IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MURGOR & J. MOHAMMED JJ.A.)

MSA CIVIL APPEAL (APPLICATION) NO. 9 OF 2019

BETWEEN

TROPICANA HOTELS LIMITED.....APPELLANT/RESPONDENT

AND

SBM BANK (KENYA) LIMITED (*formerly known as* **FIDELITY COMMERCIAL**

BANK LTD.....RESPONDENT/APPLICANT

(Being an appeal from part of judgment of the Environment and Land Court (Hon. J. O. Olola, J.) dated 25th *May 2018 in* **Malindi ELC No. 220 of 2015)**

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RULING OF THE COURT

Before us is a Notice of Motion dated 15th March 2019, premised on **Rules 42, 77, 83** and **84** of the Court of Appeal Rules 2010, seeking an order that the record of appeal dated 4th February 2019 be struck out. It is supported by the grounds included in the prayer for striking out and reiterated in the supporting affidavit together with annextures thereto. It has not been opposed by any replying affidavit from the respondents as all that we have on the record in the form of a replying affidavit is that sworn on 21st September 2020 by **Gikandi Ngibuini,** advocate for the applicant. Our appraisal of the contents of the said replying affidavit reveals that it was in response to the respondents' application premised on **Rule 5(2)(b)** which is not the application now under consideration before us. Likewise, the further affidavit sworn by **Kamal Bhatt** on 2nd September 2020 in response to **Mr. Gikandi's** replying affidavit has no bearing on the application under consideration. We therefore reiterate that the application under consideration is not opposed.

It was canvassed through the sole pleadings filed by the applicant without oral highlighting by the respective parties.

In summary, the applicant has faulted the record of appeal as filed for lack of inclusion of certified copies of both the decree and the judgment appealed against. Second, for lack of inclusion of all the rival pleadings and exhibits tendered in evidence at the trial by the respective parties. Third, it was also filed outside the prescribed sixty (60) days period without leave.

We have considered the record in light of the sole pleadings of the applicant. It is not in dispute that on 25th May 2018 **J. O. Olola, J.** delivered the impugned judgment in the Environment and Land Court (ELC) at Malindi in ELC Case No. 220 of 2015. The respondent was dissatisfied with the whole decision and timeously filed a Notice of Appeal dated 4th June 2018 and served it on the applicant on 11th June 2018, in compliance with the prerequisites in **rules 75** and **77** of the rules of the Court. As correctly contended by the applicant, the respondent ought to have processed and filed the record of appeal within the timelines provided for in **rule 82** of the Court's **rules**. It provides:

> **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 –**
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> **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 dispense 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 exposition, the respondent's record of appeal undoubtedly dated 4th February 2019 and filed on 6th February 2019 and served on 13th February 2019 can only be sustained if there is demonstration that the circumstance under which it came to be lodged at that point in time falls within the exception provided for in the proviso to **rule 82(1**) of the Court's rules. In the absence of a replying affidavit, the record is silent as to the circumstances under which the record of appeal which ought to have been lodged within sixty (60) days of the date of the lodging of the notice of appeal on 6th June 2018 came to be dated 4th February 2019 and lodged on 6th February 2019.

The above assessment and reasoning now leads us to determine whether the application is sustainable under **Rule 83** and **84** of the Court's rules. **Rule 83** provides as follows:

> **"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served".**

In the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others** [supra], the Court had this to say about the intent and purport of Rule 83:

> **"This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice".**

In light of the above exposition, **Rule 83** of the Court's Rules applies where the Court has moved *suo motu* to strike out the notice of appeal which is not the position herein.

Rule 84 on the other hand provides as follows:

> **"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."**

The guiding principle therein is that the application must be filed within thirty (30) days of service on the opposite party of either the notice of appeal or the record of appeal. It is evident from the record that the applicant's complaint is not hinged on the service of the notice of appeal but on the service of the record of appeal. From applicant's own supportive documents, the record of appeal was served on them on 13th February 2019. Considering that February 2019 had twenty-eight (28) days, thirty (30) days from 13th February 2019 for purposes of this provision fell on 13th March 2019, after factoring in two days to be added to 28 days in February to make up the 30 days provided for in the rule which by our own computation of time in light of what we have stated above, that February 2019 only had twenty-eight (28) days fell on 15th March 2019 the very day on which the application was filed. It is therefore our finding that the application under consideration was filed within the timeline stipulated for in **Rule 84** of the Court's rules, therefore falls for merit consideration.

As for the other complaint's on non-compliance with the rules on what should or should not be contained in a record of appeal, **Rule 87** of the Court's rules is explicit on what should form the content of a record of appeal. Among these are pleadings, judgment or order appealed against and a certified copy of the decree or order appealed against. We do not have the record of appeal before us. However, from our appraisal of the applicant's supportive documents it is evident that some pleadings were admittedly included in the record namely a further amended plaint and an amended defence, meaning that the pleadings missing were the original and amended plaint and the original defence. **Rule 87(1)(c)** simply makes reference to **"pleadings"**. There is no qualification that only current pleadings should be included. Sub paragraph (g) and (h) provide for inclusion of the judgment or order and a certified copy of the decree appealed against, all of which the applicant asserts that they are missing from the record of appeal, a position not controverted by the respondent.

The mandatory requirement in **Rule 87(1)** is only subject to subsection (3) which donates jurisdiction to a judge or registrar of the court appealed from to exercise his/her discretion on application of a party to direct which documents or parts of documents should be excluded from the record of appeal. Our appreciation of the implication of this rule in our view is that in the absence of giving of such directions, inclusion of all the documents enumerated in Rule 87 of the Court's rules is mandatory. Non-compliance therefore vitiates the record of appeal as filed by the respondent.

In the result, we allow the application as prayed with costs to the applicant.

Dated and Delivered at Nairobi this 23rd day of October, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR