND DATED AT MOMBASA THIS 17TH DAY OF DECEMBER 2021.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

