



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 13 OF 2017

BETWEEN

RALSON (INDIA) LIMITED.....APPELLANT/RESPONDENT

AND

DOSHI IRONMONGERS LIMITED.....RESPONDENT/APPLICANT

(Being an application to strike out the appellant's/respondent's memorandum of appeal

dated 19th January 2017 and entire record of appeal filed on 20th January 2017

against the Ruling and Orders of the High Court of Kenya at Nairobi

(Ang'awa & Onyancha, JJ.) dated 18th October 2012

in

Nairobi H.C.C.APP. No. 490 of 2009)

RULING OF THE COURT

1. Before us is an application by the respondent in this appeal to strike out the appellant's appeal herein.
2. Before the High Court, in Nairobi HCC Appeal No. 490 of 2009, the appellant challenged a ruling of the Registrar of Trademarks allowing an application by the respondent for registration of a trademark. The respondent raised objection to that appeal based on the issue of representation. In a ruling delivered on 18th October 2012, the High Court (*Ang'awa* and *Onyancha, JJ.*) upheld the objection and struck out that appeal.
3. The appellant was aggrieved by the decision of the High Court. It filed a Notice of Appeal dated 1st November 2012 in the Civil Appeals Division registry of the High Court. The court stamp thereon indicates the date of filing as 1st November 2012. However, the date it was lodged is indicated as 5th November 2012. It was served on 7th November 2012. Subsequently, the memorandum and record of appeal were lodged in the Court of Appeal registry on 20th January 2017.
4. On 20th March 2017, that is 59 days after the memorandum and record of appeal were filed, the respondent filed the present application seeking orders: that the application be admitted out of time; and that the memorandum and record of appeal filed on 20th January 2017 be struck out. The application is, on the face of it, based on Rules 4, 42 and 84 of the Court of Appeal Rules (the Rules).
5. Urging the application before us, learned counsel for the applicant (the respondent in the appeal) *Miss. I. Ruto* drew our attention to the grounds appearing on the face of the application and the supporting affidavit sworn on 20th March 2017 by Ashok L. Doshi, a director of the respondent. She submitted that the appeal herein was filed outside the 60 days prescribed under Rule 82 of the Rules of this Court; that although the appellant obtained a certificate of delay, it should have prepared and filed the appeal well before 20th January 2017 as it was informed that proceedings were ready as early as 30th September 2016; and that the appeal is an abuse of the process of the court.

6. Opposing the application, **Mr. E. Owiti**, learned counsel for the respondent (appellant in the appeal) drew our attention to a replying affidavit sworn on 10th April 2017 by Queenton Ochieng Advocate in opposition to the application. He also pointed to a notice of preliminary objection filed on 10th April 2017 in which the appellant contends that the application is incompetent; that the application was filed outside the period permitted under Rule 84 of the Rules; and that in any event the Certificate of Delay contained in the record of appeal confirms that the appeal was filed within time.

7. Counsel referred to numerous decisions of this Court contained in the appellant's digest of authorities for the proposition that an application to strike out an appeal which is filed outside the 30 days window provided under the proviso to Rule 84 of the Rules is incompetent and should be struck out.

8. We have considered the application, the affidavits, the preliminary objection, the submissions and the authorities cited. Beginning with the prayer by the applicant for admission of the application out of time, it is correct that under Rule 53 of the Rules, an application for extension of time under Rule 4 of the Rules is a matter for consideration by a single judge of the Court in the first instance. That said, we note that there is no reason given, either in the body of the application or in the supporting affidavit, why the application was not filed within the time prescribed under the proviso to Rule 84 of the Rules. In the absence of any explanation for the delay in presenting the application, there does not appear to be any material before the Court on the basis of which that request can be considered.

9. Adverting, however, to the appellant's preliminary objection to the application, Rule 84 of the Rules provides that a person affected by an appeal may at any time, either before or after the institution of the appeal, apply 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. The proviso to Rule 84 states:

“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 the record of appeal as the case may be.”

10. The respondent's complaint in this case is that under Rule 82 of the Rules of the Court, the appeal should have been filed within 60 days of lodging the notice of appeal. As already noted, the memorandum and record of appeal were lodged in the Court of Appeal registry on 20th January 2017. The present application was filed on 20th March 2017. That, as stated, is 59 days after the memorandum and record of appeal were filed. In effect, the application is caught up by the proviso to Rule 84.

11. There are many decisions of this Court to the effect that the right to apply to strike out an appeal is lost if the application is not made within the time prescribed. We will only refer to one such decision. In **Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & another, Kisumu Civil Application No. 22 of 2015 [2016] eKLR**, the Court expressed:

“It is not at all in dispute that this application was filed outside the period of 30 days after the notices sought to be struck out were lodged and served. The above proviso is couched in mandatory terms and we have no discretion to second guess what was intended by the framers of the Rules when they gave a time frame. See the case of Gichuki King'ara & Co Advocates v AL Jalal Enterprises Ltd & Others, Civil Appl. No. NAI 211 of 2012(unreported) where this Court stated in reference to Rule 84 as follows;

“The applicant did not file its application within the stipulated period of thirty days. It did so on the 9th August 2012 which was about five months outside the limit set by the Rules. It is clear to us that such an omission renders the application before us a non-starter given the logic and rationale of the time-bound provision. The rule is mandatory and an application brought outside the thirty-day period properly qualifies to be seen as an afterthought.”

12. That is precisely the position here. We need not say more. We uphold the appellant's preliminary objection. The result is that respondent's notice of motion dated 20th March 2017 is hereby struck out with costs of the application to the appellant.

Dated and delivered at Nairobi this 6th day of December, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR