



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 39 OF 2017

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED.....APPLICANT

AND

ANWAR MOHAMED BAYUSUF LIMITED.....RESPONDENT

(Being an application to strike out Notice of Appeal lodged on the 25th day of May, 2017 against the Order of the High Court of Kenya at Mombasa (Thande, J.) issued on the 16th day of May, 2017

in

Mombasa High Court Case No. 13 of 2013)

RULING OF THE COURT

[1] Diamond Trust Bank Kenya Limited (applicant) has moved this Court pursuant to **Rule 77(1)** and **84** of the **Court of Appeal Rules** for the striking out of the Notice of Appeal dated 25th May, 2017, in respect of Mombasa HCCNo. 13 of 2013.

[2] According to the applicant, the said Notice of Appeal was served on it on 7th June, 2017 which was outside the 7 days stipulated in **Rule 77(1)** of the **Court of Appeal Rules**.

[3] Mr. Lwanga Mwangi, the debt recovery officer of the applicant, in his affidavit sworn on 4th July, 2017 in support of the application deposes that the impugned Notice of Appeal is incompetent, it having been filed out of time and without leave of Court. He urges us to allow the application.

[4] The application elicited no response from the respondent Anwar Mohamed Bayusuf Limited. When the application came up for hearing on 26th September, 2018, there was no appearance by counsel for the respondent inspite of service of the hearing notice on the firm of Matete Mwelese and Company advocates duly informing them of the hearing date. The application therefore proceeded ex-parte with the leave of the Court.

[5] In his brief oral submission before us, Mr. Mbugua learned counsel for the applicant reiterated the contents of the replying affidavit and emphasized that the application was not opposed and the same should therefore be allowed.

[6] We have considered the application, the contents of the affidavit in support of the same and learned counsel's brief submissions. Having done so, we are satisfied that the Notice of Appeal was served on the applicant late outside the 7 days allowed by the Rules. There was no leave of the Court obtained to sanction the late service. We also appreciate that the application is unopposed and so the depositions of Mr. Lwanga are not controverted. We find no reason why the Notice of Appeal dated 25th May, 2018 should not be struck out. We are persuaded that the same is incompetent, and it is hereby struck out as prayed with no orders as to costs.

Dated and delivered at Mombasa this 15th day of November, 2018

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR